Agenda

Advisory Committee on Rules of Civil Procedure

November 16, 2016
4:00 to 6:00 p.m.

Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room
Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Jonathan Hafen
Rule 5. Inmate Mailbox Rule	Tab 2	Linda Jones, Nancy Sylvester
Rule 84. Forms. (repeal)	Tab 3	Nancy Sylvester
FRCP Rule 37(e). Failure to Preserve ESI	Tab 4	Paul Stancil, Nancy Sylvester
Rule 60. *Logue v. Court of Appeals*, 2016 UT 44: (discussion only)	Tab 5	Nancy Sylvester

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

January 25, 2017
February 22, 2017
March 22, 2017
April 26, 2017
May 24, 2017
June 28, 2017
September 27, 2017
October 25, 2017
November 15, 2017

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – October 28, 2016

PRESENT: Jonathan Hafen, Trystan Smith, James Hunnicutt, Judge James Blanch, Judge Kate Toomey, Terri McIntosh, Lincoln Davies, Judge Andrew Stone, Leslie Slaugh, Rod Andreason, Barbara Townsend

ABSENT: Dawn Hautamaki, Judge John Baxter, Judge Derek Pullan, Sammi Anderson, Heather Sneddon, Amber Mettler, Kent Holmberg

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Zachary Myers, Ken McCabe, Martin Blaustein, Jacob Kent, Kirk Cullimore, Jr., Jeremy Shorts, Jim Deans, Alan Robbins, Jason Jacobson, Rick Schwermer, Kyle Johnson

---

(1) WELCOME

Chair Jonathan Hafen welcomed the committee and guests.

(2) RULE 4. PROCESS (SERVICE UPON ROOMMATES).

Leslie Slaugh began with a summary of the issue to be discussed.

Zachary Myers spoke on behalf of tenants in support of Mr. Slaugh's proposed rule changes. Mr. Slaugh raised the issue of serving a husband and wife, particularly the issue of requiring service upon both and the issue of one avoiding service after notice to the other. Martin Blaustein responded that typically both husband and wife appear at the hearing if one has been requested, and, as a result, an order of judgment can be obtained against both of them.

Kirk Cullimore spoke on behalf of landlords, suggesting change isn't necessary, i.e. the rule is not currently broken. Mr. Cullimore argued there are already safeguards in place to notify the parties, including the termination notice that precedes the unlawful detainer action. Mr. Slaugh suggested that although we do not typically make rules for a small minority of situations or individuals, sometimes we do if there is a need to protect them. Jeremy Shorts spoke about complicating the service process. Guests from a process server company represented that in about 90% of unlawful detainer actions, the papers are served on a named party. They explained the limitations of process servers not being able to force parties to identify themselves and said avoidance of service has become an increasing problem as parties are more frequently seeking loopholes in the system. Judge Blanch clarified when treble damages begin to accrue. Terri McIntosh questioned how often treble damages are actually collected. Attorneys speaking on behalf of landlords suggested the proposal would further burden the courts with increased motion practice. Mr. Cullimore noted that

the intent of the Legislature was to expedite the process and that the rule as it currently exists was created with Rule 4 in its current state.

Attorneys speaking on behalf of tenants represented that they get calls approximately once a week claiming the party never received notice of and had no knowledge of the action. Each side discussed how unlawful detainer actions happen in other states. It was further noted that service of the action is jurisdictional. Attorneys speaking on behalf of landlords suggested that the proposed change puts additional burden on process servers. Judge Blanch asked Judge Toomey how often this issue came before her as a judge, and she indicated that many instances of it happening stuck out in her mind. Attorneys speaking on behalf of tenants raised fairness issues.

The Committee discussed the proposed change. Mr. Hafen proposed that discussion of this issue be shelved and no action on the proposed change be taken. Although it appeared that this issue has come up in a handful of cases, he was not convinced that it was big enough to merit a change to the rule. The committee agreed.

(3) APPROVAL OF THE MINUTES.

Judge Toomey moved to approve the minutes from the September 28, 2016 meeting, as amended; James Hunnicutt seconded. The motion approved unanimously.

(4) RULE 15. FURTHER AMENDMENT REQUESTED BY THE UTAH SUPREME COURT (COMMITTEE NOTE).

Mr. Hafen presented the proposal from the Utah Supreme Court regarding proposed Rule 15, line 39, and the added Advisory Committee Note. The committee discussed the proposed committee note and agreed on the following language: "Although the precise language is different for purposes of clarity, the 2016 amendments to the Utah Rule of Civil Procedure 15(c) adopt the approach of Federal Rule 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party."

Lincoln Davies moved to adopt the proposed change to Rule 15(c) with the agreed-upon Advisory Committee note; Barbara Townsend seconded. The motion passed unanimously.

(5) RULES 34 AND 35: COMMENTS.

Mr. Hafen presented on the comments to Rule 34 and the suggested edits in response to the same, including Nancy Sylvester's suggested edit in response to a comment from Clark Fetzer. In addition to Ms. Sylvester's suggested edit, Mr. Slaugh suggested we add language to proposed Rule 34, line 28 to add the following italicized language: "The party must identify and permit inspection of *items responsive to* any part of a request that is not objectionable." The committee discussed the suggested edits and was in favor of both.

Ms. Townsend moved to send amended Rule 34 with Ms. Sylvester's and Mr. Slaugh's suggested edits to Utah Supreme Court for approval; Judge Toomey seconded. The motion passed unanimously.

Ms. Sylvester presented on the comments to proposed Rule 35. The committee discussed the comments on 28 days versus 60 days for the examiner to produce a report and a proposal for including language permitting an extension to the allotted period to produce a report. Trystan Smith noted that as a practical matter parties were typically only producing a single, combined report under Rules 26 and 34, rather than two separate reports. The committee was generally of the opinion that if current practice was to produce one report instead of two, that the rule should not be amended to encourage two reports.

The committee discussed at length the interplay between the proposed deadline and the close of fact discovery and expert disclosure deadlines. Some concern was expressed about a likely need to extend fact discovery (and need to file serial stipulations for extraordinary discovery to do so) in order to meet deadlines if the Rule 35 report would need to be disclosed significantly before the close of fact discovery. Mr. Smith proposed setting the deadline at the shorter of 60 days after the examination or seven days prior to the close of fact discovery. The final proposal was to change line 12 of proposed Rule 35 to "examiner within the shorter of 60 days after the examination or 7 days prior to the close of fact discovery, setting out the examiner's findings." The committee discussed whether the new proposal should go back for public comment, and decided that additional public comment was advisable. Mr. Smith also suggested adding language to the proposed Rule 35 itself to note that two separate reports are not required. The proposal was to add language to line 16 of the proposed Rule 35 to read: "as required by Rule 26(a)(4), but need not provide a separate Rule 26(a)(4) report if the report under this rule contains all the information required by Rule 26(a)(4)." The committee also discussed whether an amendment to the Advisory Committee note was appropriate in light of the foregoing proposed amendments, and requested that Ms. Sylvester make a minor edit to it.

Mr. Hunnicutt moved to adopt the preceding amendments and send them out for public comment; Rod Andreason seconded. The motion passed unanimously.

(5) **TIER 2 VERSUS TIER 3 AND LIMITS ON VERDICTS.**

Mr. Hafen presented on a recent decision from Judge Petit where a plaintiff pleaded his case as Tier 2, received a verdict in excess of the Tier 2 limits, and moved to amend the complaint to conform to the evidence following the verdict to make it a Tier 3 case. Judge Petit followed the committee's FAQ anticipating this situation and denied the motion.

Judge Stone recommended discussing a possible change to have the tier designations include only certain categories of damages. Mr. Hafen suggested the committee discuss that proposal at a later date and in conjunction with input from the Tier 3 pilot program.

(6) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:04pm. The next meeting will be held on November 16, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 10, 2016
Re: Rule 5 and the Prison Mailbox Rule

Linda Jones proposes adopting the prison mailbox rule in the Utah Rules of Civil Procedure. The following are her arguments for this change:

> By way of background, Utah Rule of Appellate Procedure 21(f) states that "Papers filed by an inmate confined in an institution are timely filed if they are 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." The rule simply requires the inmate to include a written declaration setting forth the date he deposited the document in the prison mail system (i.e., leaves it in a box outside his cell). The rule is important to inmates who are filing appeal papers. It is a safety net because sometimes the prison holds outgoing mail for at least a week. Before the Supreme Court adopted the appellate prison-mailbox rule, the Utah Court of Appeals held that the rule did not apply in Utah because it was not expressly contained in the rules of appellate procedure. *State v. Parker*, 936 P.2d 1118 (Utah Ct. App. 1997).
>
> Because inmates also file papers in the trial court under the civil rules (they file petitions under rules 65B and 65C, motions, etc.), it would be helpful to have a similar mailbox provision in those rules. Hopefully, the Supreme Court and the civil rules committee will agree. I haven't reviewed this ALR article but it may be useful to the committee: 29 A.L.R. 6th 237, Application of "Prisoner Mailbox Rule" by State Courts Under State Statutory and Common Law.

Judge Blanch suggested that Rule 5 was a good place for this amendment and I agree; Appellate Rule 21 and Civil Rule 5 both deal with service and filing of papers. Appellate Rule 21(f)'s language is also not specific to appeals, so I have simply copied

that paragraph into new Rule 5 paragraph (g). There may be a better place for this language earlier in the rule, though, and that is a determination—along with any language adjustments—the committee will need to make.

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) an order or judgment prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

(g) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are 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.

Advisory Committee Notes

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk. Except as provided in subpart (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the date of the postmark if first class mail is utilized. If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(e) Signature. All papers filed in the appellate court shall be signed by counsel of record or by a party who is not represented by counsel.

(f) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are 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.

(g) Filings containing other than public information and records. If a filing, including an addendum, contains non-public information, the filer must also file a version with all such information removed. Non-public information means information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law.

Advisory Committee Notes

Paragraph (e) is added to Rule 21 to consolidate various signature provisions formerly found in other sections of the rules.

Records are classified as public, private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social by Code of Judicial Administration Rule 4-202.02. The right of public access might also be restricted by Title 63G, Chapter 2, Government Records Access and Management Act, by other statutes, rules, or case law, or by court order. If a filing contains information or records that are not public, Rule 21(g) requires the filer to file an unredacted version for the court and a version for the public that does not contain the confidential information.

Effective May 1, 2016

29 A.L.R.6th 237 (Originally published in 2007)

American Law Reports
ALR6th
The ALR databases are made current by the weekly addition of relevant new cases.

Barbara J. Van Arsdale, J.D.

Application of "Prisoner Mailbox Rule" by State Courts under State Statutory and Common Law

The prisoner mailbox rule, as applied to appeals, dictates that a pro se prisoner is deemed to have filed his or her notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the court. Some states have adopted the prisoner mailbox rule. For example, the court in State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005), held that the prisoner mailbox rule applied to an inmate's pro per petition for review by the Arizona Supreme Court. The court reasoned that the same considerations that pertained to the filing of a notice of appeal and a notice of petition for postconviction relief applied to the inmate's petition for review by the supreme court, including the fact that the inmate was not in a position to make sure that his petition was timely filed. This annotation collects and analyzes all of the state court cases that have construed and applied, under state statutory and common law, the prisoner mailbox rule.

TABLE OF CONTENTS

ARTICLE OUTLINE

INDEX

Table of Cases, Laws, and Rules

United States

Supreme Court

Connecticut

Delaware

Florida

Georgia

Hawaii

Missouri

Nebraska

Nevada

New York
N.Y. C.P.L.R. 304. See 26
N.Y. Ct. Cl. Act § 11. See 30
Espinal v. State, 159 Misc. 2d 1051, 607 N.Y.S.2d 1008 (Ct. Cl. 1993) — 5, 30
Grant v. Senkowski, 95 N.Y.2d 605, 721 N.Y.S.2d 597, 744 N.E.2d 132 (2001) — 5, 26
James v. Goord, 281 A.D.2d 825, 722 N.Y.S.2d 609 (3d Dep't 2001) — 5, 26
Loper v. Selsky, 26 A.D.3d 653, 810 N.Y.S.2d 525 (3d Dep't 2006) — 5, 26
Mandala v. Jablonsky, 242 A.D.2d 271, 660 N.Y.S.2d 593 (2d Dep't 1997) — 26
Purcell v. Dennison, 29 A.D.3d 1128, 814 N.Y.S.2d 787 (3d Dep't 2006) — 5, 27

Ohio
Ohio Rev. Code Ann. § 2505.04. See 4, 9
Ohio R. Civ. P. 5(E). See 24
Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992) — 4, 9, 19
L.J. Smith, Inc. v. Harrison Cty. Bd. of Revision, 140 Ohio St. 3d 114, 2014-Ohio-2872, 16 N.E.3d 573 (2014) — 4
Mosely v. Dragon, 1990 WL 145744 (Ohio Ct. App. 11th Dist. Ashtabula County 1990) — 4, 9
State v. Anderson, 11 Ohio St. 2d 252, 40 Ohio Op. 2d 217, 228 N.E.2d 312 (1967) — 4, 9
State v. Bell, 2002-Ohio-2182, 2002 WL 987536 (Ohio Ct. App. 3d Dist. Marion County 2002) — 4, 9
State v. Bowens, 1998 WL 553049 (Ohio Ct. App. 11th Dist. Ashtabula County 1998) — 4, 9, 24
State v. Buckwald, 2000 WL 1859845 (Ohio Ct. App. 9th Dist. Lorain County 2000) — 24
State v. Clement, 1995 WL 390795 (Ohio Ct. App. 10th Dist. Franklin County 1995) — 4, 9, 21
State v. Coots, 1997 WL 803125 (Ohio Ct. App. 9th Dist. Wayne County 1997) — 22
State v. Cutler, 2000-Ohio-2587, 2000 WL 1617820 (Ohio Ct. App. 7th Dist. Jefferson County 2000) — 4, 9, 21
State v. Finfrock, 1998 WL 726478 (Ohio Ct. App. 2d Dist. Montgomery County 1998) — 24
State v. Friley, 2006-Ohio-230, 2006 WL 164417 (Ohio Ct. App. 10th Dist. Franklin County 2006) — 24
State v. Hansbro, 2002-Ohio-2922, 2002 WL 1332297 (Ohio Ct. App. 2d Dist. Clark County 2002) — 4, 9, 24
State v. Harris, 2005-Ohio-921, 2005 WL 501602 (Ohio Ct. App. 6th Dist. Erie County 2005) — 4, 9, 21
State v. Landis, 2000-Ohio-2016, 2000 WL 33226196 (Ohio Ct. App. 4th Dist. Athens County 2000) — 21
State v. Lathan, 2000 WL 1005206 (Ohio Ct. App. 6th Dist. Lucas County 2000) — 24
State v. Miller, 2000 WL 1273467 (Ohio Ct. App. 4th Dist. Ross County 2000) — 24
State v. Nesbitt, 1984 WL 4579 (Ohio Ct. App. 8th Dist. Cuyahoga County 1984) — 4, 9
State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) — 4, 6, 9, 21, 24
State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998) — 4, 8, 9
State v. Proctor, 2000 WL 1251969 (Ohio Ct. App. 12th Dist. Butler County 2000) — 24
State v. Ramage, 2000 WL 228249 (Ohio Ct. App. 4th Dist. Highland County 2000) — 21
State v. Smith, 1999 WL 34821 (Ohio Ct. App. 2d Dist. Montgomery County 1999) — 21
State v. Smith, 123 Ohio App. 3d 48, 702 N.E.2d 1245 (2d Dist. Montgomery County 1997) — 24
State v. Spears, 1999 WL 144064 (Ohio Ct. App. 4th Dist. Hocking County 1999) — 21
State v. Springs, 1999 WL 148369 (Ohio Ct. App. 7th Dist. Mahoning County 1999) — 24
State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997) — 4, 9, 24
State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976) — 4, 6, 9, 21
State v. Williams, 157 Ohio App. 3d 374, 2004-Ohio-2857, 811 N.E.2d 561 (8th Dist. Cuyahoga County 2004) — 24
State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) — 4, 6, 8, 9, 19, 21, 24
Tyler, State ex rel. v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) — 4, 6, 8, 9, 19, 21, 22, 24, 27

Oklahoma
Okla. Const. Art. II, § 6. See 4, 14
Hunnicutt v. State, 1997 OK CR 77, 952 P.2d 988 (Okla. Crim. App. 1997) — 14, 24
Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992) — 4, 14, 24

Oregon

Pennsylvania

Tennessee

Texas

Utah
Utah R. App. P. 4. See 21
Utah R. App. P. 4(a). See 21
Utah R. App. P. 4(g). See 4, 6, 21
Beasley v. State, 2000 UT App 168, 2000 WL 33243768 (Utah Ct. App. 2000) — 4
State v. Chavez, 2005 UT App 363, 2005 WL 2045798 (Utah Ct. App. 2005) — 4, 6
State v. Palmer, 777 P.2d 521 (Utah Ct. App. 1989) — 21
State v. Parker, 936 P.2d 1118 (Utah Ct. App. 1997) — 21

Vermont
Bruyette, In re, 2016 VT 3, 136 A.3d 575 (Vt. 2016) — 4

Washington
Wash. R. App. P. 18.6(c). See 5, 24
Wash. Super. Ct. Civ. R. 5(e). See 20
Carlstad, In re, 150 Wash. 2d 583, 80 P.3d 587 (2003) — 5, 20, 24
State v. Hurt, 107 Wash. App. 816, 27 P.3d 1276 (Div. 3 2001) — 20, 24

Wisconsin
Brown, State ex rel. v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427 (2003) — 4, 8
Kelley, State ex rel. v. State, 2003 WI App 81, 261 Wis. 2d 803, 661 N.W.2d 854 (Ct. App. 2003) — 4, 9
L'Minggio, State ex rel. v. Gamble, 2003 WI 82, 263 Wis. 2d 55, 667 N.W.2d 1 (2003) — 4, 14
Nichols, State ex rel. v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001) — 4, 8
Shimkus, State ex rel. v. Sondalle, 2000 WI App 238, 239 Wis. 2d 327, 620 N.W.2d 409 (Ct. App. 2000) — 2, 4, 8, 14, 26
Tyler, State ex rel. v. Bett, 2002 WI App 234, 257 Wis. 2d 606, 652 N.W.2d 800 (Ct. App. 2002) — 4, 26

I. Preliminary Matters

§ 1. Scope

This annotation [1] collects and analyzes all of the state court cases that have applied, under state statutory and common law, the prisoner mailbox rule (alternately referred to as the "prison mailbox rule"). The prisoner mailbox rule is that a pro se prisoner is deemed to have filed his or her notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the court. This annotation is limited to application by state courts of the prisoner mailbox rule pursuant to state statutory or common law. Only those cases in which the courts explicitly refer to the "prisoner mailbox rule" or "prison mailbox rule" as such are included; cases which refer to the rule in some other fashion are included only to the extent deemed necessary by the editorial staff so as to provide jurisdictionally complete coverage. Excluded from this annotation are cases considering the determination of timely filing of tax returns or other tax documents by taxpayer-prisoners under the internal revenue code, which are covered in another annotation. [2]

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

§ 2. Summary and comment

The prisoner mailbox rule, as applied to appeals, provides that a pro se prisoner is deemed to have filed his or her notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the court. [3] The United States Supreme Court established what has become known as the prisoner mailbox rule when it held that a prisoner's delivery to prison authorities, for forwarding to a federal district court, of a notice of appeal in a habeas corpus case in which the prisoner is acting pro se, amounts to the filing of the notice for purposes of the Federal Rules of Appellate Procedure. [4] The Supreme Court reasoned that the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. A prisoner's control over the processing of his or her notice necessarily ceases as soon as he or she hands it over to the only public officials to whom he or she has access, the prison authorities, and the only information he or she will likely have is the date he or she delivered the notice to those prison authorities and the date ultimately stamped on his or her notice. [5] Some states have adopted the prisoner mailbox rule articulated in *Houston* and applied it to a broad range of filings, others have not. In determining state procedural issues, state courts are not bound by the United States Supreme Court's rulings on federal procedural issues absent a controlling constitutional consideration. [6] Accordingly, *Houston*, as a nonconstitutional federal case, is not binding on state courts. [7] A state court need not follow the federal procedural cases if it concludes that state policy, practice, or case law requires a different result. [8]

Courts have recognized and applied the prisoner mailbox rule under state statutory and common law with varying results. Some courts recognize the prisoner mailbox rule as it applies to at least some filings by a pro se inmate (§ 4), while courts in a few jurisdictions have declined to recognize the prisoner mailbox rule at all, regardless of the circumstances (§ 5).

In criminal cases, courts have applied the prisoner mailbox rule to the filing, by a pro se inmate, of a notice of appeal from conviction or sentence (§ 6) or from the denial of a motion to modify or correct sentence (§ 7), and to a petition for a state writ of habeas corpus or other postconviction relief (§ 8) or an appeal from a determination thereon (§ 9). The prisoner mailbox rule has also been held applicable to the filing of an application for a certificate of probable cause to appeal the denial of habeas corpus relief (§ 10), as well as to a petition seeking review by a state supreme court (§ 11), a petition for a writ of certiorari (§ 12), and a notice to invoke discretionary jurisdiction (§ 13), when such documents have been filed by a pro se inmate. Similarly, a pro se inmate's petition for judicial review of a prisoner disciplinary committee determination (§ 14) and an appeal from a decision of the state probation and parole board (§ 15) have also been held subject to the prisoner mailbox rule. Other courts, meanwhile, have held that the prisoner mailbox rule did not apply to render timely the filing, by a pro se inmate, of a motion to withdraw a guilty plea (§ 20), a notice of appeal from conviction or sentence (§ 21), a motion (§ 22), or an appeal from the denial of a motion (§ 23), seeking to modify, vacate, or correct a judgment or sentence. Late filings by a pro se inmate have also been held to be not subject to the prisoner mailbox rule where an inmate petitioned for state habeas corpus or other postconviction relief (§ 24), or appealed from a determination thereon (§ 25). Likewise, the prisoner mailbox rule did not apply to render timely a pro se inmate's petition for review of a determination by the prison disciplinary committee (§ 26), an appeal of a decision of the state probation and parole board (§ 27), or a request for administrative relief from a state probation and parole board order filed by the parolee's counsel (§ 28).

The prisoner mailbox rule has also been found to apply, or not to apply, in various civil proceedings. In some instances, courts have allowed the prisoner mailbox rule to operate to render timely a pro se inmate's civil complaint (§ 16) or responsive pleading (§ 17), while other courts have determined that the rule did not apply in considering the timeliness of a pro se inmate's civil complaint (§ 29). While some courts have likewise held that the prisoner mailbox rule did not apply to render timely a pro se inmate's notice of claim (§ 30), a notice of appeal (§ 31), or postjudgment motion (§ 32), other courts have applied the prisoner mailbox rule to a notice of appeal (§ 19) or concise statement of matters complained of on appeal (§ 18).

§ 3. Practice pointers

When there is no clear record on appeal as to when a pro se inmate's notice of appeal was delivered to prison authorities, the proper course of action is to remand to the trial court to make that determination. [9] Courts will generally accept any reasonably verifiable evidence of the date that the prisoner deposited the appeal with prison authorities, including but not limited to a certificate of mailing, a cash slip from prison authorities, an affidavit from the prisoner, and evidence of the internal operating procedures of the prison or the court regarding mail delivery. [10]

Receipt of prisoner mail by the prison does not necessarily signify receipt of that mail by the prisoner. At least one court has held that, by logical extension of the prisoner mailbox rule, an exception to timeliness requirements when a pro se inmate produces evidence that prison officials did not provide the inmate with a copy of the court's order in time for the inmate to file a timely appeal. [11]

II. Recognition of Prisoner Mailbox Rule

§ 4. Rule recognized

[Cumulative Supplement]

The following authority recognized the prisoner mailbox rule as applicable within the particular jurisdiction for some or all types of filings by pro se inmates.

Ala.
Ex parte Wright, 860 So. 2d 1253 (Ala. 2002)
Ex parte Williams, 651 So. 2d 569 (Ala. 1992)
Holland v. State, 621 So. 2d 373 (Ala. Crim. App. 1993), opinion extended after remand, 654 So. 2d 77 (Ala. Crim. App. 1994)
Ariz.
State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005)
State v. Rosario, 195 Ariz. 264, 987 P.2d 226 (Ct. App. Div. 1 1999)
Mayer v. State, 184 Ariz. 242, 908 P.2d 56 (Ct. App. Div. 1 1995)
Cal.
In re Chavez, 30 Cal. 4th 643, 134 Cal. Rptr. 2d 54, 68 P.3d 347 (2003)
In re Jordan, 4 Cal. 4th 116, 13 Cal. Rptr. 2d 878, 840 P.2d 983 (1992)
People v. Slobodion, 30 Cal. 2d 362, 181 P.2d 868 (1947) (holding in favor of inmate on equal protection grounds, before prisoner mailbox rule formally adopted)
In re Marriage of Williams, 2005 WL 2660409 (Cal. App. 3d Dist. 2005), unpublished/noncitable
Jameson v. Schwarzenegger, 2004 WL 2320299 (Cal. App. 3d Dist. 2004), unpublished/noncitable, (Oct. 15, 2004) and review denied, (Jan. 19, 2005)
Moore v. Twomey, 120 Cal. App. 4th 910, 16 Cal. Rptr. 3d 163 (3d Dist. 2004)
People v. Blake, 2002 WL 1722406 (Cal. App. 3d Dist. 2002), unpublished/noncitable
People v. Bunn, 2002 WL 226384 (Cal. App. 4th Dist. 2002), unpublished/noncitable
People v. Lepe, 195 Cal. App. 3d 1347, 241 Cal. Rptr. 388 (4th Dist. 1987)
Fla.
Thompson v. State, 761 So. 2d 324 (Fla. 2000), opinion after reinstatement of review, 773 So. 2d 58 (Fla. 2000)
Haag v. State, 591 So. 2d 614 (Fla. 1992)
Spicer v. State, 898 So. 2d 984 (Fla. Dist. Ct. App. 5th Dist. 2005)

Jones v. State, 785 So. 2d 561 (Fla. Dist. Ct. App. 2d Dist. 2001)
Gonzalez v. State, 604 So. 2d 874 (Fla. Dist. Ct. App. 1st Dist. 1992)
Higgs v. State, 599 So. 2d 274 (Fla. Dist. Ct. App. 5th Dist. 1992)

Ga.

Massaline v. Williams, 274 Ga. 552, 554 S.E.2d 720 (2001) (applicable as to habeas corpus appeals)

Haw.

Inoue v. State, 2006 WL 1492502 (Haw. 2006), order clarified, 2006 WL 2065399 (Haw. 2006) (unpublished opinion)
Kauhi v. State, 2005 WL 1861899 (Haw. 2005) (unpublished opinion)
Setala v. J.C. Penney Co., 97 Haw. 484, 40 P.3d 886 (2002)

Idaho

Munson v. State, 128 Idaho 639, 917 P.2d 796 (1996)

Kan.

Taylor v. McKune, 25 Kan. App. 2d 283, 962 P.2d 566 (1998)

La.

State ex rel. Egana v. State, 771 So. 2d 638 (La. 2000)
Tatum v. Lynn, 637 So. 2d 796 (La. Ct. App. 1st Cir. 1994)

Mass.

Com. v. Hartsgrove, 407 Mass. 441, 553 N.E.2d 1299 (1990) (applicable as to appeal of conviction)

Miss.

Easley v. Roach, 879 So. 2d 1041 (Miss. 2004)
Sykes v. State, 757 So. 2d 997 (Miss. 2000)
Benbow v. State, 614 So. 2d 398 (Miss. 1993) (citing federal mailbox rule, but without formally adopting state rule)
Minchew v. State, 2007 WL 1191706 (Miss. Ct. App. 2007)
Clay v. Epps, 953 So. 2d 264 (Miss. Ct. App. 2007)
Rhone v. State, 957 So. 2d 1018 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232 (Miss. 2007)
Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960 (Miss. 2007)
Vance v. State, 941 So. 2d 225 (Miss. Ct. App. 2006)
Melton v. State, 930 So. 2d 452 (Miss. Ct. App. 2006)
Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005)
Maze v. Mississippi Dept. of Corrections, 854 So. 2d 1090 (Miss. Ct. App. 2003)
Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003)
Mosby v. State, 830 So. 2d 661 (Miss. Ct. App. 2002)
Ratliff v. State, 813 So. 2d 773 (Miss. Ct. App. 2002)

Nev.

Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992) (applicable as to notices of appeal)

Ohio

State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998) (unpublished opinion; effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992) (unpublished opinion; effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
State v. Anderson, 11 Ohio St. 2d 252, 40 Ohio Op. 2d 217, 228 N.E.2d 312 (1967) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))

State v. Nesbitt, 1984 WL 4579 (Ohio Ct. App. 8th Dist. Cuyahoga County 1984) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
State v. Bell, 2002-Ohio-2182, 2002 WL 987536 (Ohio Ct. App. 3d Dist. Marion County 2002) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))
Mosely v. Dragon, 1990 WL 145744 (Ohio Ct. App. 11th Dist. Ashtabula County 1990), dismissed without opinion, 57 Ohio St. 3d 723, 568 N.E.2d 1226 (1991) (effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27))

Okla.

Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992) (applicable to appeals to state supreme court)

Ore.

Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994)

Pa.

Com. v. Patterson, 2007 PA Super 241, 931 A.2d 710 (2007)
Com. v. Heckman, 2007 PA Super 200, 928 A.2d 1077 (2007)
Copestakes v. Reichard-Copestakes, 2007 PA Super 155, 925 A.2d 874 (2007)
Com. v. Wilson, 2006 PA Super 313, 911 A.2d 942 (2006)
Com. v. Holmes, 2006 PA Super 198, 905 A.2d 507 (2006), appeal denied, 591 Pa. 689, 917 A.2d 845 (2007)
Com. v. Friend, 2006 PA Super 70, 896 A.2d 607 (2006)
In re Adoption of J.N.F., 2005 PA Super 379, 887 A.2d 775 (2005)
Com. v. Kositi, 2005 PA Super 265, 880 A.2d 648 (2005)
Com. v. Johnson, 2004 PA Super 374, 860 A.2d 146 (2004) (disapproved of on other grounds by, Com. v. Robinson, 2007 PA Super 230, 931 A.2d 15 (2007))
Com. v. Perez, 2002 PA Super 165, 799 A.2d 848 (2002)
Com. v. Plummer, 2002 PA Super 141, 798 A.2d 777 (2002)
Thomas v. Elash, 2001 PA Super 214, 781 A.2d 170 (2001)
Com. v. Castro, 2001 PA Super 17, 766 A.2d 1283 (2001)
Com. v. Jerman, 2000 PA Super 325, 762 A.2d 366 (2000)
Com. v. Jones, 549 Pa. 58, 700 A.2d 423 (1997)
Com. v. Jones, 549 Pa. 58, 700 A.2d 423 (1997)
Smith v. Pennsylvania Bd. of Probation and Parole, 546 Pa. 115, 683 A.2d 278 (1996)
Com. v. Little, 716 A.2d 1287 (Pa. Super. Ct. 1998)
Com. v. Cooper, 710 A.2d 76 (Pa. Super. Ct. 1998)
Com. v. Hockenberry, 455 Pa. Super. 626, 689 A.2d 283 (1997)
Kutnyak v. Department of Corrections, 923 A.2d 1248 (Pa. Commw. Ct. 2007)
Tate v. Pennsylvania Bd. of Probation and Parole, 797 A.2d 435 (Pa. Commw. Ct. 2002)
Coldren v. Pennsylvania Bd. of Probation and Parole, 795 A.2d 457 (Pa. Commw. Ct. 2002)
Pettibone v. Pennsylvania Bd. of Probation and Parole, 782 A.2d 605 (Pa. Commw. Ct. 2001)
Christjohn v. Pennsylvania Bd. of Probation and Parole, 755 A.2d 92 (Pa. Commw. Ct. 2000)

Tenn.

Butler v. State, 92 S.W.3d 387 (Tenn. 2002)
Riggs v. State, 2005 WL 1919844 (Tenn. Crim. App. 2005) (unpublished opinion)
Mitchell v. State, 2004 WL 2098335 (Tenn. Crim. App. 2004), appeal denied, (Feb. 28, 2005) (unpublished opinion)
Smith v. State, 2004 WL 989827 (Tenn. Crim. App. 2004) (unpublished opinion)
Saulsberry v. State, 2004 WL 239767 (Tenn. Crim. App. 2004) (unpublished opinion)
Hough v. State, 2001 WL 394840 (Tenn. Crim. App. 2001) (unpublished opinion)
Neely v. State, 34 S.W.3d 879 (Tenn. Crim. App. 2000)

Tex.

Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007)

Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)
Wanzer v. Longoria, 2006 WL 1814305 (Tex. App. San Antonio 2006), reh'g overruled, (Aug. 2, 2006) and review denied, (Dec. 8, 2006) (unpublished opinion)
Horrice v. Fondren, 2006 WL 416973 (Tex. App. Fort Worth 2006) (unpublished opinion)
Dumas v. TDCJ-CID, 2005 WL 1797074 (Tex. App. Corpus Christi 2005), reh'g overruled, (Aug. 30, 2005) (unpublished opinion)
Brooks v. TDCJ-ID, 2005 WL 1797071 (Tex. App. Corpus Christi 2005), reh'g overruled, (Sept. 15, 2005) and review denied, (Mar. 3, 2006) (unpublished opinion)
Witherspoon v. Johnson, 2004 WL 2803410 (Tex. App. San Antonio 2004) (unpublished opinion)
In re Vespestad, 1999 WL 989586 (Tex. App. Amarillo 1999) (unpublished opinion)
Acuna v. State, 988 S.W.2d 299 (Tex. App. Texarkana 1999) (appeal of decision of revoking probation)

Utah

State v. Chavez, 2005 UT App 363, 2005 WL 2045798 (Utah Ct. App. 2005) (applying former Utah R. App. P. 4(f), now Utah R. App. P. 4(g))
Beasley v. State, 2000 UT App 168, 2000 WL 33243768 (Utah Ct. App. 2000) (applying former Utah R. App. P. 4(f), now Utah R. App. P. 4(g))

Wis.

State ex rel. L'Minggio v. Gamble, 2003 WI 82, 263 Wis. 2d 55, 667 N.W.2d 1 (2003) ("prisoner mailbox tolling rule")
State ex rel. Brown v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427 (2003) ("prisoner mailbox tolling rule")
State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001) ("prisoner mailbox tolling rule")
State ex rel. Kelley v. State, 261 Wis. 2d 803, 2003 WI App 81, 661 N.W.2d 854 (Ct. App. 2003) ("prisoner mailbox tolling rule")
State ex rel. Tyler v. Bett, 257 Wis. 2d 606, 2002 WI App 234, 652 N.W.2d 800 (Ct. App. 2002) ("prisoner mailbox tolling rule")
State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000) ("prisoner mailbox tolling rule")

In In re Marriage of Williams, 2005 WL 2660409 (Cal. App. 3d Dist. 2005), unpublished/noncitable, the court held that the "prisoner delivery" rule applied to a pro se inmate's motion to set aside a default judgment in a divorce action, noting that it had previously held that the prison delivery rule extended to civil complaints filed by incarcerated pro se prisoners because it effectively places the plaintiff and other pro se prisoner litigants on equal footing with litigants who are not impeded by the practical difficulties encountered by incarcerated litigants in meeting filing requirements, such as the inability to monitor the process of the mails to ensure that their pleadings were timely filed, to learn about delays in filing, and to rectify any problems so identified. The court reasoned that the same rationale applied to pro se litigants attempting to participate as respondents in litigation while incarcerated.

In Haag v. State, 591 So. 2d 614 (Fla. 1992), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. Specifically, the court held that the prisoner mailbox rule, under which a petition or notice of appeal filed by a pro se inmate was deemed filed at the moment in time when the inmate lost control over the document by entrusting its further delivery or processing to agents of the state, existed as a matter of Florida law, although it applied only to pro se petitioners who were incarcerated.

In Gonzalez v. State, 604 So. 2d 874 (Fla. Dist. Ct. App. 1st Dist. 1992), the court held that the federal prisoner mailbox rule, which existed as a matter of Florida law, was not limited solely to the filing of petitions or notices of appeal in court but was uniformly applied whenever a pro se inmate was required to use mail to file documents within a limited jurisdictional time frame. The court acknowledged that it was extending the prisoner mailbox rule set forth in Haag v. State, 591 So. 2d 614 (Fla. 1992), this section. Under the prisoner mailbox rule set forth in *Haag*, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state. The court concluded that the same notions of simplicity

and fairness which were the rationale for the prisoner mailbox rule in filing notices of appeal applied whenever a pro se inmate was required to use the U.S. mail to file documents within a limited jurisdictional time frame.

In Massaline v. Williams, 274 Ga. 552, 554 S.E.2d 720 (2001), the court held that the prisoner mailbox rule applied to an inmate's pro se application for a certificate of probable cause to appeal a denial of habeas corpus relief, as such rule promotes judicial fairness and helps assure that habeas corpus cases are decided on the merits and not on the overly technical application of procedural rules. The court adopted a mailbox rule to the effect that when a prisoner, who is proceeding pro se, appeals from a decision on his habeas corpus petition, his application for a certificate of probable cause to appeal will, under the "mailbox rule," be deemed filed on the date he delivers them to the prison authorities for forwarding to the clerks of the supreme court and the superior court, respectively.

Comment

In a subsequent case, Riley v. State, 280 Ga. 267, 626 S.E.2d 116 (2006), cert. denied, 127 S. Ct. 53, 166 L. Ed. 2d 52 (U.S. 2006) (also discussed in § 21), the Supreme Court of Georgia declined to apply the prisoner mailbox rule to a pro se inmate's notice of appeal, declaring that the prisoner mailbox rule enunciated in Massaline v. Williams, 274 Ga. 552, 554 S.E.2d 720 (2001), by its explicit terms, applied only in the narrow context of habeas corpus appeals to permit a pro se prisoner's notice of appeal to be deemed filed on the date delivered to prison authorities.

The court in Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005), held that the prison mailbox rule applied to a pro se inmate's notice of appeal from an order denying his petition for postconviction relief, noting that the prison mailbox rule extends to all actions under the Uniform Post Conviction Collateral Relief Act (UPCCRA) and appeals in those actions, and a pro se prisoner's motion for postconviction relief is delivered for filing when the prisoner delivers the papers to prison authorities for mailing.

The Ohio Supreme Court, in State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967), adopted the prison mailbox rule, holding that a prisoner acting pro se would be deemed to have filed his notice of appeal in postconviction relief proceedings in time if, within the statutory 20-day period, he or she delivered such notice to the proper prison authorities for forwarding to the court. In such a case, the court noted, the jailer in effect represented the lower court within the meaning of the statute (Ohio Rev. Code Ann. § 2505.04) providing that an appeal was perfected when written notice of appeal was filed with the lower court.

Caution

The decision in State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967), though followed in a few subsequent Ohio decisions [12] has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), as noted in State v. Harris, 2005-Ohio-921, 2005 WL 501602 (Ohio Ct. App. 6th Dist. Erie County 2005) (also discussed in § 21); State v. Hansbro, 2002-Ohio-2922, 2002 WL 1332297 (Ohio Ct. App. 2d Dist. Clark County 2002) (also discussed in § 24); State v. Bowens, 1998 WL 553049 (Ohio Ct. App. 11th Dist. Ashtabula County 1998) (also discussed in § 24); and State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997) (also discussed in § 24). [13]

In Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992), the court held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee. In so holding, the court not only found that the rationale for the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), was persuasive, but concluded that an Oklahoma state constitutional provision (Okla. Const. Art. II, § 6) providing that the courts must be open to all on the same terms

without prejudice, mandated adoption of the prisoner mailbox rule. A discriminatory denial of a statutory right to appeal is a violation of an individual's equal protection rights and a denial of equal access to courts, concluded the court.

The court in Thomas v. Elash, 2001 PA Super 214, 781 A.2d 170 (2001), held that the prisoner mailbox rule applied to all pro se legal filings by incarcerated litigants, including a pro se inmate's appeal from an arbitrators' decision in favor of the inmate's former defense attorney on breach of contract claims arising out of the attorney's alleged failure to attach various items to the inmate's petition for postconviction relief, which resulted in the denial of the petition. In so holding, the court reasoned that an incarcerated, pro se litigant in a civil action is faced with the same difficulties in tracking his filings as an incarcerated defendant pursuing relief, pro se, from a criminal conviction, and therefore, the prisoner mailbox rule applies to all pro se legal filings by incarcerated litigants. As such, the court indicated, a legal document is deemed filed by an incarcerated litigant, proceeding pro se, on the date it is delivered to the proper prison authority or deposited in the prison mailbox.

The court in Com. v. Jones, 549 Pa. 58, 700 A.2d 423 (1997), held that the "prisoner mailbox rule," which provides that an appeal by a pro se prisoner is deemed filed on the date the prisoner deposits the appeal with prison authorities and/or places it in the prison mailbox, though the appeal is actually received by the court after the deadline for filing the appeal, extended to all appeals by pro se prisoners.

The court in Com. v. Cooper, 710 A.2d 76 (Pa. Super. Ct. 1998), held that the prisoner mailbox rule applied to all appeals filed by incarcerated pro se litigants, not just to challenges to a prisoner's sentence or conviction.

In Warner v. Glass, 135 S.W.3d 681 (Tex. 2004), the Texas Supreme Court held that, consistent with the Inmate Litigation Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001 to 14.014, and Tex. R. Civ. P. 5, a pro se inmate's civil petition that is placed in a properly addressed and stamped envelope or wrapper is deemed filed at the moment prison authorities receive the document for mailing. Neither the general rule protecting litigants from clerical errors in the courthouse nor Rule 5's mailbox rule addresses the position of the party, who, because he or she is incarcerated and proceeding pro se, does not have direct access to either the clerk's office or a United States mailbox for first-class mail, the court observed. Just as we have declined to punish parties for failing to obtain a file-stamp when they have timely placed the document in the constructive control of a court clerk, reasoned the court, we decline to penalize a pro se litigant for failing to obtain a postmark or a file-stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access.

The court in State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000), adopted a modified version of the prisoner mailbox rule established by the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988). As described in *Houston*, explained the court, the prisoner mailbox rule states that the deposit of the pleading or notice in the prison mail receptacle constitutes "filing" within the meaning of a time-limit statute. Finding the reasoning of the *Houston* case persuasive, the court stated that it saw no real difference between a prisoner in the federal system and a state prisoner, as neither are able to file documents directly, or make a telephone call to determine whether their papers have been properly filed. Pro se prisoners necessarily lose all control over and all contact with their documents the moment they deliver them to the prison authorities. The court stated that the *Houston* rationale was entirely consistent with the basic principles of fairness and equal treatment on which both the state's substantive and procedural laws are based. The court, however, cautioned that there was much more to the "filing" process in the instant case than that which existed in *Houston*. Under the federal rules at issue in *Houston*, nothing more than the simple act of filing a notice of appeal is required for the institution of appeal proceedings. In Wisconsin, however, civil actions are not commenced until the applicable filing fee is paid, or waived by the court for cause shown, and prison inmates are required to file certain other documents in order to establish that any applicable administrative remedies have been exhausted. For this reason, the court declared, it would not adopt *Houston*'s express holding that deposit of the pleading or notice in the prison mail receptacle constitutes "filing" within the meaning of a time-limit statute. Rather, applying the *Houston* court's rationale, the court adopted a tolling rule,

effectively tolling the statutory 45-day time limit from the time the appropriate documents were deposited in the prison mail receptacle and their receipt by the clerk of court. Thus, under the court's modified prisoner mailbox tolling rule, even though a prisoner's certiorari action may be timely with respect to the 45-day time limit, the court may still decline to allow the action to proceed if the fee and other requirements were not met. The court concluded, therefore, that when a prison inmate places a certiorari petition in the institution's mailbox for forwarding to the circuit court, the 45-day time limit in Wisconsin procedural law is tolled.

CUMULATIVE SUPPLEMENT

Cases:

The "prisoner mailbox rule" provides that a notice of appeal is deemed filed on the date it is submitted to prison authorities to forward to the district court as opposed to the date received by the district court. Jones v. U.S., 879 F. Supp. 2d 492 (E.D. N.C. 2012).

Under 'mailbox rule,' a pro se prisoner's state habeas petition is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of the court. Noble v. Adams, 2012 WL 1353564 (9th Cir. 2012).

The "prison-delivery rule," which deems a notice of appeal filed as of the date an incarcerated pro se litigant delivers the documents to prison authorities, applies not only to criminal appeals but also to civil appeals filed by an incarcerated pro se litigant. Cal.Rules of Court, Rule 8.25(b). Shufelt v. Hall, 77 Cal. Rptr. 3d 900 (Cal. App. 4th Dist. 2008).

Pursuant to the prison "mailbox rule," a pro se inmate's motion is considered filed on the date he provides it to prison officials for mailing. Norris v. State, 198 So. 3d 1036 (Fla. 5th DCA 2016).

Under "mailbox rule" for notices of appeal or petitions filed by incarcerated pro se litigants, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state. Davis v. State, 198 So. 3d 995 (Fla. 4th DCA 2016).

The date reflected on the prison stamp of a pro se inmate's document is presumed to be the date that the document is filed in the court proceeding. Martinez v. State, 162 So. 3d 1051 (Fla. 5th DCA 2015).

Under the prisoner mailbox rule, the timeliness of defendant's pleading should be measured from the date he placed the document in the hands of prison officials for mailing. Kerr v. State, 148 So. 3d 123 (Fla. 2d DCA 2014).

Only pro se prisoners who are confined on the date that a notice of appeal must be filed may take advantage of the "mailbox rule," which provides that a notice of appeal submitted by the prisoner is deemed filed at the moment the inmate loses control over the document by entrusting its further delivery or processing to agents of the state, usually prison officials. Donaldson v. State, 136 So. 3d 1281 (Fla. 2d DCA 2014).

Pursuant to the "mailbox rule," a petition or notice of appeal filed by pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state. West's F.S.A. R.App.P.Rule 9.420(a)(2). Crews v. Malara, 123 So. 3d 144 (Fla. 1st DCA 2013).

Under the "mailbox rule," a pro se inmate's document is deemed filed when the inmate entrusts the document to prison officials for further delivery or processing. Lawson v. State, 107 So. 3d 1228 (Fla. 2d DCA 2013).

Pro se prisoners' petitions are deemed filed on the date they are delivered to prison officials. Head v. McNeil, 975 So. 2d 583 (Fla. Dist. Ct. App. 1st Dist. 2008).

Under the mailbox rule, a document filed by a pro se prisoner is deemed filed on the date it is submitted to prison authorities for the purpose of mailing. Shelton v. Shelton, 225 P.3d 693 (Idaho 2009).

Under the "mailbox rule," pleadings, including posttrial motions, are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant. People v. Liner, 2015 IL App (3d) 140167, 46 N.E.3d 264 (Ill. App. Ct. 3d Dist. 2015), appeal pending, (Mar. 1, 2016).

Under the "mailbox rule," pleadings, including posttrial motions, are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant. People v. Shines, 2015 IL App (1st) 121070, 33 N.E.3d 169 (Ill. App. Ct. 1st Dist. 2015).

Under the "prison mailbox rule," the date a pro-se prisoner delivers notice of appeal to prison authorities for mailing should be considered the date of filing as opposed to the date of receipt. Rules App.Proc., Rule 9. Morales v. State, 19 N.E.3d 292 (Ind. Ct. App. 2014).

Under the "prison mailbox rule," pro se filings from an incarcerated litigant are deemed filed when they are delivered to prison officials for mailing. Dowell v. State, 908 N.E.2d 643 (Ind. Ct. App. 2009).

The "prison mailbox rule" deems a prisoner's pro se documents "filed" when he or she submits them to prison authorities for mailing. Wahl v. State, 344 P.3d 385 (Kan. 2015).

Under the "prison mailbox rule," a habeas petition is considered filed when it is delivered to prison authorities for mailing —not on the date it is eventually filed with the court clerk—since those prison authorities control what happens after the paper is delivered to them. Sauls v. McKune, 238 P.3d 747 (Kan. Ct. App. 2010).

The "prison mailbox rule" states that in pro se postconviction relief (PCR) proceedings, the prisoner's motion is considered delivered for filing when the prisoner gives the documents to prison officials for mailing. Small v. State, 141 So. 3d 61 (Miss. Ct. App. 2014).

The "prison-mailbox rule" states that a pro se prisoner's appeal or motion is considered delivered for filing when the prisoner gives the documents to prison authorities for mailing. Whatley v. State, 123 So. 3d 461 (Miss. Ct. App. 2013), cert. denied, 123 So. 3d 450 (Miss. 2013).

"Prison-mailbox rule" states that in pro se post-conviction relief proceedings, the prisoner's motion is considered delivered for filing when the prisoner gives the documents to prison officials for mailing. Lott v. State, 115 So. 3d 903 (Miss. Ct. App. 2013).

Under the prison mailbox rule, a pro se prisoner's motion is considered filed when he delivers the papers to prison authorities for mailing. Scruggs v. State, 102 So. 3d 1172 (Miss. Ct. App. 2012), cert. denied, 102 So. 3d 272 (Miss. 2012).

Under the "prison mailbox rule," a pro se prisoner's motion for postconviction relief is delivered for filing when the prisoner delivers the papers to prison authorities for mailing. Stokes v. State, 66 So. 3d 746 (Miss. Ct. App. 2011).

Under the prison mailbox rule, in pro se post-conviction relief proceedings, the prisoner's motion is considered delivered for filing when the prisoner gives the documents to prison officials for mailing. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Under "prison mailbox rule," pro se prisoner's motion for post-conviction relief is delivered for filing when prisoner delivers the papers to prison authorities for mailing. Duhart v. State, 981 So. 2d 1056 (Miss. Ct. App. 2008).

Under the prison mailbox rule, a pro se prisoner's notice of appeal is effectively filed when the prisoner delivers his notice of appeal to the proper prison authorities for mailing. Rules App.Proc., Rule 4. Carroll v. State, 3 So. 3d 767 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280 (Miss. 2009).

Statutes that provide for filing documents require physical delivery to the official or agency, unless the statute at issue states a mailbox rule that deems the claim filed when mailed. L.J. Smith, Inc. v. Harrison Cty. Bd. of Revision, 140 Ohio St. 3d 114, 2014-Ohio-2872, 16 N.E.3d 573 (2014).

Pursuant to the "prisoner mailbox rule," the Superior Court deems an appellant's documents filed on the date when he placed them in the hands of prison authorities for mailing. Com. v. Leggett, 2011 PA Super 40, 16 A.3d 1144 (2011).

Pursuant to the Pennsylvania prisoner mailbox rule, the date of delivery of a Pennsylvania Post Conviction Relief Act (PCRA) petition by the defendant to the proper prison authority or to a prison mailbox is considered the date of filing of the petition. 42 Pa.C.S.A. § 9541 et seq. Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80 (3d Cir. 2013) (applying Pennsylvania law).

Under the "prisoner mailbox rule," a prisoner's pro se appeal is deemed filed at the time it is given to prison officials or put in the prison mailbox. Kittrell v. Watson, 88 A.3d 1091 (Pa. Commw. Ct. 2014).

The "prisoner mailbox rule" deems that a prisoner's pro se appeal is filed at the time it is given to prison officials or put in the prison mailbox. Sweesy v. Pennsylvania Bd. of Probation and Parole, 955 A.2d 501 (Pa. Commw. Ct. 2008).

When a pleading is mailed by an inmate, the pleading is considered timely if it is received by prison authorities for mailing on or before the deadline. Rules App.Proc., Rule 25.1(a). In re Smith, 270 S.W.3d 783 (Tex. App. Waco 2008).

Supreme Court would adopt the prison mailbox rule that an unrepresented prisoner is deemed to have filed a notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the court; it would be unfair to hold a prisoner accountable for the vagaries of the prison mail system. Rules App.Proc., Rule 4(a)(1). In re Bruyette, 2016 VT 3, 136 A.3d 575 (Vt. 2016).

[Top of Section]

[END OF SUPPLEMENT]

§ 5. Rule not recognized

[Cumulative Supplement]

The following authority does not recognize the prisoner mailbox rule as applicable to any type of filings by pro se inmates within the particular jurisdiction.

Col.
Talley v. Diesslin, 908 P.2d 1173 (Colo. Ct. App. 1995)
Ark.
Johnson v. State, 2006 WL 2839239 (Ark. 2006) (unpublished opinion)
Murdock v. State, 2006 WL 2700011 (Ark. 2006) (unpublished opinion)
Sanders v. State, 2006 WL 349693 (Ark. 2006) (unpublished opinion)

Stokes v. State, 2006 WL 137227 (Ark. 2006) (unpublished opinion)
Winningham v. State, 2002 WL 31731477 (Ark. 2002) (unpublished opinion)
Ladwig v. State, 2001 WL 128880 (Ark. 2001) (unpublished opinion)
Hamel v. State, 338 Ark. 769, 1 S.W.3d 434 (1999)
Hughes v. State, 1993 WL 132971 (Ark. 1993) (unpublished opinion)
Key v. State, 297 Ark. 111, 759 S.W.2d 567 (1988)

Conn.

Hastings v. Commissioner of Correction, 82 Conn. App. 600, 847 A.2d 1009 (2004), appeal on other grounds dismissed as improvidently granted, 274 Conn. 555, 876 A.2d 1196 (2005)

Del.

Ball v. State, 911 A.2d 802 (Del. 2006)
Whalen v. State, 759 A.2d 603 (Del. 2000)
Douglas v. State, 712 A.2d 475 (Del. 1998)
Robinson v. Snyder, 705 A.2d 245 (Del. 1997)
Carr v. State, 554 A.2d 778 (Del. 1989)
State v. Gregory, 2005 WL 3194482 (Del. Super. Ct. 2005) (unpublished opinion)

Ky.

Robertson v. Com., 177 S.W.3d 789 (Ky. 2005)
Holt v. Cooper, 2007 WL 491605 (Ky. Ct. App. 2007)
Runyon v. Bell, 2006 WL 1046214 (Ky. Ct. App. 2006), review denied, (Aug. 17, 2006) (unpublished opinion)
Richardson v. Nichols, 2006 WL 1044473 (Ky. Ct. App. 2006)
Thomas v. Motley, 2005 WL 2174616 (Ky. Ct. App. 2005)

Mich.

Northington v. Michigan Dept. of Corrections, 2002 WL 31376755 (Mich. Ct. App. 2002) (unpublished opinion)
Bailey v. City of Kalamazoo, 2000 WL 33421434 (Mich. Ct. App. 2000) (unpublished opinion)
People v. Williams, 2000 WL 33395316 (Mich. Ct. App. 2000) (unpublished opinion) (in dicta)
Scott v. Department of Corrections, 1998 WL 1997674 (Mich. Ct. App. 1998) (unpublished opinion)
Walker-Bey v. Department of Corrections, 222 Mich. App. 605, 564 N.W.2d 171 (1997)

Mo.

Johnson v. Purkett, 217 S.W.3d 341 (Mo. Ct. App. E.D. 2007)
Unnerstall v. State, 53 S.W.3d 589 (Mo. Ct. App. E.D. 2001)
Daniels v. State, 31 S.W.3d 121 (Mo. Ct. App. W.D. 2000)
O'Rourke v. State, 782 S.W.2d 808 (Mo. Ct. App. W.D. 1990)
Vollmer v. State, 775 S.W.2d 230 (Mo. Ct. App. E.D. 1989)

Neb.

State v. Hess, 261 Neb. 368, 622 N.W.2d 891 (2001)
State v. Parmar, 255 Neb. 356, 586 N.W.2d 279 (1998)

N.Y.

Purcell v. Dennison, 29 A.D.3d 1128, 814 N.Y.S.2d 787 (3d Dep't 2006)
Loper v. Selsky, 26 A.D.3d 653, 810 N.Y.S.2d 525 (3d Dep't 2006)
Grant v. Senkowski, 95 N.Y.2d 605, 721 N.Y.S.2d 597, 744 N.E.2d 132 (2001)
James v. Goord, 281 A.D.2d 825, 722 N.Y.S.2d 609 (3d Dep't 2001)
Espinal v. State, 159 Misc. 2d 1051, 607 N.Y.S.2d 1008 (Ct. Cl. 1993)

Wash.

In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003)

The court in Hamel v. State, 338 Ark. 769, 1 S.W.3d 434 (1999), refused to adopt the prisoner mailbox rule announced in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which provided that a pro se inmate files his or her petition at the time the petition is placed in the hands of prison officials for mailing, concluding that *Houston* was not controlling, as it represented the United States Supreme Court's interpretation of federal

rules which had no applicability in the instant case. Rather, the court determined, the clear language of the applicable court rule (Ark. R. Crim. P. 37.2(c)) was controlling, which provided that petition for postconviction relief must be filed in the appropriate circuit court within 90 days of judgment.

In Talley v. Diesslin, 908 P.2d 1173 (Colo. Ct. App. 1995), the court refused to adopt the prisoner mailbox rule, concluding that, since the rule under consideration (Colo. R. Civ. P. 106(b)) was unambiguous, the court had to apply the plain meaning rule of statutory construction and construe the rule as written. Moreover, the court determined, the prisoner mailbox rule was contrary to the plain language of the procedural rule.

The court in Carr v. State, 554 A.2d 778 (Del. 1989), held that, under Delaware law (Del. Code Ann. tit. 10, § 147) and procedure (Del. Sup. Ct. R. 6), a notice of appeal is filed when it is received and filed by the office of the clerk, not at the moment it is placed in the mail. Such law and court rule clearly required a timely filing within a 30-day period, irrespective of the mailing date. The holding of the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), said the court, did not compel it to abandon its own precedent, as *Houston* did not establish as a constitutional requirement that there must be a prison mailbox rule. Moreover, the prison mailbox rule is inappropriate for Delaware, the court concluded, because: (1) a notice of appeal filing deadline was not subject to enlargement in Delaware as it was in the federal system; and (2) the procedure used to mail letters in the Delaware prison system was very different from that employed in the federal penal system. In the absence of compelling policy reasons to support a change in the court's longstanding interpretation of Delaware law, the court declined to adopt a separate prison mailbox rule.

The court in Robertson v. Com., 177 S.W.3d 789 (Ky. 2005), refused to adopt the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), citing the possibility of unforeseen mischief fostered by otherwise good intentions, and thus, declining to adopt the fiction that "filing" means delivery to prison authorities.

Concluding that a prisoner's act of leaving of his postconviction motion with prison authorities for mailing was not sufficient compliance with the filing deadline under state law, the court in O'Rourke v. State, 782 S.W.2d 808 (Mo. Ct. App. W.D. 1990), refused to extend the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and applicable in the federal prison system, to the state system in which the prisoner merely dropped off an envelope to be mailed and there was no recording of the transaction. In reaching its holding, the court noted that its refusal to create a prisoner mailbox rule was prompted by a lack of state institutional safeguards which distinguished the instant case from *Houston*. In the federal penitentiary system, the court remarked, the pro se prisoner does not anonymously drop his notice of appeal in a public mailbox, but rather, hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing. Since the procedural protections of the federal system did not exist in the instant case, wherein the prisoner testified that he merely dropped off the envelope to be mailed, with no recording of the transaction, the court reasoned, the policy grounds which favored the adoption of the prison mailbox rule in the federal system were not applicable.

The court in Vollmer v. State, 775 S.W.2d 230 (Mo. Ct. App. E.D. 1989), declined to follow the prisoner mailbox rule announced in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), concluding that it was not controlling because it involved a federal general rule of procedure applicable to all federal appeals, while the rule at issue in the instant case was enacted by the Missouri Supreme Court specifically as a procedure for prisoners seeking vacation of their sentences following a plea of guilty. The court concluded from a plain reading of the rule that the inmate's motion was not filed when mailed, but when it was lodged in the circuit clerk's office.

The court in In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003), held that the plain language of the state court appellate rule (Wash. R. App. P. 18.6(c)), providing that petitions were timely filed only if received by the appellate court within

the limitations period, precluded application of the federal mailbox rule, which considered pro se prisoners' notices filed at the moment of delivery to prison authorities.

CUMULATIVE SUPPLEMENT

Cases:

Statute and procedural rule that recognized the date on which notice of appeal was received by Supreme Court, rather than moment of delivery of notice to prison authorities, for purposes of determining timeliness of appeals prevented Supreme Court from adopting federal prison mailbox rule set forth in *Houston v. Lack* or a tolling analysis that would have reached the same result. 10 West's Del.C. § 147; Sup.Ct.Rules, Rule 6(a)(ii). Smith v. State, 47 A.3d 481 (Del. 2012).

Michigan does not follow the prison mailbox rule. MCR 7.202(2). Dorn v. Lafler, 601 F.3d 439 (6th Cir. 2010) (applying Michigan law).

[Top of Section]

[END OF SUPPLEMENT]

III. Prisoner Mailbox Rule Applied

A. Criminal Proceedings

1. In General

§ 6. Notice of appeal from conviction or sentence; criminal appeals generally

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal in a criminal proceeding, under the facts and circumstances presented.

The California Supreme Court in In re Jordan, 4 Cal. 4th 116, 13 Cal. Rptr. 2d 878, 840 P.2d 983 (1992), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal following his conviction and sentencing. Specifically, the court held that the prison-delivery rule, providing that a prisoner's notice of appeal is deemed timely filed if delivered to prison authorities within the filing period set forth in the Rules of Court, remained viable in California, despite an extension of the appeal period from 10 days to 60 days. The court stated that a prisoner's notice of appeal is deemed to have been filed in the office of the appropriate county clerk on the date, within the 60-day filing period prescribed by Rules of Court (Cal. Rules of Court, rule 8.104) on which it was delivered to prison authorities. If the notice of appeal was received by the county clerk following the expiration of the 60-day filing period, the prisoner who seeks to pursue his or her appellate rights has the burden of establishing that the notice of appeal was delivered to prison authorities within the 60-day period. The prison-delivery rule ensures that an unrepresented defendant, confined during the period allowed for the filing of an appeal, is given an opportunity to adhere to the filing requirements similar to that provided to a defendant who has counsel or who is not confined. The court reasoned that such equality of treatment was as important under the current 60-day filing period as it was under the former 10-day filing period. In addition, the prison-delivery rule promotes the efficient use of judicial resources by establishing a "bright-line" test that permits the courts to avoid the substantial administrative burden that would be imposed if the courts were required to determine, in each instance, whether a prisoner's notice of appeal was delivered to prison authorities sufficiently in advance of the filing deadline to permit the timely filing of the notice in the county clerk's office. Accordingly, the court held that the petition was timely

even though it was delivered to prison authorities on the 57th day of the time period and received by the clerk of court after the expiration of the 60-day appeal period.

See People v. Slobodion, 30 Cal. 2d 362, 181 P.2d 868 (1947), in which the court held the pro se prisoner's delivery of a notice of appeal of his conviction to state prison employees for mailing six days prior to the expiration of the date for taking of the appeal was constructive filing within the prescribed time limit, notwithstanding that the prison employees negligently delayed in mailing the notice until after the expiration date. The court reasoned that the state's failure, through its employees, to function in protection of the prisoner's exercise of his right of appeal, must not deprive him of such right after he has timely performed, as far as the state allows, all the steps required by state law in perfection of his appeal. The court stated that any other conclusion would result in a violation of the Equal Protection Clause of the 14th Amendment of the Federal Constitution, in that the state would be refusing such inmate privileges of appeal which it afforded to others.

The court in People v. Lepe, 195 Cal. App. 3d 1347, 241 Cal. Rptr. 388 (4th Dist. 1987), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal. The incarcerated defendant appealed his sentence to concurrent terms. The court found that the appeal of the incarcerated defendant acting in pro per would be deemed timely filed, where the notice of appeal was filed on December 26, two days after the 60-day time for filing appeals had expired, but the defendant had signed his notice of appeal December 16.

The court in State ex rel. Egana v. State, 771 So. 2d 638 (La. 2000), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal of his conviction. The Supreme Court of Louisiana remanded the case to the court of appeals with instructions that the court review the inmate's district court filing of April 1999 to determine if the inmate filed it timely under the prisoner mailbox rule.

The court in Com. v. Hartsgrove, 407 Mass. 441, 553 N.E.2d 1299 (1990), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal of his conviction on multiple charges. The court found that the incarcerated pro se defendant should be deemed to have filed a notice of appeal with the trial court clerk upon relinquishing control of the notice to prison authorities. The court reasoned that since the defendant, acting without the aid of an attorney, was incarcerated in a correctional facility when he placed his notice of appeal in the institutional mailbox, it would be unfair to hold the defendant accountable for the vagaries, if any, of the prison mail system. The Commonwealth disputed when the defendant actually placed his notice of appeal in the institutional mailbox. The court remanded for a determination of when the defendant placed the notice of appeal in the prison mailbox. The court stated that once the defendant came forward with evidence as to the date and time he deposited the notice of appeal with prison authorities, the burden of proof (civil) was 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 was the entity with the best access to the evidence needed to resolve the question.

Caution

But see, Tibbs v. Dipalo, 2000 WL 1273854 (Mass. Super. Ct. 2000) (unpublished opinion) (also discussed in § 26), which distinguished, for purposes of the application of the prison mailbox rule, the timeliness of an appeal from a conviction, as was at issue in Com. v. Hartsgrove, 407 Mass. 441, 553 N.E.2d 1299 (1990), with that of a complaint in the nature of certiorari appealing the findings of a prison disciplinary hearing, finding that the *Hartsgrove* prisoner mailbox rule did not apply in the latter situation.

See Benbow v. State, 614 So. 2d 398 (Miss. 1993), in which the court held that it would consider the defendant's untimely appeal where the incarcerated pro se defendant delivered a notice of appeal of his conviction to prison authorities for mailing two days before the expiration of the 30-day appeal period, even though the notice of appeal did not arrive in the clerk's office of filing until four days after the expiration of the appeal period. The court found that the defendant

did all he could reasonably be expected to do to perfect his appeal in a timely fashion. The court discussed the adoption of the prisoner mailbox rule for federal appeals in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988). The court stated, however, that it would leave the decision of whether to adopt or reject the prisoner mailbox rule for another day, and that it found that the circumstances in the instant case dictated the suspension of the rule requiring a defendant to file a notice of appeal within 30 days.

The court in State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976), held that the prisoner mailbox rule applied to render a pro se inmate's notice of appeal from conviction timely where the inmate filed his original notice of appeal with legal officer of correctional institute well within time for perfecting his appeal but, through no fault of his own, the notice of appeal was erroneously mailed to wrong county. The inmate, said the court, had properly followed institution procedure, had thus filed his notice of appeal 'in time' by delivering such notice to the proper prison authorities for forwarding to the court.

Caution

The decision in State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976), which relied on the authority of State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in §§ 4, 9), has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

The court in State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal. The prisoner argued that he delivered his notice of appeal to prison authorities 25 days after the trial court denied postconviction relief. The prisoner submitted documents substantiating his claim. The prisoner maintained that the timely filing of his notice of appeal was beyond his control, and he urged the court to apply the prisoner mailbox rule and thereby treat his delivery of the notice of appeal to prison authorities as the date of filing with the court. The court applied the prisoner mailbox rule, saying that with respect to inmates of prisons, ordinarily the date of delivery to prison authorities for mailing would be deemed the date of filing. Thus the court held that the inmate's notice of appeal was timely, even though the notice was filed with the court after the 30-day appeal period, where the inmate gave the notice of appeal to prison authorities within the 30-day appeal period.

Caution

The decision in State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997), which relied on the authority of State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in §§ 4, 9), has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

The court in Com. v. Patterson, 2007 PA Super 241, 931 A.2d 710 (2007), held that the prisoner mailbox rule applied to a pro se petitioner's notice of appeal following his conviction of probation violations and the denial, on August 23, 2006, of his postsentencing motions, thus rendering his notice of appeal timely as received by the court on September 25, 2006, where, the court found, since both September 23 and 24 were weekend days, and in order for the court to have received the notice of appeal on the 25th, it was likely that the appellant mailed his notice of appeal on or before the expiration of the period on September 22, 2006.

The court in Com. v. Johnson, 2004 PA Super 374, 860 A.2d 146 (2004) (disapproved of on other grounds by, Com. v. Robinson, 2007 PA Super 230, 931 A.2d 15 (2007)), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal. Under Pennsylvania court rules (Pa. R. App. P. 903), to be timely, a notice of appeal had to be filed within 30 days after entry of the order from which the appeal was taken. Judgment of sentence was entered against the

prisoner on May 21, 2003. The deadline for filing a notice of appeal was therefore Friday, June 20, 2003. The prisoner, incarcerated at the time, filed a pro se notice of appeal that was time-stamped on Monday, June 23, 2003. Under the prisoner mailbox rule, a pro se appeal by a prisoner is deemed filed as of the date it is delivered to prison authorities or placed in the institutional mailbox. The court concluded that to be received by the clerk of the court Monday, June 23, the prisoner's Notice of Appeal must have been mailed by Friday, June 20, and thus the appeal was timely.

See, Com. v. Little, 716 A.2d 1287 (Pa. Super. Ct. 1998), more fully discussed in § 8, wherein the court recognized that the prisoner mailbox rule, which provides that the date of delivery by a prisoner to the proper prison authority or to the prison mailbox is considered the date of filing, applied to a pro se direct appeal. The court indicated that it would accept any reasonably verifiable evidence of the date that the prisoner deposited the appeal with the prison authorities.

The court in Com. v. Cooper, 710 A.2d 76 (Pa. Super. Ct. 1998), held that the prisoner mailbox rule applied to all appeals filed by incarcerated pro se litigants, not just to challenges to a prisoner's sentence or conviction. Under the prisoner mailbox rule, a notice of appeal is deemed filed as of the date it is deposited in the prison mail system, for prisoners proceeding pro se. The court found that the pro se incarcerated plaintiff filed a timely notice of appeal, seeking review of a trial court's affirmation of a denial of a private criminal complaint, where neither party raised the issue of the timeliness of the appeal and the clerk of courts received the notice only two days after the 30-day period expired. In deciding that the prisoner mailbox rule applied to the appeal of a denial of a private criminal complaint, the court reasoned that the policy reason for the rule was based on affording prisoners the same appellate opportunities as other litigants, and such rationale did not depend on whether the appeal was a challenge to a sentence or conviction or another type of appeal.

In State v. Chavez, 2005 UT App 363, 2005 WL 2045798 (Utah Ct. App. 2005), the court held that the prisoner mailbox rule contained in former Utah R. App. P. 4(f), now Utah R. App. P. 4(g), applied to render a pro se inmate's notice of appeal following his conviction and denial of his motion to withdraw his guilty plea timely. The court nevertheless dismissed the appeal for lack of jurisdiction.

CUMULATIVE SUPPLEMENT

Cases:

Legible postmark affixed by the United States Postal Service, while considered prima facie evidence of mailing, is not essential for compliance with Texas' mailbox rule. Vernon's Ann.Texas Rules Civ.Proc., Rule 5. White v. Dietrich Industries, Inc., 554 F. Supp. 2d 684 (E.D. Tex. 2006).

Pro se prisoner's notice of appeal would be deemed to have been filed on the date she placed her notice of appeal in the hands of prison officials with first class postage affixed, rather than the date on which her notice of appeal was docketed in the district court. F.R.A.P.Rule 4(c), 28 U.S.C.A. U.S. v. Blaine, 409 Fed. Appx. 253 (11th Cir. 2010).

The "mailbox rule," in which a pro se prisoner-litigant's notice of appeal is timely filed on the date that the it is delivered to the prison officials for mailing, governs as to the time of filing of the pro se prisoner-litigant's notice of appeal in both criminal and civil cases. Rules App.Proc., Rule 4(c). Parris v. Prison Health Services, Inc., 68 So. 3d 108 (Ala. Civ. App. 2009), cert. denied, (Feb. 11, 2011).

Defendant's notice of appeal was not timely filed, even pursuant to the "mailbox rule" that applied to pro se inmates; although defendant was an inmate and was required only to present his notice of appeal to a corrections officer for mailing in order to comply with the filing deadline, the stamp on defendant's notice of appeal bearing his initials demonstrated that it was tendered to a corrections officer more than 30 days following the rendition of the trial court's order he sought to appeal. West's F.S.A. R.App.P.Rules 9.020(i), 9.110(b), 9.420(a)(2)(A); West's F.S.A. RCrP Rule 3.850(k). Ivey v. State, 199 So. 3d 378 (Fla. 3d DCA 2016).

Incarcerated defendant's pro se request for appeal from his convictions was timely filed under the prison-mailbox rule, where defendant gave his request to prison officials five days before the expiration of the 30-day period in which to file a notice of appeal. Rules App.Proc., Rule 9(A)(1). Lawrence v. State, 915 N.E.2d 202 (Ind. Ct. App. 2009).

State failed to satisfy its burden of showing that defendant, while incarcerated, failed to send his notice of appeal within 30 days of the entry of the trial court's order dismissing his motion for postconviction relief, in light of the extra time that was allowed by the prison mailbox rule, and thus, defendant's appeal was considered on the merits. Rules App.Proc., Rule 4(a). Catchings v. State, 35 So. 3d 552 (Miss. Ct. App. 2010).

Application of prison mailbox rule rendered defendant's notice of appeal presumptively timely, even though it was filed one day late, and thus, appeal from order denying defendant's several post-trial motions was reviewed on the merits; defendant's motion for postconviction relief was pro se and the notice of appeal was filed while he was incarcerated. Rules App.Proc., Rule 4(a). Owens v. State, 17 So. 3d 628 (Miss. Ct. App. 2009).

Under "prison mailbox rule," petition for post-conviction collateral relief was delivered for filing, for purposes of determining its timeliness, on date prisoner mailed it to circuit clerk, not date clerk marked it as filed. West's A.M.C. § 99–39–5(2). Duhart v. State, 981 So. 2d 1056 (Miss. Ct. App. 2008).

Although defendant's notice of appeal was received and filed by the circuit court more than thirty days after entry of judgment denying his motion to dismiss indictment for an alleged violation of right to speedy trial, appellate court had jurisdiction over appeal, where cover letter and certificate of service attached to notice of appeal were dated within thirty days of the entry of judgment, and while appellate court had no way of knowing when defendant actually delivered his appeal documents to prison authorities for mailing, the State offered no evidence indicating that defendant failed to do so within the thirty-day window. Rules App.Proc., Rule 4(a). Carroll v. State, 3 So. 3d 767 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280 (Miss. 2009).

Under the "prison mailbox rule," a motion for post-conviction relief is considered as filed on the date that the prisoner delivers the motion to prison officials for mailing. Shelton v. State, 984 So. 2d 320 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277 (Miss. 2008).

Prison mailbox rule, under which a prisoner's motion for post-conviction relief is delivered for filing on the date that the prisoner submitted the papers to prison authorities for mailing, applies to appeals from denials of post-conviction relief. Ducote v. State, 970 So. 2d 1309 (Miss. Ct. App. 2007).

Under the prison mailbox rule, a pro se prisoner's notice of appeal is effectively "filed" when the prisoner delivers his notice of appeal to the proper prison authorities for mailing. Rules App.Proc., Rule 4(a). Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Due to the unique circumstances facing an incarcerated pro se petitioner, a cash slip showing the date that the prisoner's account was charged for mailing a document for filing with the court may be sufficient to establish that an appeal was delivered to prison officials or deposited in the prison mailbox within the filing period. Com v. Chambers, 2011 PA Super 276, 35 A.3d 34 (2011).

Pursuant to prisoner mailbox rule, defendant's pro se notice of appeal from denial of postconviction relief was deemed to have been filed when it was handed to prison officials on February 4, 2010, as opposed to 14 days later when notice of appeal was time-stamped and docketed. Com. v. Ousley, 2011 PA Super 103, 21 A.3d 1238 (2011).

Pro se inmate's appeal was filed at the time it was delivered to prison authorities for forwarding to the court clerk under prisoner mailbox rule in prosecution for possession of a controlled substance, cocaine, in an amount of four grams or more, but less than 200 grams; because reference to prison mail logs would generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivered the notice to prison authorities for mailing was a bright-line rule, not an uncertain one. Vernon's Ann.Texas Rules Civ.Proc., Rule 5; Rules App.Proc., Rule 9.2(b)(1). Campbell v. State, 2010 WL 3655949 (Tex. Crim. App. 2010) [citing annotation].

Pro se inmate's appeal was filed at the time it was delivered to prison authorities for forwarding to the court clerk under prisoner mailbox rule in prosecution for possession of a controlled substance, cocaine, in an amount of four grams or more, but less than 200 grams; because reference to prison mail logs would generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivered the notice to prison authorities for mailing was a bright-line rule, not an uncertain one. Vernon's Ann.Texas Rules Civ.Proc., Rule 5; Rules App.Proc., Rule 9.2(b)(1). Campbell v. State, 320 S.W.3d 338 (Tex. Crim. App. 2010).

[Top of Section]

[END OF SUPPLEMENT]

§ 7. Motion to modify or correct judgment or sentence—Notice of appeal from denial thereof

The courts in the following cases held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal from the denial of a motion, seeking to modify or correct a judgment conviction or sentence, under the facts and circumstances presented.

The court in Spicer v. State, 898 So. 2d 984 (Fla. Dist. Ct. App. 5th Dist. 2005), held that the prisoner mailbox rule applied to a pro se inmate's appeal from the denial of his motion to vacate, set aside, or correct sentence, and thus, the inmate adequately established timely service of his motion for rehearing, thus tolling the time for taking appeal from summary denial of his motion, where, in response to an order to show cause, the inmate submitted the response to his inmate request form, in which an officer stated that he observed the defendant sealing a legal document and placing it into the prison mail within the deadline for service of the motion, and the circuit court clerk's office supplied the envelope containing the motion for rehearing, which was actually postmarked prior to the date referred to by the inmate and the officer.

In Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal from the denial of his motion for an amended judgment of conviction to include jail time credit. [14] After the appeal was dismissed as untimely, the prisoner petitioned for a rehearing. The prisoner provided the court with documents establishing that the prisoner delivered the notice of appeal to prison officials before the appeal period expired. The Supreme Court of Nevada held that, under the prisoner mailbox rule, the notice of appeal was "filed" on the date of delivery to a prison official and thus the notice of appeal was timely. The court stated that the rationale for application of the prisoner mailbox rule was that prisoners have no control over when their notices of appeal are actually filed. 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 on time. Since substantial rights depend on the date of filing of a notice of appeal, prisoners should be deemed to have complied with the rule when they have done all in their power to comply.

Comment

In subsequent decisions, the Supreme Court of Nevada has declined to extend the prisoner mailbox rule, applied in Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), to a notice of appeal following conviction,

to encompass the filing of a pleading commencing a civil action,[15] or to extend the statutory deadlines for filing a postconviction petition for a writ of habeas corpus.[16]

The court in Com. v. Hockenberry, 455 Pa. Super. 626, 689 A.2d 283 (1997), held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal from the denial of his motion to modify or correct sentence. The court stated that the prisoner mailbox rule applied and held that the pro se prisoner's appeal from the order denying his motion to modify sentence was timely where his notice of appeal was placed in the prison mailbox within 30 days of the entry of the order denying his motion. The court observed that the pro se prisoner's state of incarceration prohibited him from directly filing an appeal with the appellate court and prohibited any monitoring of the filing process. Therefore, the court held that in the interest of fairness, a pro se prisoner's appeal must 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. Accordingly, the defendant's appeal was timely since his notice was placed in the prison mailbox within 30 days of entry of the order.

§ 8. Petition for state writ of habeas corpus or other postconviction relief—Initial petition or motion

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule applied to a pro se prisoner's state habeas petition, notice of petition, or petition seeking postconviction relief, under the facts and circumstances presented.

In Holland v. State, 621 So. 2d 373 (Ala. Crim. App. 1993), opinion extended after remand, 654 So. 2d 77 (Ala. Crim. App. 1994), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. Following an affirmance of his pharmacy robbery conviction on direct appeal, the pro se petitioner sought postconviction relief. The circuit court denied the petition as untimely, and the petitioner appealed. The prisoner's petition for postconviction relief was mailed four days before the limitations period elapsed but was not received by the circuit court until one day after expiration of the limitations period. The court of criminal appeals followed the holding of Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and held that a pro se incarcerated petitioner files a petition for postconviction relief when he hands the petition over to prison authorities for mailing. Thus, the court of criminal appeals held that the petition for postconviction relief mailed four days before the limitations period elapsed was timely filed, even though the petition was not received by a circuit clerk until one day after statute of limitations ran. The court acknowledged that it did not have the prison mail log before it and so could not verify the prisoner's allegation that he in fact delivered his petition to prison authorities four days before the limitation period elapsed, but the district attorney failed to challenge this allegation in the circuit court and, consequently, the court had to accept it as true.

The court in State v. Rosario, 195 Ariz. 264, 987 P.2d 226 (Ct. App. Div. 1 1999), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The plaintiff's notice of petition for postconviction relief was stamped "filed" by the superior court on a date outside the 90-day limit by five days. However, the plaintiff argued that he had notarized and mailed his notice of postconviction relief on a date which was within the 90-day time limit, making the petition timely even if the court received it later. The court stated that although no law directly dealt with the notice of a petition for postconviction relief, the rationale for determining the date of the filing was the same as for a notice of appeal. The court found that a pro se prisoner is not in a position to make sure that his notice of appeal is timely filed. He cannot personally file the notice with the clerk of the court nor can he directly place the notice in the hands of the United States Postal Service. If the plaintiff timely gave his notice of petition for postconviction relief to the state Department of Corrections for mailing, his notice must be considered timely filed. The court had no evidence other than the plaintiff's statement that he timely filed the notice so the court remanded to the trial court to make a determination.

In Haag v. State, 591 So. 2d 614 (Fla. 1992), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. Specifically, the court held that the prisoner mailbox rule, under which a petition or notice of appeal filed by a pro se inmate was deemed filed at the moment in time when the inmate lost control over he document by entrusting its further delivery or processing to agents of the state, existed as a matter of Florida law, although it applied only to pro se petitioners who were incarcerated. The prisoner deposited in the outgoing prisoner mail a pro se motion for postconviction relief five days prior to the expiration of the two-year time limit imposed by the applicable rule governing postconviction motions (Fla. R. Crim. P. 3.850). Such date was documented in the prison's mail log. Although there was no direct evidence of the date on which the petitioner's motion was received at the court, it was not stamped "filed" by the clerk of court until four days after the time limit had run. The court noted that the rule governing postconviction motions was a procedural vehicle for a collateral remedy otherwise available by a writ of habeas corpus and implicated the state constitutional right to habeas relief. The court concluded that the prisoner mailbox rule was most consistent with the simplicity and fairness demanded both by the Florida Rules of Criminal Procedure and of the Florida Constitution. The state could not subtract from that two-year period through the failure to deliver a pro se inmate's petition until after the period had expired, even if the delay was through honest oversight. In addition, a rule other than the prisoner mailbox rule would interject a level of arbitrariness that could undermine equal protection and equal access to the courts. Accordingly, the court held that the mailbox rule existed as a matter of Florida law and the prisoner's petition was timely.

The court in Jones v. State, 785 So. 2d 561 (Fla. Dist. Ct. App. 2d Dist. 2001), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The inmate brought a motion for postconviction relief. The trial court summarily denied the motion. On appeal, the court of appeals held that the inmate's allegation that he timely filed the motion under Haag v. State, 591 So. 2d 614 (Fla. 1992), this section, when he had it notarized by a Department of Corrections employee, was a facially sufficient claim requiring an evidentiary hearing to determine if the motion was timely filed, and thus the trial court erred in summarily denying the inmate's motion. Accordingly, the court of appeals remanded to the trial court with directions that the trial court should hold an evidentiary hearing where the inmate would be allowed to prove he timely created the postconviction document and entrusted it to the hands of prison officials. Should the inmate establish the timely entrustment of the document, and if the state then chose to challenge the inmate's assertion that the motion was timely filed, the court pointed out that there would be a rebuttable presumption that the document was timely filed based on the date reflected in the certificate of service showing entrustment of the document in the hands of a prison official for mailing.

The court in Munson v. State, 128 Idaho 639, 917 P.2d 796 (1996), held that the prisoner mailbox rule applied to a pro se inmate's filing of a petition for postconviction relief, so that a petition delivered to prison authorities for mailing prior to the filing deadline was timely, even if the petition was not received by the court clerk until after the deadline. In the instant case, the pro se inmate lost control over his petition once the petition was delivered to prison officials. The court stated that pro se inmates do not have control over delays between the prison authorities' receipt of the inmate's court documents and the formal filing by the court clerk. Thus, 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. The court found that the policy reasons that supported the application of the prisoner mailbox rule to a notice of appeal, equally applied in the case of a petition filed for postconviction relief. Accordingly, the court held that the mailbox rule applied for the purposes of a pro se inmate's filing a petition for postconviction relief.

The court in Taylor v. McKune, 25 Kan. App. 2d 283, 962 P.2d 566 (1998), held that the prisoner mailbox rule applied to an inmate's pro se state habeas corpus petition. The inmate filed the habeas petition following the imposition of prison disciplinary action. The district court dismissed the action as untimely, and the inmate appealed. The evidence showed that the inmate delivered the petition to prison authorities for mailing on the last day of the 30-day time period for filing the petition. The court of appeals held that the inmate's delivery of his pro se habeas petition to prison authorities for mailing to the clerk of the district court constituted filing and thus the petition was timely. The court found the reasoning behind the federal prisoner mailbox rule in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed.

R. Serv. 3d 849 (1988), to be persuasive. The court reasoned that an inmate given a short 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 reduces the time within the petitioner's control to 29 days or less to make certain the petition is filed in a timely manner. 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 gives every inmate a full 30-day filing period.

The court in Sykes v. State, 757 So. 2d 997 (Miss. 2000), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The court stated that the time had come to adopt the prisoner mailbox rule. The court stated that, pursuant to the prisoner mailbox rule, a pro se prisoner's motion for postconviction relief is delivered for filing when the prisoner delivers papers to prison authorities for mailing. The court noted that prison authorities may initiate such procedures as are necessary to reliably document the date of such delivery, by means of a prison mail log of legal mail or other expeditious means. The court stated that an inmate's certificate of service would not suffice as proof. In the instant case, the court held that the action was timely, even though it was not stamped "filed" within three years of entry of judgment on the guilty plea.

In Rhone v. State, 957 So. 2d 1018 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232 (Miss. 2007), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The prisoner's motion for postconviction relief was filed in the circuit court on October 6, 2004. The prisoner's entry of judgment was on October 3, 2001. Therefore, the prisoner's motion was three days past the statute of limitations for postconviction relief petitions. The prisoner mailbox rule states that a pro se prisoner's postconviction relief petition is considered delivered for filing on the date that the prisoner gives the document to prison officials for mailing. The court noted that if the state wanted to challenge an appeal as untimely, the state had the burden of proving the notice was not timely mailed by the prisoner. The state had not challenged the motion as time-barred, and based on the date of filing, the prisoner might well have delivered his documents to prison officials for mailing in a timely manner. Accordingly, the court did not consider the motion time-barred, but addressed the appeal on the merits.

The court in Mosby v. State, 830 So. 2d 661 (Miss. Ct. App. 2002), held that a prisoner's motion for postconviction relief that was filed pro se was subject to the prisoner mailbox rule, and thus, delivery to the clerk of court two days after the expiration of the three-year limitation period for filing for relief was presumed timely, given that it was reasonable to presume that the prisoner delivered the motion for mailing to prison authorities before the filing deadline; prison authorities may initiate such procedures as are necessary to reliably document the date of such delivery, by means of a prison mail log of legal mail or other expeditious means.

In Ratliff v. State, 813 So. 2d 773 (Miss. Ct. App. 2002), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The defendant who pled guilty to the offense of the sale of a controlled substance filed a pro se motion for postconviction relief. The circuit court dismissed the defendant's motion, finding it to be procedurally barred by the statute of limitations. On appeal, the defendant argued that under the prisoner mailbox rule, which states that a pleading is timely if it is delivered to prison authorities for mailing within the applicable time period, his petition for postconviction relief was timely filed. The court of appeals concluded that although the prisoner mailbox rule applied to the pro se defendant's petition for postconviction relief, the prisoner mailbox rule did not save his petition from being filed in an untimely fashion because the defendant mistakenly filed his petition with the incorrect court, and did not properly file his pleadings with the proper court until two months after the three-year statute of limitations had expired. The court pointed out that the prisoner mailbox rule does not state that it is the prison authorities' responsibility to determine which court should properly receive pleadings. Prison authorities are only responsible for placing the pleadings in the mail, and any delay by authorities in mailing pleadings is not prejudicial to the petitioner. The defendant was responsible for determining which court should have received his pleadings. The defendant chose the wrong court and did not properly file his pleadings with the trial court until after the three-year statute of limitations had run. Accordingly, the court affirmed the dismissal of the defendant's appeal.

In State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998) (unpublished opinion), the court held that the prisoner mailbox rule applied to render timely filed a pro se inmate's petition for postconviction relief where there was evidence that the inmate submitted the petition to prison officials before the expiration of the filing period for overnight mail delivery, that it was received by the court clerk the following day, but was not time-stamped by the clerk until several days later, after the expiration of the filing period. The filing deadline expired on September 20, 1996. The clerk's office time-stamped the petition on September 24, 1996. The inmate produced cash receipts for money disbursed from his account for the mailing of the petition, certified mail receipts addressed to the court clerk, and, most notably, a return receipt signed by an individual at the clerk's office on September 17, 1996, three full days before the filing deadline.

Caution

The decision in State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998), which relied on the authority of State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in §§ 4, 9), has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

The court in Com. v. Holmes, 2006 PA Super 198, 905 A.2d 507 (2006), appeal denied, 591 Pa. 689, 917 A.2d 845 (2007), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The court stated that pursuant to the prisoner mailbox rule, a pro se postconviction relief petition is considered filed on the date it was delivered to prison authorities for mailing. In the instant case, the petition was timely filed because the pro se prisoner's petition was postmarked with a date prior to the expiration of the filing period and the court deemed it to have been filed by that date.

The court in Com. v. Plummer, 2002 PA Super 141, 798 A.2d 777 (2002), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The prisoner filed a pro se petition seeking postconviction collateral relief. The Commonwealth responded denying the prisoner's allegations and moving to dismiss the petition as untimely. The Commonwealth alleged that the prisoner's judgment became final on September 9, 1996, and that the prisoner's petition was not filed until September 18, 1997, making it untimely. The prisoner testified that he placed his petition in the institutional mail at the state prison on September 7, 1997, and that he could provide the court with proof of this mailing. A cash slip from the prison dated September 7, 1997, showed that the prisoner placed the petition in the prison mail on that date. The prisoner mailbox rule provides that the date of delivery of the postconviction relief petition by the defendant to the proper prison authority or to a prison mailbox is considered the date of filing of the petition. The court concluded that, in accordance with the prisoner mailbox rule, the prisoner's petition was timely filed.

The court in Com. v. Castro, 2001 PA Super 17, 766 A.2d 1283 (2001), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The inmate filed a petition for postconviction relief. The lower court dismissed the petition as untimely. On appeal, the court of appeals reversed and held that the postconviction relief petition prepared pro se by the prisoner was "filed" when duly deposited in the United States mail and addressed to the clerk of courts despite the clerk of courts' failure to docket the receipt of the petition. In so holding, the court adopted the prisoner mailbox rule, providing that an inmate's petition for postconviction relief is considered "filed" on the date petition is delivered by the inmate to the proper prison authorities or to the prison mailbox, rather than on the date that the clerk of court dockets the petition. The petitioner thus filed his notice within the requisite 30-day period when, three days before the deadline, he delivered the notice to prison authorities for forwarding to the court. The court reasoned that it would be inconsistent with notions of fundamental fairness if a litigant could lose valuable rights due solely to the acts, or failure to act, of an administrative office.

In Com. v. Jerman, 2000 PA Super 325, 762 A.2d 366 (2000), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The court stated that, under the prisoner mailbox rule,

a postconviction relief petition filed by a prisoner is deemed "filed" on the date it is deposited with prison authorities for mailing. In the instant case, the court found that under the prisoner mailbox rule, the mailing date of the petition for postconviction relief, which was within one year of date that the conviction became final, was considered the filing date, and thus the defendant's petition was timely, even though it was not filed by the clerk of courts until 10 days after it was dated, where the defendant filed an affidavit of mailing along with postal receipts indicating the mailing date within the one year for filing. Since the petition was timely, the court vacated the lower court ruling dismissing the petition and remanded.

The court in Com. v. Little, 716 A.2d 1287 (Pa. Super. Ct. 1998), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The prisoner mailbox rule provides that the date of delivery of the petition for postconviction relief by the defendant to the proper prison authority or to a prison mailbox is considered the date of filing the petition. The situation of prisoners seeking to appeal without the aid of counsel is such that the prisoners cannot take steps available to other litigants to monitor the process of appeal in order to ensure that the appeal arrives before the deadline. Prisoners cannot travel to the courthouse to see whether the appeal has been filed and they cannot place their appeal directly into the hands of the United States Postal Service. Prisoners cannot call the court to determine whether the appeal has been received and stamped, and they cannot, at the last minute, personally deliver their appeal if the mailed copy has been lost. The court found that all of the preceding policy reasons which supported the prisoner mailbox rule for direct appeals were equally applicable to collateral attacks by defendants. Thus, the court concluded that the prisoner mailbox rule applied to petitions for postconviction relief. In the instant case, the filing deadline was January 16, 1997. The petitioner sent his petition by first class mail, posted on January 9, 1997. The petitioner submitted a copy of his receipt for certified mail which appeared to be stamped January 9, 1997, along with a Postal Service form which indicated that the date of delivery to the court was January 13, 1997. The petitioner also submitted a computer printout of uncertain origin, which indicated that his petition was filed on January 16, 1997. Under the prisoner mailbox rule, the petitioner's appeal would be deemed filed on the date that the prisoner deposited the appeal with prison authorities, or placed it in a prison mailbox. The court remanded the case to the lower court to consider the evidence submitted to establish the timeliness of petitioner's petition.

In Butler v. State, 92 S.W.3d 387 (Tenn. 2002), the court held that the prison mailbox rule contained in Tenn. Sup. Ct. R. 28, § 2(G) applied to a pro se inmate's petition for postconviction relief, thus entitling him to an evidentiary hearing to determine whether he properly complied with Rule 28 by timely delivering his petition to the appropriate prison authorities.

The court in Riggs v. State, 2005 WL 1919844 (Tenn. Crim. App. 2005) (unpublished opinion), held that the prisoner mailbox rule contained in Tenn. Sup. Ct. R. 28, § 2(G) and, similarly, in Tenn. R. Crim. P. 49(c), applied to an inmate's petition for postconviction relief, such that remand to the trial court was required for an evidentiary hearing to determine the date upon which the inmate actually delivered his petition to prison officials.

The court in State ex rel. Brown v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427 (2003), applied the prisoner mailbox tolling rule adopted in State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001), this section, to an inmate's pro se petition for a writ of habeas corpus, seeking reconsideration of the state supreme court's denial of a petition for review that was filed late by the petitioner following conviction before the circuit court. The court first determined that the tolling rule adopted in *Nichols* was a civil procedural rule with limited retroactive application. Because the denial of the inmate's petition for review in the present case occurred prior to the court's decision in *Nichols*, the rule would not apply retroactively to render his petition timely. Nevertheless, the court determined, denying relief to this inmate-petitioner would be unjust because this court denied his petition for habeas corpus while nearly simultaneously granting the petition in *Nichols*, raising virtually the same claim. According, the court reinstated the inmate's petition for review.

The court in State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292 (2001), held that the prisoner mailbox tolling rule established in State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000) (also discussed in § 4), applied to an inmate's pro se petition for postconviction relief. Following the affirmance of his conviction by the court of appeals, and the dismissal, as untimely, of his petition for review by the supreme court, the inmate filed a petition for writ of habeas corpus, seeking reinstatement of his petition for review. On February 21, a Monday, the inmate delivered his petition for review, properly addressed, to the prison mailroom. The clerk of the court received the inmate's petition for review on February 28, 2000, one business day late. The inmate urged the court to adopt the prisoner mailbox rule of Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), under which his petition for review by the supreme court of a decision of the court of appeals would be deemed to be "filed" with the supreme court clerk's office when the pro se prisoner deposited the petition in the prison mailbox. As in *Shimkus*, the court declined to interpret the term "file" as used in the applicable state law and court rules to mean "deposit in a prison mailbox." The court concluded, however, that it found the rationale in *Houston*, and the approach taken by the court in *Shimkus* and its progeny to be persuasive. Accordingly, the court applied a similar tolling rule to pro se prisoners who file petitions for review in the Wisconsin Supreme Court. While the procedures for commencing a civil action, as discussed in *Shimkus*, are not the same as those for filing a petition for review, both require filing fees and establish a separate procedure for waiver of those fees, the court indicated. A tolling rule will not excuse a pro se prisoner who ultimately fails to pay the filing fees, address the petition properly, or otherwise comply with applicable filing requirements, cautioned the court. In sum, the court concluded, the 30-day deadline for receipt of a petition for review is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing. Thus, even though it was not received in the clerk's office until after the 30th day, because the prisoner in this case delivered his properly addressed petition to the proper prison authorities on the 26th day, it was timely.

CUMULATIVE SUPPLEMENT

Cases:

The date on certificate of service created a rebuttable presumption that inmate's postconviction motion was, for purposes of prisoner mailbox rule, actually placed in a corrections official's hands on that date. West's F.S.A. RCrP Rule 3.850. Kerr v. State, 148 So. 3d 123 (Fla. 2d DCA 2014).

Defendant's motion for post-conviction relief was considered filed on the day it was placed in the hands of prison officials for mailing, pursuant to the mailbox rule, and thus was timely filed. West's F.S.A. RCrP Rule 3.850(b). Hatten v. State, 143 So. 3d 1103 (Fla. 5th DCA 2014).

Pursuant to prison mailbox rule, pro se defendant's motion for postconviction relief was filed, for purposes of determining timeliness of motion, when defendant delivered motion to prison authorities for mailing. West's K.S.A. 60–1507(f)(1). Wahl v. State, 344 P.3d 385 (Kan. 2015).

Under the "prison mailbox rule," a habeas petition is considered filed when it is delivered to prison authorities for mailing —not on the date it is eventually filed with the court clerk—since those prison authorities control what happens after the paper is delivered to them. Sauls v. McKune, 45 Kan. App. 2d 915, 260 P.3d 95 (2011).

Statutory codification of prison mailbox rule applied retroactively to defendants' motions for post-conviction relief that were timely placed in the prison mail system, but filed in the trial court after deadline expired, where cases were pending before the Supreme Court when the prison mailbox rule took effect and no final judgment had been entered which disposed of defendants' collateral attacks. Rules Crim.Proc., Rule 12.04(5). Hallum v. Com., 347 S.W.3d 55 (Ky. 2011), as modified, (Aug. 25, 2011).

Motion for postconviction collateral relief was not time barred on the ground that it was filed three days after the three-year statute of limitations expired; the motion was signed and notarized one day before the expiration of the statute of limitations, and the state failed to prove that the motion was not timely filed under the prison-mailbox rule, i.e., that defendant, who was in prison, did not present his motion to the prison for mailing on the same day that it was signed and notarized. West's A.M.C. § 99–39–5(2). White v. State, 22 So. 3d 378 (Miss. Ct. App. 2009).

Time for defendant, who had not appealed judgment or sentence after guilty plea, to file motion for post-conviction relief began to run when he was delivered to Department of Corrections. V.A.M.R. 24.035. Mitchell v. State, 381 S.W.3d 386 (Mo. Ct. App. E.D. 2012).

Under prisoner mailbox rule, petitioner's pro se petition under Post-Conviction Relief Act (PCRA) was considered filed as of date handed to prison officials for mailing. 42 Pa.C.S.A. §§ 9541–9546. Com. v. Allen, 2012 PA Super 144, 48 A.3d 1283 (2012).

[Top of Section]

[END OF SUPPLEMENT]

§ 9. State writ of habeas corpus or other postconviction relief—Notice of appeal from determination thereon

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal or appeal from a determination on the prisoner's petition for a writ of habeas corpus or petition seeking other postconviction relief, under the facts and circumstances presented.

In Ex parte Wright, 860 So. 2d 1253 (Ala. 2002), the court held that the prison mailbox rule contained in Ala. R. App. P. 4(c) applied to a pro se inmate's notice of appeal from the decision denying his petition for postconviction relief and, thus, remand of the matter was required for the trial court to determine whether the inmate, in fact, deposited his pro se notice of appeal in the appropriate internal mail system of the prison institution, or handed the notice to an appropriate officer of that institution for such deposit, on or before the expiration of the applicable 42-day appeal period.

The court in Melton v. State, 930 So. 2d 452 (Miss. Ct. App. 2006), held that the prisoner mailbox rule applied to a pro se prisoner's appeal from a denial of postconviction relief. The court concluded that the prisoner mailbox rule, under which a prisoner's pro se motion for postconviction relief is delivered for filing on the date that the prisoner submitted papers to prison authorities for mailing, applied to appeals from a denial of postconviction relief and, therefore, the prisoner's delivery of a notice of appeal to prison authorities for mailing within 30 days after the entry of judgment or order appealed from effected a timely filing under a rule which required filing with the clerk of the trial court within 30 days after the date of entry of judgment or order appealed from. For purposes of the prisoner mail box rule, competent proof of the date of mailing may consist of a prison mail log or other means of record keeping which prison authorities find expeditious. However, the court stated that an inmate's certificate of service would not suffice as proof. The court stated that the state had the burden of proof on the issue of timeliness, under the prisoner mailbox rule, of the defendant's filing of an appeal from a denial of his motion for postconviction relief because the state was the party moving for dismissal of the appeal. In the instant case, the court held that the defendant's motion for postconviction relief was not time-barred, where the defendant's motion was filed within three years after the entry of judgment of conviction of aggravated domestic violence.

The court in Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005), held that the prison mailbox rule applied to a pro se inmate's notice of appeal from an order denying his petition for postconviction relief and, thus, the appeal was timely filed. The court clerk received the notice of appeal on the 31st day after the order appealed from was entered. The court noted that the prison mailbox rule extends to all actions under the Uniform Post Conviction Collateral Relief

Act (UPCCRA) and appeals in those actions, and a pro se prisoner's motion for postconviction relief is delivered for filing when the prisoner delivers the papers to prison authorities for mailing. In this case, where the notice of appeal was received by the court one day late, it is reasonable to infer that the inmate deposited his notice of appeal in the prison mail at least the day before it was received by the clerk, the court concluded, and the appeal was thus timely served.

The Ohio Supreme Court, in State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967), adopted the prison mailbox rule, holding that a pro se inmate's notice of appeal from the denial of his motion for postconviction relief was timely filed when the inmate, acting without the aid of counsel, placed his notice of appeal in the prison mail room seven days before the final date for filing. Although, due to the delay occasioned by the administrative processes of the prison, the notice of appeal did not reach the court of appeals until the filing date was past, the court concluded in such a case the jailer in effect represented the lower court within the meaning of the statute (Ohio Rev. Code Ann. § 2505.04) providing that an appeal was perfected when written notice of appeal was filed with the lower court.

Caution

The decision in State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967), though followed in a few subsequent Ohio decisions [17] has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), as noted in State v. Harris, 2005-Ohio-921, 2005 WL 501602 (Ohio Ct. App. 6th Dist. Erie County 2005) (also discussed in § 21); State v. Hansbro, 2002-Ohio-2922, 2002 WL 1332297 (Ohio Ct. App. 2d Dist. Clark County 2002), (also discussed in § 24); State v. Bowens, 1998 WL 553049 (Ohio Ct. App. 11th Dist. Ashtabula County 1998) (also discussed in § 24); and State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997) (also discussed in § 24). [18]

In Com. v. Wilson, 2006 PA Super 313, 911 A.2d 942 (2006), the court held that the prisoner mailbox rule applied to a pro se inmate's filing of a notice of appeal following the dismissal of his second petition for postconviction relief. The inmate's notice of appeal was required to be filed by January 23, 2006. Although the notice of appeal was recorded on the docket on January 24, 2006, a postmark on an envelope appended to the appeal had a date of January 18, 2006. Pursuant to the prisoner mailbox rule, a document is deemed filed when placed in the hands of prison authorities for mailing. Therefore, the inmate's notice of appeal was deemed filed at least as of January 18, 2006, and was timely.

See Com. v. Friend, 2006 PA Super 70, 896 A.2d 607 (2006), wherein the court, in evaluating a pro se inmate's appeal from the denial of a petition seeking postconviction relief, noted in dicta that, in conformance with the prisoner mailbox rule, when dealing with an incarcerated pro se litigant, the date of mailing will be regarded as the date of filing.

The court in Com. v. Perez, 2002 PA Super 165, 799 A.2d 848 (2002), held that the prisoner mailbox rule applied to a pro se prisoner's notice of a petition for postconviction relief. The court stated that pursuant to the prison mailbox rule, the prisoner's appeal from a denial of postconviction relief petition was timely. Although the notice of appeal was docketed 36 days after the order denying relief, the prisoner submitted a copy of a certified mail receipt demonstrating that the notice of appeal was sent 10 days earlier and the notice of appeal was dated 11 days earlier. The court stated that it was inclined to accept any reasonably verifiable evidence of the date that the prisoner deposits the appeal with the prison authorities. The court found that the prisoner sufficiently demonstrated that he deposited his notice of appeal in the prison mail system on or about four days before the expiration of the 30-day filing period. Since that deposit was within the 30-day period allowed for filing, the court deemed the prisoner's appeal timely.

The court in Com. v. Jones, 549 Pa. 58, 700 A.2d 423 (1997), held that the "prisoner mailbox rule," which provides that an appeal by a pro se prisoner is deemed filed on the date the prisoner deposits the appeal with prison authorities and/or places it in the prison mailbox, applied to a pro se prisoner's notice of appeal from an order dismissing his petition for postconviction relief, and thus, the court deemed the notice of appeal timely filed, even though it was not received

by the court until after the filing deadline had expired, where the prisoner employed a postal form for certified mail that indicated the date of mailing within the deadline for filing an appeal, the envelope used to mail the appeal bore a postal date stamp for the last day of the appeal, and the Commonwealth conceded that the prisoner delivered the notice of appeal to prison authorities within the filing deadline.

In State ex rel. Kelley v. State, 261 Wis. 2d 803, 2003 WI App 81, 661 N.W.2d 854 (Ct. App. 2003), the court held that a prison mailbox tolling rule applied to toll the 90-day period for filing the inmate's notice of appeal from a decision dismissing his petition for habeas relief. The prison mailbox rule applied to toll the 90-day period for filing on the date that the inmate delivered the notice to the proper prison authorities for mailing, where the inmate's affidavit and copy of certified mail receipt indicated that his notice was mailed three days prior to the deadline, and was properly and correctly addressed to the deputy clerk at a specific branch of the circuit court. The court stated that the prison mailbox tolling rule, which provides that the time period for filing a petition for review or notice of appeal is tolled on the date a pro se prisoner delivers a correctly addressed petition or notice to the proper prison authorities for mailing, was conditioned on the prisoner meeting certain conditions including requirements to address the petition or notice properly or otherwise comply with filing requirements.

Also, see the following additional cases, in which the courts held or recognized that, under the particular circumstances involved, the prisoner mailbox rule applied to a pro se prisoner's notice of appeal or appeal from a determination on the prisoner's petition for a writ of habeas corpus, or petition seeking other postconviction relief, under the facts and circumstances presented, where—

—an inmate alleged that he turned his notice of appeal from a decision denying his petition for postconviction relief over to prison officials for mailing within the 30-day filing period but it was not filed by the court until after the expiration of the 30-day filing period, and the court of appeals held that a remand for an evidentiary hearing was necessary to determine whether the inmate's sworn allegations were true, in which case his notice of appeal would have been timely filed under the prisoner mailbox rule. Higgs v. State, 599 So. 2d 274 (Fla. Dist. Ct. App. 5th Dist. 1992).

—the defendant's notice of appeal from denial of his petition for postconviction relief was not rendered untimely by its filing six days after expiration of the 30-day period for such an appeal, rather, in accordance with the prisoner mailbox rule, a rebuttable presumption arose that the notice of appeal was timely filed, and the state did not rebut the presumption; to rebut the presumption the state's proof must be in the form of a prison mail log of legal mail or some similarly reliable documentation. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960 (Miss. 2007).

—the prisoner's notice of appeal from the denial of postconviction relief was not received by the circuit court for filing within the 30-day time period, and since the court could not tell when the prisoner's petition was given to prison officials to mail, and since it might have been that the prisoner did deliver his papers to prison officials in a timely manner, the court opted to exercise its discretion to suspend the 30-day filing requirement to the extent the prisoner's filing may have been untimely under the prisoner mailbox rule. Vance v. State, 941 So. 2d 225 (Miss. Ct. App. 2006).

—the petitioner appealed from a denial of postconviction relief following acceptance of his guilty plea to armed robbery and aggravated assault, and the court stated that although the petitioner was not entitled to relief because the three-year time period for filing the petition had expired and petitioner did not argue any exemption excusing delay, the court of appeals would review the merits of the petition; the petitioner argued for an extension of the prisoner mailbox rule, since, alleging that due to security reasons, it could take a letter from a prisoner longer to reach the court. Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003).

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals had jurisdiction to consider defendant's pro se appeal from the denial of his postconviction relief (PCR) motion, even though notice of appeal was file stamped four days after expiration of the 30–day appeal period following the denial of the motion; documents filed contemporaneously with the notice of appeal were dated within the 30–day period, making it not unlikely that defendant delivered the notice to prison officials for mailing within the 30–day period so as to be timely under the prison mailbox rule, and Court of Appeals would exercise its discretion to suspend the 30–day requirement to the extent the filing was untimely. Rules App.Proc., Rules 2(c), 4(a). Small v. State, 141 So. 3d 61 (Miss. Ct. App. 2014).

Prison mailbox rule applied to inmate's notice of appeal from the denial of his motion requesting certain documents from the circuit court clerk, even though the action was not brought under the Uniform Post-Conviction Collateral Relief Act (UPCCRA). Rules Civ.Proc., Rule 4. Pryer v. State, 139 So. 3d 719 (Miss. Ct. App. 2013), aff'd, 139 So. 3d 713 (Miss. 2014).

Court of Appeals had jurisdiction to hear defendant's appeal from the denial of his motion to reconsider the dismissal of his post-conviction relief (PCR) petition, even if appeal was filed more than 30 days after the motion to reconsider was denied; notice of appeal was stamped "filed" one day late, notice therefore could have been delivered to prison authorities for mailing within the 30–day time frame, as required by the prison mailbox rule, and Court of Appeals had discretion to suspend the requirements of appellate rules such as the 30–day time limit in the interest of justice. Rules App.Proc., Rules 2(c), 4(a); Rules Civ.Proc., Rule 60(b). Campbell v. State, 126 So. 3d 61 (Miss. Ct. App. 2013), cert. denied, 125 So. 3d 658 (Miss. 2013).

[Top of Section]

[END OF SUPPLEMENT]

§ 10. Application for certificate of probable cause to appeal denial of habeas corpus relief

The following authority held that the prisoner mailbox rule applied to an inmate's pro se application for a certificate of probable cause to appeal a denial of habeas corpus relief, under the facts and circumstances presented.

In Massaline v. Williams, 274 Ga. 552, 554 S.E.2d 720 (2001), the court held that the prisoner mailbox rule applied to an inmate's pro se application for a certificate of probable cause to appeal a denial of habeas corpus relief. The plaintiff's pro se application for a certificate of probable cause to appeal the trial court's denial of his petition for a writ of habeas corpus, however, was filed one day late. The court reasoned that a "mailbox rule" for determining the timeliness of a pro se petitioner's application for certificate of probable cause to appeal the denial of habeas corpus relief promotes judicial fairness and helps assure that habeas corpus cases are decided on the merits and not on the overly technical application of procedural rules. The court adopted a mailbox rule to the effect that when a prisoner, who is proceeding pro se, appeals from a decision on his habeas corpus petition, his application for a certificate of probable cause to appeal will, under the "mailbox rule," be deemed filed on the date he delivers them to the prison authorities for forwarding to the clerks of the supreme court and the superior court, respectively. The court further stated that absent an established system for logging the date an inmate's outgoing legal mail is delivered to prison officials, a pro se prisoner may, using the "mailbox rule," prove the timeliness of his application for a certificate of probable cause to appeal, from a decision on his habeas corpus petition, in at least the following ways: (1) an official United States Postal Service postmark showing a date before the deadline will be conclusive; (2) a date on certificate of service will give rise to a rebuttable presumption that the prisoner handed his filing to prison officials on that date; or (3) 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.

§ 11. Petition for review by state supreme court

The following authority held that the prisoner mailbox rule applied to an inmate's pro per petition for review by a state supreme court, under the facts and circumstances presented.

The court in State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005), held that the prisoner mailbox rule applied to an inmate's pro per petition for review by the Arizona Supreme Court. The court reasoned that the same considerations that pertained to the filing of a notice of appeal and a notice of petition for postconviction relief applied to the inmate's petition for review by the supreme court, including the fact that the inmate was not in a position to make sure that his petition was timely filed. An inmate cannot personally file the notice with the clerk of the court nor can he or she directly place the notice in the hands of the United States Postal Service. Indeed, the pro se petitioner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. The court noted that, previously, it had applied the prisoner mailbox rule to a notice of appeal in Mayer v. State, 184 Ariz. 242, 908 P.2d 56 (Ct. App. Div. 1 1995) (also discussed in § 19), and to a notice of a petition for postconviction relief in State v. Rosario, 195 Ariz. 264, 987 P.2d 226 (Ct. App. Div. 1 1999) (also discussed in § 8). The court found that the considerations that pertain to the filing of a notice of appeal and a notice of a petition for postconviction relief were the same as those for an inmate's pro per petition for review by the Arizona Supreme Court, and thus, application of the prisoner mailbox rule was appropriate in the instant case. Applying the prisoner mailbox rule to the inmate's pro per petition for review by the Arizona Supreme Court, the court found that the petition for review was considered timely, where the mailing certificate stated that the petition was mailed on the final day of the deadline, it was received by the court clerk three days later, and the state pointed to no facts to indicate the petition was not tendered on the date stated.

§ 12. Petition for writ of certiorari

The following authority held that the prisoner mailbox rule applied to a pro se prisoner's petition for writ of certiorari, under the facts and circumstances presented.

The court in Ex parte Williams, 651 So. 2d 569 (Ala. 1992), held that the prisoner mailbox rule applied to a pro se prisoner's petition for a writ of certiorari. After the defendant's convictions of first-degree rape and second-degree kidnapping were affirmed, the defendant petitioned for postconviction relief. The circuit court dismissed the petition, and the defendant appealed. The Court of Criminal Appeals affirmed, and the defendant petitioned for certiorari. The supreme court held that the petition for certiorari was timely filed, even thought the pro se prisoner's petition for writ of certiorari was received by the supreme court by normal mail four days after the deadline for filing. The court held that the pro se prisoner's filings would be deemed filed upon the prisoner's tendering them to prison officials. The court found it significant that the prisoner had no access to the post office and tendered the petition to prison officials to be mailed within the time prescribed by law.

§ 13. Notice to invoke discretionary jurisdiction

The following authority held that the prisoner mailbox rule applied to a pro se prisoner's notice to invoke discretionary jurisdiction, under the facts and circumstances presented.

The court in Thompson v. State, 761 So. 2d 324 (Fla. 2000), opinion after reinstatement of review, 773 So. 2d 58 (Fla. 2000), held that the prisoner mailbox rule applied to a pro se prisoner's notice to invoke discretionary jurisdiction. The prisoner argued that he had timely filed his notice to invoke because he filed his document under the prisoner mailbox rule established in Haag v. State, 591 So. 2d 614 (Fla. 1992) (also discussed in § 8), when he placed his document in the hands of prison officials. The prisoner argued that his notice to invoke should have been considered timely because the

court in the instant case held in *Haag* that an inmate's document was deemed "filed" when he or she placed it in the hands of prison officials. The prisoner stated that he timely placed his notice to invoke in the hands of prison officials, but since his institution maintained no outgoing mail log in which it documented when inmates submitted their legal documents to prison officials for mailing, the prisoner could not provide any additional evidence that he actually submitted his notice to the officials on time. The court acknowledged that *Haag* held that an inmate's document was deemed "filed" when he or she placed it in the hands of prison officials. However, the court noted that it generally required that inmates provide additional proof, usually in the form of copies of their institutions' outgoing mail logs, that the document was actually placed in prison officials' hands on the relevant date. The court stated that because many prisons did not have outgoing mail logs, in order to carry out the intent of its decision in *Haag*, henceforth the court would presume that a legal document submitted by an inmate was timely filed if it contained a certificate of service showing that the pleading was placed in the hands of prison or jail officials for mailing on a particular date, and if that pleading would be timely filed if it had been received and file-stamped by the court on that particular date. The court stated that this presumption shifted to the state the burden to prove that the document was not timely placed in prison officials' hands for mailing. Accordingly, the court granted the petitioner's motion for reinstatement.

2. Administrative Decisions Relating to Prison Discipline or Probation and Parole

§ 14. Petition for judicial review of determination of prison disciplinary committee

The courts in the following cases held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee, under the facts and circumstances presented.

In Gonzalez v. State, 604 So. 2d 874 (Fla. Dist. Ct. App. 1st Dist. 1992), the court held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee. The court held that where an appeal from an inmate grievance procedure has to be received by the Department of Corrections within 15 calendar days of the date of the institutional response, the appeal would be deemed "received" by the department under the prisoner mailbox rule at the moment when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state. The court stated that, as noted by the Florida Supreme Court in Haag v. State, 591 So. 2d 614 (Fla. 1992) (also discussed in § 8), usually, this point occurs when the inmate places a document in the hands of prison officials, since the logging of prisoner mail reliably documents this point in time. Accordingly, the court reversed the lower court order dismissing the petition.

The court in Tatum v. Lynn, 637 So. 2d 796 (La. Ct. App. 1st Cir. 1994), held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee. The court found that placing a petition for judicial review of a prison disciplinary proceeding in the prisoner's mailbox complied with the requirement of Louisiana law that such petitions be filed in the district court. In the instant case, the court found that the petition was filed at the time it was delivered to prison authorities for forwarding to the district court, rather than when it was received and filed with the district court after the expiration of the 30-day filing period and, thus, the petition was timely filed. The petition was deposited in the inmate's mailbox five days prior to the statutory deadline and was placed in the mail on the same date, and it took nine days to arrive at its destination.

In Easley v. Roach, 879 So. 2d 1041 (Miss. 2004), the court held that the prisoner mailbox rule applied to a pro se civil pleading from a prison inmate seeking judicial review of an adverse decision rendered pursuant to an administrative review procedure. The inmate filed a motion for an order to show cause alleging that procedures used by the state Department of Corrections to place him in solitary confinement violated his due process rights. The circuit court dismissed the case and the inmate appealed. The inmate filed his motion to show cause seeking judicial review within the 30-day period. However, the motion was stamped filed outside of the 30-day period. The court stated that, under the prisoner mailbox rule, a civil filing by a pro se prisoner seeking judicial review was considered filed when mailed by the inmate, and not when it was received by the circuit clerk. There was nothing in the record conclusively showing

on what date the inmate's motion was submitted for mailing. Therefore, because the record failed to establish when the inmate's motion was submitted for mailing, the court vacated the judgment below and remanded the case to the circuit court for proceedings to determine whether the inmate submitted his complaint for mailing within 30 days after receipt of the agency's final decision.

The court in Maze v. Mississippi Dept. of Corrections, 854 So. 2d 1090 (Miss. Ct. App. 2003), held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee. Following denial of the inmate's grievance arising out of the state Department of Corrections' failure to upgrade him to B-custody, the inmate filed a complaint for judicial review. The circuit court dismissed the complaint as untimely filed. In his pro se appeal, the inmate argued that he mailed his complaint on July 5, 2001, within the 30-day period in compliance with the applicable statute and that the prisoner mailbox rule should apply. The court stated that while the prisoner mail box rule had only been applied in cases under postconviction relief, there was no reason why the rule should not be applied in the context of the instant case, a civil filing by a pro se prisoner seeking judicial review. The court observed that pro se prisoners would be subject to more disadvantages than were reasonably necessary in the administration of the criminal justice system if such a rule was not applied. The court found that the inmate's complaint was timely, pursuant to the prisoner mailbox rule, when mailed two days before the expiration of the statutory 30-day deadline, even though the complaint was not received by the circuit court clerk's office until four days after the deadline. The court found it significant that the statute establishing the deadline required only that the inmate must "seek judicial review" within the time limit, as opposed to a requirement that the complaint be "filed" in the trial court within the time limit. Because the court found that the circuit court erred in dismissing the inmate's complaint as untimely, the court reversed and remanded for a full hearing on the merits of the inmate's complaint.

In Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992), the court held that the prisoner mailbox rule applied to a petition for judicial review of a determination of a prison disciplinary committee. The prisoner allegedly placed a petition in error, seeking review of denial of a writ of mandamus to expunge disciplinary proceedings, in the prison's mailbox on October 4, 1991, which to be timely filed must have been received by the clerk of the supreme court on October 7, 1991. The petition in error arrived on October 9, 1991. Applying the prisoner mailbox rule, the court found that the petition in error was filed timely on the date that the prisoner delivered the petition in error to the prison authorities for forwarding to the clerk of the supreme court. The court not only found that the rationale for the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), was persuasive, but concluded that an Oklahoma state constitutional provision (Okla. Const. Art. II, § 6) providing that the courts must be open to all on the same terms without prejudice, mandated adoption of the prisoner mailbox rule. A discriminatory denial of a statutory right to appeal is a violation of an individual's equal protection rights and a denial of equal access to courts, concluded the court.

Comment

Rejecting a pro se inmate's assertion that his petition for postconviction should be deemed timely under the authority of Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992), the court in Hunnicutt v. State, 1997 OK CR 77, 952 P.2d 988 (Okla. Crim. App. 1997) (also discussed in§ 24), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. In *Hunnicutt*, the court distinguished *Woody* by pointing out that it rested on a special statute applicable only in appeals to the Oklahoma Supreme Court which specifically allowed an appeal to be commenced in the state's supreme court by sending the petition by certified mail with return receipt requested; thus, the court concluded, the holding in *Woody* did not apply to appeals in criminal matters to the state court of criminal appeals.

The court in Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994), held that the prisoner mailbox rule applied to a pro se petition for judicial review of a determination of a prison disciplinary committee. The inmate delivered his petition for judicial review of an order placing him in segregation to the prison authority within the allotted

time period, but the petition was not filed by the prison authority within the time required by the applicable statute or rules of appellate procedure. The applicable rule (Or. R. App. P. 1.35), required a petition to be filed by delivery to the state court administrator. The court pointed out that there was no way for an inmate to deliver the petition in the manner set forth in the rule. The best that a pro se inmate petitioner could do is to deliver the petition timely to the designated prison authority for filing, and make a record of the date of delivery. After that, the inmate must necessarily rely on the good faith and diligence of prison authorities. The court held that the inmate's pro se petition was deemed to have been timely filed at the time that it was delivered to the person authorized by the institution to accept delivery for forwarding to the state court administrator.

Caution

The holding in Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994), was not followed by the Oregon Supreme Court in Stull v. Hoke, 326 Or. 72, 948 P.2d 722 (1997), (also discussed in § 29), the court therein finding *Hickey*, which interpreted a court rule, to be unpersuasive and distinguishable from the issue before the state's highest court, that being the interpretation of a statute (Or. Rev. Stat. Ann. § 12.020).

Other Oregon courts have also declined to adopt or apply the prison mailbox rule, concluding that the particular filing at issue was governed by state statute or rule. [19]

In State ex rel. L'Minggio v. Gamble, 2003 WI 82, 263 Wis. 2d 55, 667 N.W.2d 1 (2003), the court held that the prison mailbox tolling rule [20] applied to the determination of whether a pro se inmate's certiorari petition challenging a prison disciplinary hearing and, thus, if the inmate could present proof by affidavit or other evidence that he placed both envelopes containing his complete petition in the prison mailbox before the end of the applicable 45-day filing period, then his petition would be deemed timely filed. The court therefore reversed the dismissal of the inmate's petition and remanded the matter for further proceedings.

The court in State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000), applied the prisoner mailbox tolling rule, holding that a pro se inmate's certiorari petition challenging the decision of a prison disciplinary committee was timely. While the prisoner mailbox rule established by the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), states that the deposit of the pleading or notice in the prison mail receptacle constitutes "filing" within the meaning of a time-limit statute, the court in the present case, noting that there was much more to the "filing" process in the instant case than that which existed in *Houston* adopted a tolling rule, effectively tolling the statutory 45-day time limit from the time the appropriate documents were deposited in the prison mail receptacle and their receipt by the clerk of court. [21] Thus, the court concluded that the circuit court erred in quashing the writ based on the untimeliness of the petition.

§ 15. Appeal of decision of state probation and parole board

The courts in the following cases held that the prisoner mailbox rule applied to a pro se prisoner's appeal of a decision of a state probation and parole board, under the facts and circumstances presented.

See Lovelace v. Board of Parole and Post-Prison Supervision, 188 Or. App. 35, 69 P.3d 1234 (2003), wherein the court granted a pro se inmate's petition seeking judicial review of an order of the state parole board, which had denied as untimely his request for an administrative review of an order postponing his release on parole, the court finding that the inmate presented a substantial question of law for judicial review. The inmate argued that he complied with the board's rules by delivering his petition for administrative review to prison officials before the 45-day filing period expired, citing Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994) (also discussed in § 14), for application of the prisoner mailbox rule. The court concluded that *Hickey* did not compel the conclusion that the inmate presented

a substantial question of law for two reasons: (1) the board's rules, not the court's prisoner mailbox rule, govern the timeliness of administrative review requests involving the board's parole release decisions; and (2) the board's rules do not concern the filing of administrative review requests, but rather, impose a time limit for their receipt by the board. Because the board's interpretation of its rules is consistent with their wording, the court deferred to that interpretation on review. However, the court reasoned, the inmate asserted that the board's failure to accept the late filing of his administrative review request was inconsistent with its prior practice, in violation of his rights under Or. Const. Art. I, § 20, which may be invoked by any individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs.

The court in Smith v. Pennsylvania Bd. of Probation and Parole, 546 Pa. 115, 683 A.2d 278 (1996), held that the prisoner mailbox rule applied to a pro se prisoner's appeal of a decision of a state probation and parole board. The pro se prisoner appealed a decision of the state probation and parole board, recalculating his maximum term expiration date. The court ruled that the pro se prisoner's appeal of the parole decision must 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. The court found that the fact that a prison cash slip showing a receipt for postage did not show the date the notice of appeal was mailed, did not show the docket number of the pardon and parole board, and did not allow a determination of timeliness on its face, did not preclude the cash slip from establishing, in the absence of certified mail forms, that the pro se prisoner's appeal of the parole decision was mailed within the 30-day filing period, where neither party could state whether the prisoner had funds available to utilize the required certified mail forms or even if the forms were available at the prison. The court noted that a pro se prisoner's state of incarceration prohibits him or her from directly filing an appeal with the appellate court and prohibits any monitoring of the filing process. Therefore, the court held that in the interest of fairness, a pro se prisoner's appeal is deemed to be filed on the date that he or she delivers the appeal to prison authorities and/or places his or her notice of appeal in the institutional mailbox. The court cautioned, however, that the holding applied only to pro se petitioners who were incarcerated. Accordingly, the court found that the appeal was timely.

The court in Tate v. Pennsylvania Bd. of Probation and Parole, 797 A.2d 435 (Pa. Commw. Ct. 2002), held that the prisoner mailbox rule would apply to a pro se inmate's appeal of a determination of the state probation and parole board where prison officials made an error affixing postage to the inmate's request for administrative relief.

In Coldren v. Pennsylvania Bd. of Probation and Parole, 795 A.2d 457 (Pa. Commw. Ct. 2002), the court held that the prisoner mailbox rule applied to a pro se prisoner's appeal of a decision of a state probation and parole board. The parolee filed a pro se administrative appeal from a decision recommitting him as a technical parole violator and ordering him to serve 18 months back time. Under the prisoner mailbox rule, a pro se prisoner's appeal is deemed to be filed when it is deposited with prison officials or placed in the prison mailbox. The court found that the parolee's pro se appeal was covered by the prisoner mailbox rule. Thus, the date which determined the timeliness of the parolee's appeal to the Board was the date that the parolee turned the appeal over to the Department of Corrections for mailing to the Board rather than the date the appeal was received by the Board. Accordingly, the Board erred in dismissing the parolee's appeal as untimely based on the date that the appeal was received by the Board. However, because the court could not determine from the record the date on which the parolee deposited his pro se appeal with the Department of Corrections, the court vacated the Board's decision and remanded for that factual determination.

Caution

The court in Coldren v. Pennsylvania Bd. of Probation and Parole, 795 A.2d 457 (Pa. Commw. Ct. 2002), rejected an earlier case, Maldonado v. Com., Pennsylvania Bd. of Probation and Parole, 89 Pa. Commw. 576, 492 A.2d 1202 (1985), which had apparently rejected the prisoner mailbox rule and held that a parolee's request for administrative relief after recommitment was untimely where it was not received by Board of Probation and Parole within 30 days of the order recommitting the defendant, even though it was mailed within 30 days of the order. However, *Coldren* points out that

the petitioner in *Maldonado* might have been represented by counsel, in which case the prisoner mailbox rule would not have applied.

The court in Pettibone v. Pennsylvania Bd. of Probation and Parole, 782 A.2d 605 (Pa. Commw. Ct. 2001), held that the prisoner mailbox rule, under which an appeal is considered filed when deposited with prison officials or placed in the prison mailbox, applied to a pro se administrative appeal filed with the Board of Probation and Parole, for purpose of determining timeliness of the appeal. The parolee petitioned for review of an order of the Board of Probation and Parole dismissing his pro se administrative appeal as untimely. In deciding whether the prisoner mailbox rule applied, the court noted that the appeal in the instant case was a pro se administrative appeal filed with the Board, not a pro se appeal filed in one of the state appellate courts. However, the court pointed out that the rationale of the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988) (in which the Supreme Court adopted a prisoner mailbox rule for notice of appeals in federal court), which was rooted in constitutional concepts of due process and fundamental fairness, had equal force in the instant case. Therefore, the court extended the prisoner mailbox rule to pro se administrative appeals filed with the Board. The court rejected the Board's argument that the court's extending of the prisoner mailbox rule to pro se administrative appeals filed with the Board violated the separation of powers doctrine. The court concluded that its statutory scope of review gave it authority to determine whether the Board's regulation governing the filing of administrative appeals violated the litigant's constitutional rights. The constitutional notions of due process and fundamental fairness were at the heart of the prisoner mailbox rule. Applying the prisoner mailbox rule in the instant case, the court found that the parolee's pro se administrative appeal filed with Board was timely, where a postmark on the appeal was within 30 days of mailing of the Board's parole revocation decision.

See Taylor v. Pennsylvania Bd. of Probation and Parole, 746 A.2d 671 (Pa. Commw. Ct. 2000), in which the court held that it would not decide an appeal that was rendered moot due to the expiration of the parolee's maximum term, though the appeal presented an issue of great public interest of whether the "prisoner mailbox rule" should be applied to pro se administrative appeals to the Board of Probation and Parole, where such issue was not likely to evade review, and a decision would not render the parolee any relief.

Where a pro se inmate appealed from the revocation of his community supervision probation, the court in Acuna v. State, 988 S.W.2d 299 (Tex. App. Texarkana 1999), held that the prisoner mailbox rule applied to render the inmate's notice of appeal timely, despite being file-marked one day after the last day on which the notice of appeal could properly be filed pursuant to Tex. R. App. P. 26.2(a), the court concluding that it was reasonable to conclude that, because the inmate was incarcerated at the time of filing, he mailed the document to the court and that the mailbox rule contained in Tex. R. App. P. 9.2 applied.

Caution

But see, Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000) (also discussed in § 31), which held that a prison mail receptacle was not a "mailbox" for purposes of Tex. R. App. P. 9.2 and, thus, that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal in a civil action. [22]

B. Civil Proceedings

§ 16. Civil complaint

[Cumulative Supplement]

The following authority held that the prisoner mailbox rule applied to a civil complaint by a pro se prisoner, under the facts and circumstances presented.

In Moore v. Twomey, 120 Cal. App. 4th 910, 16 Cal. Rptr. 3d 163 (3d Dist. 2004), the court held that the prisoner mailbox rule applied to a civil complaint by a pro se prisoner. The trial court dismissed the prisoner's civil complaint as untimely filed. The prisoners' outgoing mail log submitted on appeal indicated that the prisoner's civil complaint was delivered by the prisoner and mailed within the effective statute of limitations, but the superior court clerk filed it 12 days later, after the statute had expired. The court acknowledged two decisions which applied the prisoner mailbox rule to notices of appeal in criminal proceedings by pro se prisoners. First, the court acknowledged a decision by the California Supreme Court in In re Jordan, 4 Cal. 4th 116, 13 Cal. Rptr. 2d 878, 840 P.2d 983 (1992) (also discussed in § 6), which held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal. Second, the court acknowledged a decision by the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which held that a document mailed by an inmate in a federal appeal is to be considered filed when it is given to prison staff for mailing. Although application of the prisoner mailbox rule to civil complaint filings presented an issue of first impression in California state courts, the court concluded that the concerns underlying the decisions in *Jordan* and *Houston* applied to the instant case. Thus the court held that because a civil complaint by a pro se prisoner litigant should be deemed filed when it is delivered to prison authorities for forwarding to the superior court, as are pleadings in criminal matters, the trial court should not have dismissed the pro se prisoner's civil complaint as untimely, where he placed it in the prison mail system well within the six-month limitations period, even though it was not filed with the court until after the six-month limitations period. The policies underlying statutes of limitations, prohibiting the prosecution of stale claims and granting repose, were not undermined by applying the prison-delivery rule to the filing of civil complaints by pro se incarcerated litigants. Accordingly, the court reversed the judgment of dismissal and remanded for further proceedings.

The court in Clay v. Epps, 953 So. 2d 264 (Miss. Ct. App. 2007), applying the prison mailbox rule, held that a pro se inmate's complaint seeking judicial review of a decision denying his grievance against prison officials was timely filed. The inmate filed a grievance, arising out of an incident during which he was assaulted by a fellow inmate and allegedly denied adequate medical care, with the Administrative Remedy Program of the Mississippi Department of Corrections (ARP). On March 24, 2005, the inmate acknowledged receipt of the final administrative denial of his claim from the ARP; he subsequently mailed his complaint to the circuit court on April 20, 2005, which dismissed it as not being timely filed. Under Miss. Code Ann. § 47-5-807, the inmate had 30 days after receipt of the final agency decision to seek judicial review, the court explained, and a prisoner satisfies this rule if he or she submits a complaint for mailing with prison officials within this time period. Citing evidence in the record that the prison mail log indicated that the inmate mailed "legal mail" to the county circuit court clerk's office on April 20, the court determined that the inmate's complaint was timely filed within 30 days of receiving the adverse administrative decision.

In Warner v. Glass, 135 S.W.3d 681 (Tex. 2004), the Texas Supreme Court held that, consistent with the Inmate Litigation Act (the Act), Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001 to 14.014, and Tex. R. Civ. P. 5, a pro se inmate's civil petition that is placed in a properly addressed and stamped envelope or wrapper is deemed filed at the moment prison authorities receive the document for mailing, and thus, the pro se inmate's claim against prison officials for failure to grant him reasonable protection from a prison gang was timely filed. Upon learning that his cell mates were members of a gang that had put a contract out on his life, the inmate requested protection, which was denied following an investigation by prison officials. The inmate was assaulted shortly thereafter, suffering a broken nose and multiple stab wounds. After a hospital stay and transfer to a different state prison, the inmate filed a first-step grievance requesting protective custody and claiming that he was still in danger, which was denied. He then filed a second-step grievance, again requesting protective custody, which was again denied, thus exhausting his administrative claims as required by Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b). Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 14.002(a), his civil suit was required to be filed by the 31st day after he received the written decision from the grievance system. The inmate alleged that he deposited his petition in the prison mail system 30 days later, but the petition was not received and filed in the court clerk's office until the 37th day and the district court dismissed the action as not timely filed. The appellate court affirmed the dismissal. The actual postmark date was not reflected in the record. In reversing the dismissal, the court examined the Act's filing

deadline for an inmate proceeding pro se (Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b)), noting that the Act is silent on when a petition is deemed filed. Generally, noted the court, an instrument is deemed in law filed at the time it is left with the clerk, regardless of whether or not a file mark is placed on the instrument and regardless of whether the file mark gives some other date of filing. The court also looked to Rule 5 of the Texas Rules of Civil Procedure (Tex. R. Civ. P. 5), which provides that any document sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and deposited in the mail on or before the last day for filing, and if received by the clerk not more than 10 days late, will be deemed timely filed. Neither the general rule protecting litigants from clerical errors in the courthouse nor Rule 5's mailbox rule addresses the position of the party, who, because he or she is incarcerated and proceeding pro se, does not have direct access to either the clerk's office or a United States mailbox for first-class mail, the court observed. Just as we have declined to punish parties for failing to obtain a file stamp when they have timely placed the document in the constructive control of a court clerk, reasoned the court, we decline to penalize a pro se litigant for failing to obtain a postmark or a file-stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access. Therefore, the court concluded, a pro se inmate's claim under Tex. Civ. Prac. & Rem. Code Ann. § 14.004 of the Act is deemed filed at the time the prison authorities duly receive the document to be mailed.

Comment

By its holding in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004), the Texas Supreme Court expressly disapproved, to the extent that they had applied a contrary rule, the decisions of the courts of appeals, specifically referencing Scott v. Johnson, 2003 WL 22298724 (Tex. App. San Antonio 2003) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)), and Clark v. Hudspeth, 2001 WL 1243493 (Tex. App. Houston 1st Dist. 2001) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)). Also impliedly disapproved is Willingham v. Irons, 2000 WL 145456 (Tex. App. Beaumont 2000).

The court in Wanzer v. Longoria, 2006 WL 1814305 (Tex. App. San Antonio 2006), reh'g overruled, (Aug. 2, 2006) and review denied, (Dec. 8, 2006) (unpublished opinion), held that the trial court erred in dismissing a pro se inmate's lawsuit against correction officers as untimely where the prisoner mailbox rule applied. If an inmate fails to file a claim within 31 days of receiving a final decision from the prison grievance system, the court explained, the trial court must dismiss the suit pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b). Because an inmate does not have direct access to either the clerk's office or a United State mailbox for first-class mail, however, a pro se inmate's petition that is placed in a properly addressed and stamped envelope is deemed filed at the time the prison authorities duly receive the document to be mailed, the court determined, citing Warner v. Glass, 135 S.W.3d 681 (Tex. 2004), this section. Thus, because the inmate, both in his verified petition and in his verified motion to vacate the dismissal order, stated that he delivered his petition to prison officials the day before the applicable period expired, concluded the court, under *Warner*, the trial court erred in dismissing the inmate's suit as untimely even though the petition was not file-stamped until 16 days later.

The court in Witherspoon v. Johnson, 2004 WL 2803410 (Tex. App. San Antonio 2004) (unpublished opinion), reversed the dismissal of a pro se inmate's claim against the state Department of Criminal Justice—Institutional Division, holding that the prisoner mailbox rule applied to render the claim timely where the uncontroverted evidence indicated that the inmate's claim was timely received by the proper prison authority. Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b), the inmate was required to file his claim before the 31st day after the date on which he received the written decision from the prison grievance system. The inmate asserted that he received such decision on December 10, 2003, and that he handed his original petition to prison authorities three days later. Finding the inmate's assertion to be uncontroverted, the court, citing Warner v. Glass, 135 S.W.3d 681 (Tex. 2004), this section, determined that the inmate's claim was timely filed.

CUMULATIVE SUPPLEMENT

Cases:

Under mailbox rule, civil complaint against county sheriff and deputies seeking damages for false arrest and excessive use of force was deemed filed when incarcerated plaintiff gave it to jail authorities for mailing. Scullock v. Gee, 161 So. 3d 421 (Fla. 2d DCA 2014).

Dated certificate of service combined with a mailbox filing verification constituted some measure of proof entitling inmate to the benefit of prisoner mailbox rule, deeming prisoners' petitions filed with clerk of the court at time the prison authorities duly receive document to be mailed, and because the State offered no rebuttal evidence, despite ease with which it could have shown the date inmate delivered his motion to prison officials to reinstate his case against Department of Criminal Justice for refusal to provide access to medical treatment, which was dismissed for want of prosecution, inmate's motion to reinstate was timely under the prisoner mailbox rule. Enriquez v. Livingston, 400 S.W.3d 610 (Tex. App. Austin 2013).

[Top of Section]

[END OF SUPPLEMENT]

§ 17. Responsive pleading

The following authority held that the prisoner mailbox rule applied to a responsive pleading filed by a pro se prisoner in a civil action, under the facts and circumstances presented.

In In re Marriage of Williams, 2005 WL 2660409 (Cal. App. 3d Dist. 2005), unpublished/noncitable, the court held that the "prisoner delivery" rule applied to render timely a pro se inmate's motion to set aside a default judgment in a divorce action where, even though the record did not indicate when the inmate deposited his motion in the prison mailbox, the court determined that the inmate must have given them to prison authorities at least within one month of the date they were stamped "received" by the court. In so holding, the court, citing Moore v. Twomey, 120 Cal. App. 4th 910, 16 Cal. Rptr. 3d 163 (3d Dist. 2004) (also discussed in § 16), noted that the court had previously held that the prison delivery rule extended to civil complaints filed by incarcerated pro se prisoners, because it effectively places the plaintiff and other pro se prisoner litigants on equal footing with litigants who are not impeded by the practical difficulties encountered by incarcerated litigants in meeting filing requirements, such as the inability to monitor the process of the mails to ensure that their pleadings were timely filed, to learn about delays in filing, and to rectify any problems so identified. The court reasoned that the same rationale it articulated in *Moore* applied to pro se litigants, like the inmate herein, who attempt to participate as respondents in litigation while incarcerated.

§ 18. Concise statement of matters complained of on appeal

The following authority held that the prisoner mailbox rule applied to a pro se filing of a prisoner's concise statement of matters complained of on appeal in a civil action, under the facts and circumstances presented.

In an action brought by a decedent's incarcerated son against his stepmother seeking property from his father's estate, the court in Copestakes v. Reichard-Copestakes, 2007 PA Super 155, 925 A.2d 874 (2007), held that the prisoner mailbox rule applied to the filing, by the son as pro se appellant, of Concise Statement of Matters Complained of on Appeal pursuant to Pa. R. App. P. 1925(b), thus rendering the son's statement timely filed. On November 1, 2006, the trial court ordered the son, as pro se appellant, to file the required statement within 14 days; the trial court docket indicated that the statement was filed on November 16, 2006. The court explained that the docket, however, noted proof of service of

the statement on the trial court and the appellee on November 9, 2006, the same date on which the son asserted that he mailed the statement. Pursuant to the prisoner mailbox rule, a document is deemed filed when placed in the hands of prison authorities for mailing, said the court, thus finding the son's statement to have been timely filed on or before November 9, 2006.

§ 19. Notice of appeal

[Cumulative Supplement]

The following authority held that the prisoner mailbox rule applied to a pro se filing of a prisoner's notice of appeal in a civil action, under the facts and circumstances presented, under the facts and circumstances presented.

In Mayer v. State, 184 Ariz. 242, 908 P.2d 56 (Ct. App. Div. 1 1995), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal following the dismissal, for failure to state a claim, of state prison inmates' action against state prison employees. The plaintiff filed a notice of appeal, dated within 30 days of the date of the judgment as required, but the notice of appeal was received and stamped filed by the superior court clerk more than five months late. The plaintiff relied on the decision in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which considered an incarcerated litigant's notice of federal appeal to be filed when the notice was delivered to the Department of Corrections for mailing, and argued that a notice of appeal is deemed filed the day that a pro se prisoner delivers it to the proper prison officials to mail. The court noted that just like in *Houston*, a pro se prisoner is not in a position to make sure that his notice of appeal is timely filed. The court found *Houston* persuasive in interpreting Arizona's rule of appellate procedure for filing a notice of appeal. Accordingly, the court 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. Since there was no evidence before the court to make a determination of whether the prisoner delivered his notice to the proper prison authorities within the time dictated by the appellate procedure rule, the court remanded to the trial court to determine whether the prisoner could make a colorable claim entitling him to an evidentiary hearing.

In Setala v. J.C. Penney Co., 97 Haw. 484, 40 P.3d 886 (2002), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal in a personal injury action. The prisoner's notice of appeal was filed by the court 14 days after the expiration of the filing period. The prisoner argued that within the 30-day period for appeal he had placed the notice of appeal into the prison mail system, and thus his notice of appeal was timely on the basis of the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988). The court adopted the prisoner mailbox rule. The court stated that under the mailbox rule, a pro se prisoner's civil notice of appeal is deemed filed on the day it is tendered to prison officials. The prisoner mailbox rule applies when defendants are private litigants. The court concluded that the absence of a prison log detailing when mail is received is not fatal to constructive filing under the prisoner mailbox rule. When there is no evidence of a pro se prisoner's mailing a civil notice of appeal, the appellate courts may remand the case to the trial court for a determination of when the notice was given to the prison authorities, for purposes of the prisoner mailbox rule. Accordingly, the court held that a remand of the pro se inmate's personal injury case against the store was required for an evidentiary hearing to determine the date the inmate tendered the notice of appeal to prison officials, which would be the filing date under the prisoner mailbox rule.

In Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), the court held that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal from summary judgment in a civil action. [23] After the appeal was dismissed as untimely, the prisoner petitioned for a rehearing. The prisoner provided the court with documents establishing that the prisoner delivered the notice of appeal to prison officials before the appeal period expired. The Supreme Court of Nevada held that, under the prisoner mailbox rule, the notice of appeal was "filed" on the date of delivery to a prison official and thus the notice of appeal was timely. The court stated that the rationale for application of the prisoner mailbox rule was that prisoners have no control over when their notices of appeal are actually filed. 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 on time. Since substantial rights depend on the date of filing of a notice of appeal, prisoners should be deemed to have complied with the rule when they have done all in their power to comply.

Comment

In subsequent decisions, the Supreme Court of Nevada has declined to extend the prisoner mailbox rule, applied in Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), to a notice of appeal following conviction, to encompass the filing of a pleading commencing a civil action, [24] or to extend the statutory deadlines for filing a postconviction petition for a writ of habeas corpus. [25]

In Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992) (unpublished opinion), the court held that the prison mailbox rule applied to render timely a pro se inmate's notice of appeal from the judgment dismissing his civil rights complaint against a corrections officer. The filing period expired on April 3, 1990, but the notice of appeal was not received by the court clerk until April 4, 1990. In finding the inmate's notice of appeal timely under the prison mailbox rule, the court indicated that the inmate produced an affidavit stating that he delivered his notice of appeal to a prison mailbox on April 1, 1990, and that prison officials collected the mail from that box on April 2, 1990. Under the circumstances, the court found that the inmate sufficiently demonstrated that he delivered his notice of appeal to the proper prison authorities within the applicable 30-day period.

Caution

The decision in Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992), which relied on the authority of State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in §§ 4, 9), has been effectively overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

In Com. v. Heckman, 2007 PA Super 200, 928 A.2d 1077 (2007), the court noted, in dicta, that the complainant's placement of his appeal in the hands of prison authorities within the 30-day period contemplated by statute (Pa. R. App. P. 903(a)) for providing notice of appeal rendered the appeal timely under the prisoner mailbox rule, citing Com. v. Wilson, 2006 PA Super 313, 911 A.2d 942 (2006), this section. The inmate had filed three private criminal complaints against the presiding judge at his trial, as well as the prosecutor and a police officer involved in the trial. The inmate then sought judicial review of the district attorney's refusal to prosecute these complaints, the present appeal resulting the trial court's decision upholding the district attorney's decision.

See In re Adoption of J.N.F., 2005 PA Super 379, 887 A.2d 775 (2005), wherein the court noted, in dicta, that because the envelope attached to an inmate-father's notice of intent to challenge the trial court's order terminating his parental rights indicated the date on which the father mailed the notice of intent, and because the father was incarcerated at that time, the prisoner mailbox rule applied and, thus, the notice of intent was deemed filed on the date mailed.

The court in Thomas v. Elash, 2001 PA Super 214, 781 A.2d 170 (2001), held that the prisoner mailbox rule applied to a pro se inmate's appeal of an arbitrators' decision in favor of the inmate's former attorney on a breach of contract claim. The court stated that the prisoner mailbox rule, which deems legal documents filed when mailed, applies to all pro se legal filings by incarcerated litigants, given that a pro se litigant in a civil action is faced with the same difficulties in tracking his filings as an incarcerated defendant pursuing relief pro se from a criminal conviction. Under the prisoner mailbox rule, a legal document is deemed filed by an incarcerated litigant, proceeding pro se, on the date it is delivered to the proper prison authority or deposited in the prison mailbox. Under the prisoner mailbox rule, the post-trial motions filed by the former client in the breach of contract action against the former attorney would be considered filed on the

date that they were deposited in the prison mailbox, where the former client was incarcerated. To avail himself of the prisoner mailbox rule, the incarcerated litigant had to supply sufficient proof of the date of mailing. The court found that the former client failed to supply sufficient proof of the date of mailing of the post-trial motions, even though he attached a copy of proof of service to the post-trial motions that stated he mailed the motions on a particular date, where the proof of service was not notarized. The court stated that ordinarily, when a relevant proof of service is not notarized, the appellate court would remand the matter to the trial court for a hearing on the issue. In the instant case, however, the court ruled that no remand was necessary as it found that the former client was entitled to no relief. Therefore, the court affirmed the judgment below for the former attorney.

Without expressly overruling any prior caselaw, the court in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements. Pursuant to Tex. R. App. P. 26.1, the notices of appeal were required to be filed by March 21, 2005. The prisoner and other plaintiffs, as petitioners herein, claim that the prisoner delivered the signed notices of appeal to the prison's outgoing mailbox on March 9, 2005, for prison authorities to place in the United States mail, but the notices were not stamped "filed" by the court clerk's office until March 22, 2005, causing the appellate court to dismiss the appeals. The petitioners argued that their notices of appeal were timely filed under the mailbox rule (Tex. R. Civ. P. 5), which states that 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 10 days beyond the filing deadline. The court indicated that, under Tex. R. App. P. 9.2(b)(2), the petitioners clearly have the burden of providing some measure of proof that their notices of appeal were placed in the United States mail on or before March 21, 2005. Such proof was present, the court determined, in the form of the filing letter accompanying the petitioners' notices of appeal and the certificate of service, which both stated that the notices of appeal were placed in the outgoing prison mailbox on March 9, 2005. The court rejected the respondents assertion that placement in the prison mailbox was not equivalent to placing them in the United States mail as required under Tex. R. Civ. P. 5, concluding that it had held on more than one occasion that an inmate who does everything necessary to satisfy timeliness requirements must not be penalized if the document is ultimately filed tardily because of an error on the part of officials over whom the inmate has no control.

Caution

But see, Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000) (also discussed in § 31), which held that a prison mail receptacle was not a "mailbox" for purposes of Tex. R. App. P. 9.2 and, thus, that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal in a civil action. [26]

The court in In re Vespestad, 1999 WL 989586 (Tex. App. Amarillo 1999), held that the prisoner mailbox rule applied to a notice of appeal in a child support matter filed by a pro se inmate, citing the federal standard of leniency set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and applied in Acuna v. State, 988 S.W.2d 299 (Tex. App. Texarkana 1999), this section, where the inmate provided proof, in the form of an affidavit from the prison mailroom supervisor, demonstrating that he did, in fact, submit his notice of appeal to the mailroom in a timely fashion.

Caution

But see, Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000) (also discussed in § 31), which held that a prison mail receptacle was not a "mailbox" for purposes of Tex. R. App. P. 9.2 and, thus, that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal in a civil action. [27]

CUMULATIVE SUPPLEMENT

Cases:

Inmate could rely on prison mailbox rule to establish the timeliness of his grievance appeal, which he alleged was given to prison officials for mailing within the 15-day time period for such appeals, even though Department of Corrections had established alternative logging/tracking procedure for grievance appeals, such that inmate was not required to use the mails; rule establishing the alternative procedure also allowed inmates to bypass it and mail the grievance appeal directly, in which case the notions of simplicity and fairness behind the prison mailbox rule would still apply. Fla.Admin.Code Ann. r. 33–103.006(8), 33–103.011(1)(c); West's F.S.A. R.App.P.Rule 9.420(a)(2). Waters v. Dept. of Corrections, 144 So. 3d 613 (Fla. 1st DCA 2014).

[Top of Section]

[END OF SUPPLEMENT]

IV. Prisoner Mailbox Rule Did Not Apply

A. Criminal Proceedings

1. In General

§ 20. Motion to withdraw guilty plea

[Cumulative Supplement]

The following authority held that the prisoner mailbox rule did not apply to a pro se prisoner's motion to withdraw a guilty plea,[28] under the facts and circumstances presented.

The court in In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003), held that the prisoner mailbox rule did not apply to a pro se prisoner's motion to withdraw a guilty plea. While serving his prison sentence, the inmate, acting pro se, prepared a motion to withdraw his guilty plea. The prisoner delivered his motion to prison authorities three days before the one-year deadline and the motion was received by the court two days after the deadline. The trial court dismissed the motion as untimely and the court of appeals affirmed. The Supreme Court of Washington granted discretionary review. The inmate urged the court to adopt the prisoner mailbox rule which says that, in the absence of a rule or statute defining when a pleading is filed, the court will consider a pro se incarcerated litigant to have filed pleadings when he delivers them into the hands of prison officials for mailing to the court. The court declined to adopt the prisoner mailbox rule, finding that an existing court rule (Wash. Super. Ct. Civ. R. 5(e)), which defined "filing" as having occurred when the papers were filed with the clerk of the court, rather than when the papers were mailed, precluded application of the prisoner mailbox rule. Accordingly, the court affirmed the dismissal of the motion as untimely.

Comment

In In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003), the Washington Supreme Court effectively overruled State v. Hurt, 107 Wash. App. 816, 27 P.3d 1276 (Div. 3 2001), which had adopted the federal prisoner mailbox rule in finding that a pro se inmate's motion for postconviction was timely.

CUMULATIVE SUPPLEMENT

Cases:

Pro se prisoner mailbox rule for determining timeliness of pro se defendant's appeal from decision on his habeas corpus petition did not apply to pro se defendant's notice of appeal of denial of his motions to withdraw his guilty pleas, such that notice of appeal could be deemed timely, as the rule applied only to habeas petitions, and did not exempt a pro se prisoner from complying with statutory requirements to file a timely notice of appeal in any non-habeas criminal or civil filing. McCroskey v. State, 660 S.E.2d 735 (Ga. Ct. App. 2008).

[Top of Section]

[END OF SUPPLEMENT]

§ 21. Notice of appeal from conviction or sentence

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from conviction or sentence, under the facts and circumstances presented.

In Hughes v. State, 1993 WL 132971 (Ark. 1993) (unpublished opinion), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of his petition alleging that his sentence was imposed in an illegal manner following his murder conviction. The petitioner's notice of appeal was received by the circuit clerk on the 31st day after the order was entered. Since Rule 4(a) of the Arkansas Rules of Appellate Procedure provided that a notice of appeal must be filed within 30 days from the entry of the order appealed from, the notice of appeal was untimely. The petitioner urged the court to adopt the holding in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and hold that a notice of appeal is considered filed the moment it is placed in the United States mail. The court declined to apply the rule articulated in *Houston* because *Houston* was no more than an interpretation of the Federal Rules of Appellate Procedure and was not applicable to the court's consideration of whether a petitioner had demonstrated good cause for his failure to file a timely notice of appeal.

The court in In re Chavez, 30 Cal. 4th 643, 134 Cal. Rptr. 2d 54, 68 P.3d 347 (2003), held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of his petition to withdraw his guilty plea. The court found that the prisoner mailbox rule, which extended the time period where it was clear from examination of the mailing envelope that it "was mailed or delivered to custodial officials for mailing," did not apply to extend the 60-day time period which the defendant had to file a notice of appeal because the defendant did not mail or deliver to prison authorities, his statement of reasonable grounds within 60 days after rendition of the judgment of conviction.

In People v. Blake, 2002 WL 1722406 (Cal. App. 3d Dist. 2002), unpublished/noncitable, the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the sentence imposed following his guilty plea, where the defendant did not sign his notice of appeal or the application for a certificate of probable cause until after the jurisdictional time period had expired. The prisoner mailbox rule did not apply because under that rule, a late notice may be deemed timely only when it is mailed or delivered to prison authorities before the expiration of the 60-day time period. Accordingly, the court dismissed the appeal as untimely filed.

The court in People v. Bunn, 2002 WL 226384 (Cal. App. 4th Dist. 2002), unpublished/noncitable, held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from his conviction, where the defendant was not in prison when he mailed the notice of appeal. The court found that the record did not show that the defendant was in prison when he mailed the notice of appeal, and the notice thus would not be considered as having been timely filed under the prison mailbox rule, where the notice indicated he was residing in a residential address, the postmark on envelope

showed it was mailed from Anaheim, and the superior court clerk's notation that the notice was filed pursuant to a rule applying to the receipt of mail from a custodial institution was made in error. The court stated that the prisoner mailbox rule only applied if the notice of appeal was delivered to prison authorities for mailing, and the prisoner who seeks to pursue his or her appellate rights has the burden of establishing that the notice of appeal was delivered to prison authorities within the applicable 60-day period.

The court in Whalen v. State, 759 A.2d 603 (Del. 2000), agreed with the respondent State that Delaware courts have refused to create a separate mailbox rule for prisoners and, thus, the prisoner mailbox rule did not apply to a pro se inmate's notice of appeal in a criminal matter. The inmate contended that he placed his notice of appeal in the prison mail four days prior to the expiration of the filing period, but that there had been a change in the pick-up schedule of which he was not aware. Citing Carr v. State, 554 A.2d 778 (Del. 1989) (also discussed in § 25), the court explained that time is a jurisdictional requirement and a notice of appeal must be received by the clerk's office within the applicable time period in order to be effective.

See Hicks v. State, 565 So. 2d 362 (Fla. Dist. Ct. App. 2d Dist. 1990), where the pro se inmate urged the court to follow the prisoner mailbox rule announced in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and deem his appeal from his convictions and sentences for burglary, grand theft, and escape timely since the appeal was handed over to prison authorities for mailing within the 30-day time limit, but the court concluded that it need not attempt to determine whether the holding in *Houston* was limited to federal appeals or whether the decision announced a broader policy applicable to prisoners generally. Instead, the court found that the appeal was also dismissible on the alternative ground that it was taken from a guilty plea entered pursuant to a signed plea agreement.

The court in Riley v. State, 280 Ga. 267, 626 S.E.2d 116 (2006), cert. denied, 127 S. Ct. 53, 166 L. Ed. 2d 52 (U.S. 2006), held that the prisoner mailbox rule did not apply to a pro se inmate's notice of appeal. The inmate filed a motion seeking to have his murder and armed robbery convictions declared void due to alleged irregularities in the trial jury pool. The superior court dismissed the motion. The supreme court granted the inmate's application for discretionary appeal, but the trial court subsequently granted the state's motion to dismiss based on the untimely filed notice of appeal, and the inmate appealed. The court held that the prisoner mailbox rule did not exempt the inmate from the requirement that a notice of appeal be filed in a nonhabeas proceeding within 10 days after the supreme court issued an order granting the discretionary appeal. Although the inmate acknowledged that his notice of appeal was not filed within 10 days after the supreme court issued the order granting the appeal, he contended that his appeal was nevertheless timely because the supreme court adopted a prisoner litigant mailbox rule in Massaline v. Williams, 274 Ga. 552, 554 S.E.2d 720 (2001) (also discussed in § 10). However, the court pointed out that the prisoner mailbox rule in *Massaline*, by its explicit terms, applied only in the narrow context of habeas corpus appeals to permit a pro se prisoner's notice of appeal to be deemed filed on the date delivered to prison authorities. Georgia's prison mailbox rule mitigates the considerable challenges presented to a pro se prisoner's ability to pursue his constitutional right to habeas corpus and limits the remedial nature of the rule to solely address the unique circumstances faced by pro se prisoners who bring their habeas corpus petitions to the supreme court. Accordingly, the court held that, contrary to the inmate's assertion, the mailbox rule established in *Massaline* did not exempt a pro se prisoner from complying with the statutory requirements to file a timely notice of appeal in any nonhabeas criminal or civil filing. Because the notice of appeal was not filed in the court in a timely manner, the trial court did not err in granting the state's motion to dismiss.

See State v. Lee, 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990), in which the state urged the court to reject the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), arguing that it applied only to appeals in the federal court system, did not rest on any constitutional ground and was inapposite to appeals in state court proceedings, but the court concluded that it did not need to decide whether *Houston* applied because an earlier Supreme Court's order withdrawing a conditional dismissal of the pro se inmate's appeal and directing reinstatement of the appeal implicitly resolved the challenge to the timeliness of the appeal.

In State v. Hess, 261 Neb. 368, 622 N.W.2d 891 (2001), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal. The prisoner mailed another notice of appeal on February 6, 1995, after he had been sentenced. This notice of appeal was file stamped by the clerk's office on February 10, more than 30 days after the prisoner was sentenced. The court held that the date of receipt of an inmate's notice of appeal of a conviction by the clerk's office, and not the date of mailing of the notice of appeal, was the relevant date for determining the timeliness of a notice of appeal, as Nebraska did not have a prisoner mailbox rule. The court cited State v. Parmar, 255 Neb. 356, 586 N.W.2d 279 (1998) (also discussed in § 25), for the proposition that Nebraska had no prisoner mailbox rule.

The court in State v. Harris, 2005-Ohio-921, 2005 WL 501602 (Ohio Ct. App. 6th Dist. Erie County 2005) (unpublished opinion), held that the prison mailbox rule did not apply to a pro se inmate's motion for reconsideration. The inmate cited State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in § 9), in support of his contention that his motion was timely filed when he delivered it to the appropriate prison authorities two days before the motion was due. The court rejected this argument, concluding that *Williamson* was overruled by State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

In State v. Cutler, 2000-Ohio-2587, 2000 WL 1617820 (Ohio Ct. App. 7th Dist. Jefferson County 2000) (unpublished opinion), the court held that the prison mailbox rule did not apply to render a pro se inmate's notice of appeal from conviction timely. The inmate argued that he delivered his notice of appeal to prison authorities for mailing to the clerk no later than March 7, 1993, but due to a delay in the prison mailing system, the notice of appeal was not file-stamped by the court clerk until March 16, 1993, one day after the time for appeal had expired. Citing State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in § 9), the inmate asserted that the delivery of the notice of appeal to prison authorities was equivalent to filing it in the clerk's office. This holding, the court acknowledged, was citing as controlling law in State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976), and again in State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6). There is, however, a contrary position expressed by the Ohio Supreme Court in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), the court explained. Finding no distinguishing features between *Tyler* and the present case, the court noted that it was bound to follow the decision of the Ohio Supreme Court in *Tyler*.

Comments

The State v. Cutler, 2000-Ohio-2587, 2000 WL 1617820 (Ohio Ct. App. 7th Dist. Jefferson County 2000), noted the apparent conflict between the decision in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), and that announced in State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6), further stating that the real conflict exists between the Ohio Supreme Court decisions in *Tyler* and State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in § 9). It is within the province of the Ohio Supreme Court or the state legislature to clarify the law in this area, the court remarked.

For additional Ohio authority following *Tyler* in similar circumstances involving the timeliness of a pro se inmate's notice of appeal, see State v. Landis, 2000-Ohio-2016, 2000 WL 33226196 (Ohio Ct. App. 4th Dist. Athens County 2000) (unpublished opinion); State v. Ramage, 2000 WL 228249 (Ohio Ct. App. 4th Dist. Highland County 2000) (unpublished opinion); State v. Spears, 1999 WL 144064 (Ohio Ct. App. 4th Dist. Hocking County 1999) (unpublished opinion); State v. Smith, 1999 WL 34821 (Ohio Ct. App. 2d Dist. Montgomery County 1999) (unpublished opinion); and State v. Clement, 1995 WL 390795 (Ohio Ct. App. 10th Dist. Franklin County 1995) (unpublished opinion; noting conflict).

The court in State v. Parker, 936 P.2d 1118 (Utah Ct. App. 1997), held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from his conviction. The court found that the prisoner mailbox rule did not apply in determining whether the defendant's notice of appeal was timely filed under Utah R. App. P. 4 requiring a notice of appeal to be filed within 30 days. The notice of appeal was filed when the district court clerk received the notice, not

when it was delivered to prison authorities. The court declined to adopt the prisoner mailbox rule because it was not consistent with the plain language of the state rule of appellate procedure.

Comment

The Utah Rules of Appellate Procedure were subsequently amended to provide, in Utah R. App. P. 4(g), that, "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."

In State v. Palmer, 777 P.2d 521 (Utah Ct. App. 1989), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from his conviction. The defendant prepared a notice of appeal, which he apparently mailed on or about January 16, 1989. The notice of appeal was filed in the district court on February 3, 1989, more than 30 days after entry of the judgment being appealed. The defendant argued that the notice of appeal was filed when it was placed in the prison mail. The court of appeals rejected the defendant's argument noting that the applicable Utah Rule of Appellate Procedure (Utah R. App. P. 4(a)) clearly provided that a notice of appeal must be filed with the clerk of the court from which the appeal is taken. The court of appeals held that the notice of appeal was filed not when it was placed in the prison mail by the incarcerated defendant, but only when it was stamped as filed, more than two weeks later, by the district court. Thus, the court dismissed the appeal as untimely.

Comment

The Utah Rules of Appellate Procedure were subsequently amended to provide, in Utah R. App. P. 4(g), that, "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."

CUMULATIVE SUPPLEMENT

Cases:

Mailbox rule did not apply to prisoner's notice of appeal from denial of his motion for new trial to render it as having been timely filed upon delivery to prison mailroom. Jackson v. State, 313 Ga. App. 483, 722 S.E.2d 80 (2011).

Postmark on envelope that was taped to back of postconviction petitioner's notice of appeal of order dismissing his petition did not meet proof of mailing requirements of rule governing date of filing papers in reviewing court, and, thus, petitioner, whose notice of appeal was file-stamped after due date, was precluded from taking advantage of rule's provision that documents received after due date were to be deemed filed as of date they were mailed, rendering petitioner's notice of appeal untimely, such that Appellate Court lacked jurisdiction over appeal; rule required that proof of mailing be by certificate or affidavit of mailing, and postmark was neither. Sup.Ct.Rules, Rules 12(b)(3), 373, 606(b), 612(s), 651(d). People v. Lugo, 910 N.E.2d 767 (Ill. App. Ct. 2d Dist. 2009).

Notice of appeal from dismissal of Post Conviction Relief Act (PCRA) petition was not timely "filed," precluding review by the Superior Court, even though it was mailed to the PCRA court judge and PCRA court deemed it timely "filed" under the prisoner mailbox rule, where the notice was not mailed to a filing office or sent to the clerk of courts. 42 Pa.C.S.A. § 9541 et seq.; Rules App.Proc., Rules 902, 903(a), 905(a), 42 Pa.C.S.A. Com. v. Crawford, 2011 PA Super 73, 17 A.3d 1279 (2011).

[Top of Section]

[END OF SUPPLEMENT]

§ 22. Motion to modify, vacate, or correct judgment or sentence—Initial motion

The following authority held that the prisoner mailbox rule did not apply to pro se inmate's motion seeking to modify, vacate, or correct a judgment conviction or sentence, under the facts and circumstances presented.

The court in Murdock v. State, 2006 WL 2700011 (Ark. 2006) (unpublished opinion), held that the prisoner mailbox rule did not apply to a pro se prisoner's motion to correct a purported clerical mistake in a judgment of conviction or sentence. The prisoner's brief was due in the court on April 5, 2006. On April 6, 2006, the prisoner tendered his brief, which the clerk declined to file because it was not timely. The prisoner argued that under the prisoner mailbox rule, which provides that a pro se inmate files his or her petition at the time the petition is placed in the hands of prison officials for mailing, his brief was timely, asserting that he was incarcerated, and that he had placed it in the mail by the date due. The court declined to adopt the mailbox rule, and stated that an item tendered to a court is considered tendered on the date it is received and file marked by the clerk, not on the date it may have been placed in the mail. Accordingly, the court dismissed the appeal as untimely.

The court in Vollmer v. State, 775 S.W.2d 230 (Mo. Ct. App. E.D. 1989), held that the prisoner mailbox rule did not apply to an inmate's motion to vacate sentence. The inmate's motion was filed with the circuit clerk after the expiration of the 90-day time limit. The inmate argued that under the rule in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), his motion should be deemed as filed on the date that he alleged he mailed his motion, and thus it should be deemed timely. The court declined to follow *Houston* pointing out that it was not controlling because, unlike the rule in the instant case, it involved a federal general rule of procedure applicable to all federal appeals. The rule in the instant case was enacted by the Missouri Supreme Court specifically as a procedure for prisoners seeking vacation of their sentences following a plea of guilty. The court concluded from a plain reading of the rule that the inmate's motion was not filed when mailed, but when it was lodged in the circuit clerk's office. Accordingly, the court affirmed the dismissal of the motion as untimely.

In State v. Coots, 1997 WL 803125 (Ohio Ct. App. 9th Dist. Wayne County 1997) (unpublished opinion), the court held that the prisoner mailbox rule did not apply to render a pro se inmate's petition to vacate or modify sentence timely. The inmate dated and signed his petition on September 16, 1996, on which date postage costs were debited from his prison account to mail the petition to the court. The court time stamped and filed the petition on September 26, 1996, after the period for filing had expired. The inmate argued that his delivery of the petition to prison authorities constituted "filing" so as to make the petition timely. The court disagreed, citing State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), wherein the Ohio Supreme Court rejected the concept that "filed" in a court means "delivered to the prison mail room."

§ 23. Motion to modify, vacate, or correct judgment or sentence—Notice of appeal from denial thereof

The following authority held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of a motion seeking to modify, vacate, or correct a judgment conviction or sentence, under the facts and circumstances presented.

In Key v. State, 297 Ark. 111, 759 S.W.2d 567 (1988), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of his petition to "correct and reduce" his sentences after pleading guilty to several felony charges. The applicable rule for appellate procedure required that a notice of appeal be filed with the circuit clerk. The prisoner failed to file a timely notice of appeal with the circuit clerk. The court declined to apply the rule articulated in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which held that a document mailed by an inmate is to be considered filed when it is given to prison staff for

mailing, since *Houston* was only an interpretation of the Federal Rules of Appellate Procedure and was not applicable to the instant case.

§ 24. Petition for state writ of habeas corpus or other postconviction relief—Initial petition or motion

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule did not apply to an inmate's pro se state habeas petition, notice of petition, or petition for postconviction relief, under the facts and circumstances presented.

In Johnson v. State, 2006 WL 2839239 (Ark. 2006) (unpublished opinion), the court affirmed the dismissal of a pro se inmate's petition for postconviction relief, holding that the prison mailbox rule did not apply to render the petition timely where the court had previously declined to adopt the prisoner mailbox rule.[29] An item tendered to a court is considered tendered, the court explained, on the date it is received and file-marked by the clerk, not on the date it may have been placed in the mail.

The court in Stokes v. State, 2006 WL 137227 (Ark. 2006) (unpublished opinion), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The prisoner argued that his petition was timely filed because it was placed in the mail within the required period for filing. The court declined to adopt the prisoner mailbox rule which provided that a pro se inmate is deemed to have filed his or her petition at the time the petition was placed in the hands of prison officials for mailing. The court stated that an item tendered to a court by a pro se inmate is considered tendered on the date it is received by the clerk, not on the date it was placed in the hands of prison officials for mailing. The inmate's petition was therefore untimely.

The court in Hamel v. State, 338 Ark. 769, 1 S.W.3d 434 (1999), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The court found that the defendant's failure to file his petition for postconviction relief in the circuit court clerk's office within 90 days of entry of the judgment of conviction, as required by the clear language of the applicable court rule (Ark. R. Crim. P. 37.2(c)) deprived the trial court of jurisdiction and thus required dismissal of the petition, even though the defendant was a pro se inmate and delivered his petition to prison officials for mailing within the 90-day period. The defendant urged the court to adopt the prisoner mailbox rule announced in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which provided that a pro se inmate files his or her petition at the time the petition is placed in the hands of prison officials for mailing. The court refused to adopt the prisoner mailbox rule announced in *Houston* because it was just the Supreme Court's interpretation of federal rules which had no applicability in the instant case. In addition, the court declined to adopt the prisoner mailbox rule because the language of the court rule was controlling and such court rule provided that the petition must be filed in the appropriate circuit court within 90 days of judgment. Accordingly, the court affirmed the dismissal of the petition as untimely.

The court in Hastings v. Commissioner of Correction, 82 Conn. App. 600, 847 A.2d 1009 (2004), appeal on other grounds dismissed as improvidently granted, 274 Conn. 555, 876 A.2d 1196 (2005), declined, without further discussion, to adopt the prison mailbox rule in affirming the dismissal of a pro se inmate's petition for a writ of habeas corpus where the petition was received by the clerk of the court after the inmate was no longer in custody as her sentence had ended.

The court in State v. Gregory, 2005 WL 3194482 (Del. Super. Ct. 2005), held that the prison mailbox rule did not apply to a pro se inmate's motion for postconviction relief and, thus, the inmate's motion was untimely under Del. Sup. Ct. Crim. R. 61(I) where it was filed four days after the expiration of the three-year limitations period. The court remarked that since Delaware has not adopted the prison mailbox rule, a pro se prisoner is not provided any additional time to file an appeal, the sole exception being if the deadline is not met due to the conduct of the court personnel.

The court in Robertson v. Com., 177 S.W.3d 789 (Ky. 2005), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The inmate claimed that, despite his delivery to prison officials of a properly prepared and addressed pro se motion to vacate, set aside, or correct his sentence, the motion was not filed in the trial court until 20 days later, by which time the motion was 14 days beyond the expiration of the limitations period. The inmate urged the court to adopt the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which would have considered the inmate's pro se motion filed upon its delivery to prison authorities. The court refused to adopt the prisoner mailbox rule. The court stated that because of the possibility of unforeseen mischief fostered by otherwise good intentions, it declined to adopt the fiction that "filing" means delivery to prison authorities.

The court in Minchew v. State, 2007 WL 1191706 (Miss. Ct. App. 2007), held that a pro se inmate's petition for postconviction relief was not timely filed under the prison mailbox rule where the inmate, by his own admission, did not deliver his appeal to prison authorities for mailing prior to the expiration of the applicable 30-day deadline of Miss. R. App. P. 4.

The court in Daniels v. State, 31 S.W.3d 121 (Mo. Ct. App. W.D. 2000), held that the prison mailbox rule did not apply to render timely a pro se inmate's petition for postconviction relief. The court explained that Missouri courts have declined to adopt a prison mailbox rule, citing, inter alia, Vollmer v. State, 775 S.W.2d 230 (Mo. Ct. App. E.D. 1989) (also discussed in§ 22), and O'Rourke v. State, 782 S.W.2d 808 (Mo. Ct. App. W.D. 1990), this section.

In O'Rourke v. State, 782 S.W.2d 808 (Mo. Ct. App. W.D. 1990), the court held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The prisoner sought postconviction relief and the lower court dismissed the postconviction motion for failure to comply with the filing deadline. On appeal, the court of appeals held that the prisoner's leaving of the postconviction motion with prison authorities for mailing was not sufficient compliance with the filing deadline. Since the filing deadline was June 30, 1988, and the motion was received by the court after that date, the court of appeals affirmed the dismissal of the motion as untimely. The court stated that the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and applicable in the federal prison system would not be extended to the state system in which the prisoner merely dropped off an envelope to be mailed and there was no recording of the transaction. The court stated that its refusal to create a prisoner mailbox rule was prompted by a lack of institutional safeguards which distinguished the instant case from *Houston*. In the federal penitentiary system, the pro se prisoner does not anonymously drop his notice of appeal in a public mailbox, instead he or she 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. In the instant case there were no such procedural safeguards. According to the prisoner's testimony, he merely dropped off the envelope to be mailed, and there was no recording of the transaction. Since the procedural protections of the federal system did not exist in the instant case, the policy grounds which favored the adoption of the prison mailbox rule in the federal system were not applicable. Moreover, the court found that *Houston* did not compel abandonment of the express terms of the applicable court rule (Mo. R. Crim. P. 24.035), which specified that a motion for postconviction relief was to be filed with the clerk of the trial court.

The court in Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002), held that the prisoner mailbox rule did not apply to an inmate's pro se postconviction habeas petition. The court noted that it had previously held in Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992) (also discussed in §§ 7, 19), that the prisoner mailbox rule applied to a pro se prisoner's notice of appeal. However, the court observed that while a prisoner submitting a postconviction petition in proper person faces many of the same difficulties and the vagaries of the prison mail system as a prisoner filing a notice of appeal, those concerns were more pronounced in the limited time period within which a notice of appeal must be filed, generally 30 days. In contrast, a prisoner has one year to file a postconviction habeas petition. Given the ample time that the applicable statute affords prisoners to file a postconviction habeas petition, the court concluded that the policy reasons underlying the prisoner mailbox rule were not as compelling in the habeas context as in the notice-

of-appeal context. In addition, unlike the strict jurisdictional time limits for filing a notice of appeal, the one-year time limit for filing a postconviction habeas petition could be excused by a showing of good cause and prejudice. Thus, in the notice-of-appeal context, absent the prisoner mailbox rule, a prison official's interference with the timely filing of a notice of appeal would not extend the time for filing the notice of appeal or allow the court to excuse the untimely filing of the notice of appeal. In contrast, the court recognized that under some circumstances, a petitioner may be able to demonstrate good cause to excuse the untimely filing of a postconviction petition based on official interference with the timely filing of a petition. For these reasons, the court declined to extend the prisoner mailbox rule to the filing of postconviction habeas petitions. Such petitions must be filed with the appropriate district court within the applicable time period. In the instant case, the inmate failed to file his petition with the district court within one year and thus the court concluded that the district court did not err in denying the petition as untimely.

Comment

The Supreme Court of Nevada has also declined to extend the prisoner mailbox rule, applied in Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992), to a notice of appeal following conviction, to encompass the filing of a pleading commencing a civil action. [30]

The court in State v. Friley, 2006-Ohio-230, 2006 WL 164417 (Ohio Ct. App. 10th Dist. Franklin County 2006), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief, noting that any document is considered filed when it is filed with the clerk of the court and not when it is placed in the prison mailing system (citing State v. Williams, 157 Ohio App. 3d 374, 2004-Ohio-2857, 811 N.E.2d 561 (8th Dist. Cuyahoga County 2004), this section). Thus, the court concluded, the inmate did not timely file a petition for postconviction relief, as the petition was not filed until after the expiration of the period for filing.

In State v. Williams, 157 Ohio App. 3d 374, 2004-Ohio-2857, 811 N.E.2d 561 (8th Dist. Cuyahoga County 2004), the court rejected application of the prison mailbox rule to a pro se inmate's petition for postconviction relief, which had been filed one day beyond the statutory time limit. In so holding, the court noted that the Ohio Supreme Court, in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in§ 27), expressly rejected the prison mailbox rule and determined that a pleading is considered filed on the date it is filed with the court.

In State v. Hansbro, 2002-Ohio-2922, 2002 WL 1332297 (Ohio Ct. App. 2d Dist. Clark County 2002) (unpublished opinion), the court held that the prison mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The petitioner sought postconviction relief after his burglary conviction was affirmed on direct appeal. The trial court dismissed the petition for postconviction relief and the petitioner appealed. The petitioner admitted that his petition was not filed within the applicable 180-day time period. The petitioner, however, relying on State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6), argued that his late filing was not an issue because the petition was timely delivered to prison authorities within the 180-day time period and, under the prisoner mailbox rule, the date of delivery to prison authorities for mailing is deemed the date of filing. As an initial point, the court remarked, the petitioner did not offer evidence in the lower court as to the date he delivered his petition to prison authorities. Even if he had, however, the court stated that it would not follow *Owens*, noting that since that decision, this court had twice rejected a prison mailbox rule, [31] and other districts had also rejected it as well. Moreover, the court explained, the Ohio Supreme Court in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), considering whether a notice of appeal delivered to prison authorities was timely filed, concluded that "filed in the court from which the case is appealed," as required under the applicable supreme court rule, could not reasonably be interpreted to mean "delivered to the prison mail room." Previously, the Ohio Supreme Court had held to the contrary, in State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in § 9), explained the court. While the Ohio Supreme Court had not yet resolved this apparent conflict, the court noted, subsequent appellate decisions [32] have interpreted *Tyler* as having effectively overruled *Williamson*. Although

Tyler involved a notice of appeal and the present case a postconviction motion, that difference is irrelevant, the court reasoned. Like the supreme court rule at issue in *Tyler*, Ohio R. Civ. P. 5(E), applicable herein, defines "filing" with the court as being made by filing "with the clerk of the court," or a judge, with permission. This provision, the court determined, cannot be read as equating prison officials with the clerk of the court, and a document is considered filed when it is filed with the clerk of the court, not when it is placed in the prison mailing system. Accordingly, the court affirmed the dismissal of the petition as untimely.

In State v. Miller, 2000 WL 1273467 (Ohio Ct. App. 4th Dist. Ross County 2000), the court held that the prison mailbox rule did not apply to render timely a pro se inmate's petition for postconviction relief. The inmate, citing State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6), argued that the date of delivery of his petition to prison authorities for mailing should be deemed the date of filing. While there is some case law that supports the inmate's position, the court explained, the Supreme Court of Ohio specifically rejected such a rule in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27).

The court in State v. Bowens, 1998 WL 553049 (Ohio Ct. App. 11th Dist. Ashtabula County 1998), held that the prison mailbox rule did not apply to render timely a pro se inmate's petition for postconviction relief, concluding that the inmate could not rely on the prison mailbox rule because it had been effectively overruled by the Ohio Supreme Court and, even if it were applicable, the inmate failed to produce any proof, in the form of an affidavit or receipt, establishing that his petition was actually delivered to prison authorities on or before the expiration date for filing. In so holding, the court cited State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997), this section, which, said the court, had been decided on similar facts to those at issue. In *Vroman*, the court explained, the court had determined that the Ohio Supreme Court effectively overruled State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (holding that a notice of appeal is timely filed if delivered to the proper prison authorities before the expiration of the filing period) (also discussed in § 9), with its decision in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), wherein the Ohio Supreme Court held that a filing is timely only if it is filed with the court within the appropriate time limits and that the jailer does not represent the court for filing purposes.

In State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997), the court held that the prison mailbox rule did not apply to a pro se inmate's petition for postconviction relief, and thus, the petition was properly dismissed as not timely filed. Citing State v. Williamson, 10 Ohio St. 2d 195, 39 Ohio Op. 2d 231, 226 N.E.2d 735 (1967) (also discussed in § 9), the inmate argued that his petition was timely because he delivered to prison authorities within the applicable time period. The court rejected this argument, concluding that the Ohio Supreme Court effectively overruled *Williamson* in State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990) (also discussed in § 27), which held that delivery of a filing to a prison mail room within applicable time limits did not constitute timely filing. A filing is timely only if it is filed with the court within the appropriate time limits, said the court, and the jailer does not represent the court for filing purposes.

In State v. Smith, 123 Ohio App. 3d 48, 702 N.E.2d 1245 (2d Dist. Montgomery County 1997), the court held that the prisoner mailbox rule did not apply to an inmate's pro se state habeas petition. After the defendant's convictions for attempted murder, aggravated burglary, tampering with evidence, and carrying a concealed weapon were upheld on direct appeal, the defendant filed a pro se state habeas petition. The lower court dismissed the petition as untimely, and the defendant appealed. The court of appeals held that the petition was filed, for purposes of the statute requiring postconviction petitions to be filed within 180 days of expiration of the time for filing an appeal or one year from the statute's effective date, when it was filed in the court that imposed the sentence, rather than when it was turned over to prison authorities for mailing. Since the petition was filed with the court after the expiration of the one year filing period, the petition was untimely. The court rejected the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which said that a document mailed by an inmate is to be considered filed when it is given to prison staff for mailing. The court did not find the holding in *Houston* persuasive. The court affirmed the dismissal of the appeal as untimely.

Comment

For additional Ohio authority rejecting the prison mailbox rule as applied to the pro se filing, by a prisoner of a petition seeking postconviction relief, see State v. Buckwald, 2000 WL 1859845 (Ohio Ct. App. 9th Dist. Lorain County 2000) (unpublished opinion); State v. Proctor, 2000 WL 1251969 (Ohio Ct. App. 12th Dist. Butler County 2000) (unpublished opinion); State v. Lathan, 2000 WL 1005206 (Ohio Ct. App. 6th Dist. Lucas County 2000) (unpublished opinion); State v. Springs, 1999 WL 148369 (Ohio Ct. App. 7th Dist. Mahoning County 1999) (unpublished opinion); and State v. Finfrock, 1998 WL 726478 (Ohio Ct. App. 2d Dist. Montgomery County 1998) (unpublished opinion).

The court in Hunnicutt v. State, 1997 OK CR 77, 952 P.2d 988 (Okla. Crim. App. 1997), held that the prisoner mailbox rule did not apply to an inmate's pro se petition for postconviction relief. The prisoner petitioned for a rehearing requesting that the court allow his appeal to proceed, after an attempted postconviction appeal was denied by the court of criminal appeals, claiming the original postconviction appeal was timely as he delivered it to prison officials in time, even though the pleadings did not reach the court clerk prior to the 30-day deadline. The prisoner alleged that he filed his appellate pleadings by delivering them to prison officials on January 10 or 11, 1997, for mailing to the clerk of the court. The prisoner argued that because he delivered the pleadings to prison officials prior to the expiration of his 30-day appellate deadline, his appeal should be considered timely under the authority of Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which held that for purposes of the Federal Rules of Appellate Procedure, a pro se prisoner's appeal is deemed filed when delivered to prison officials for mailing. The court declined to follow *Houston* because the United States Supreme Court's interpretations of Federal Rules of Appellate Procedure are not controlling as to the construction of any state rule of appellate procedure. The prisoner argued that his petition should also be considered timely under the authority of Woody v. State, ex rel. Dept. of Corrections, 1992 OK 45, 833 P.2d 257 (Okla. 1992) (also discussed in § 14), in which the Oklahoma Supreme Court held that the date of mailing an appeal to the state supreme court for a pro se prisoner would be the date when the prisoner delivers the petition to correction officials for mailing. The court distinguished the holding in *Woody* by pointing out that it rested on a special statute applicable only in appeals to the Oklahoma Supreme Court which specifically allowed an appeal to be commenced in the state's supreme court by sending the petition by certified mail with return receipt requested. Thus, the holding in *Woody* did not apply to appeals in criminal matters to the state court of criminal appeals, such as the appeal in the instant case. Accordingly, the court of criminal appeals held that delivery of the prisoner's pleadings to prison officials did not substitute for filing and thus the appeal was untimely.

In Neely v. State, 34 S.W.3d 879 (Tenn. Crim. App. 2000), the court held that the prison mailbox rule contained in Tenn. R. Crim. P. 49(c) and Tenn. Sup. Ct. R. 28, § 2(G) did not apply so as to render timely a pro se inmate's petition for postconviction relief where the record indicated that the inmate's petition was filed well outside the limitations period and, despite the inmate's unsupported assertions, there was no evidence that he timely delivered the postconviction petition to "the appropriate prison authorities for mailing" within the applicable time for filing. Noting that no certificate of service was produced at the hearing or on appeal, the court explained that, in a postconviction case, the burden is on the petitioner to prove his grounds for relief by clear and convincing evidence and, on appeal, the court is bound by the trial court's findings unless the evidence preponderates against those findings. Here, the court concluded, the evidence authorized the trial court's dismissal of the petition as being barred by the statute of limitations.

The court in In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003), held that the prisoner mailbox rule did not apply to a pro se prisoner's personal restraint petition. The court found that the plain language of an appellate rule (Wash. R. App. P. 18.6(c)), providing that petitions were timely filed only if received by the appellate court within the limitations period, precluded application of the federal mailbox rule, which considered pro se prisoners' notices filed at the moment of delivery to prison authorities. Therefore, the prisoner's personal restraint petition, delivered to prison authorities five days before the one-year deadline and received by the court one day after the deadline, was untimely.

Comment

In In re Carlstad, 150 Wash. 2d 583, 80 P.3d 587 (2003), the Washington Supreme Court effectively overruled State v. Hurt, 107 Wash. App. 816, 27 P.3d 1276 (Div. 3 2001), which had adopted the federal prisoner mailbox rule in finding that a pro se inmate's motion for postconviction was timely.

CUMULATIVE SUPPLEMENT

Cases:

Inmate's post-conviction relief petition was not considered filed on the date he deposited the petition in the prison mailbox, which was the last day of the limitations period, rather, the petition was filed on the date it was received by the trial court, and thus petition was untimely. M.S.A. § 590.01. Toua Hong Chang v. State, 2010 WL 520631 (Minn. Ct. App. 2010) [citing annotation]

Inmate's post-conviction relief petition was not considered filed on the date he deposited the petition in the prison mailbox, which was the last day of the limitations period, rather, the petition was filed on the date it was received by the trial court, and thus petition was untimely. M.S.A. § 590.01. Toua Hong Chang v. State, 778 N.W.2d 388 (Minn. Ct. App. 2010).

Prison delivery rule was not available to satisfy one-year period within which defendant was required to file motion for postconviction relief. Neb. Rev. Stat. § 29-3001(4). State v. Smith, 286 Neb. 77, 834 N.W.2d 799 (2013).

[Top of Section]

[END OF SUPPLEMENT]

§ 25. Petition for state writ of habeas corpus or other postconviction relief—Notice of appeal from determination thereon

[Cumulative Supplement]

The courts in the following cases held that the prisoner mailbox rule did not apply to an inmate's pro se notice of appeal or appeal from a determination on the prisoner's petition for a writ of habeas corpus or petition seeking other postconviction relief, under the facts and circumstances presented.

In Sanders v. State, 2006 WL 349693 (Ark. 2006) (unpublished decision), the court held that the prisoner mailbox rule did not apply to a pro se inmate's appeal from the denial of his petition for postconviction relief, noting that Arkansas has declined to adopt the prisoner mailbox rule and, thus, an item tendered to a court is considered tendered on the date it is received by the clerk of the court, not the date it may have been placed in the mail.

The court in Ball v. State, 911 A.2d 802 (Del. 2006) (unpublished opinion; 2006 WL 3151422), held that no mailbox rule for prisoners applied to a pro se inmate's notice of appeal from a denial of his petition for writ of habeas corpus in state court, noting that the Delaware Supreme Court in Carr v. State, 554 A.2d 778 (Del. 1989), this section, had previously considered and refused to create a separate mailbox rule for prisoners. Under Delaware law (Del. Sup. Ct. R. 6(a), 10(a)), the court explained, a notice of appeal must be received by the court clerk within the applicable time period and filing is not complete until the paper has been received by the clerk's office.

The court in Douglas v. State, 712 A.2d 475 (Del. 1998), held that no prisoner mailbox rule applied to render timely a pro se inmate's untimely notice of appeal from the order denying his motion for postconviction relief where the filing

deadline expired on April 17, 1998, but the court did not receive the notice of appeal until April 23, 1998. Citing Carr v. State, 554 A.2d 778 (Del. 1989), this section, the court noted that the court had previously considered and refused to create a separate mailbox rule for prisoners. Any delay caused by the prison mail system cannot justify an enlargement of the 30-day filing period, the court indicated, as time is a jurisdictional requirement. A notice of appeal must be received by the clerk within the applicable time period to be effecting, the court explained.

The court in Robinson v. Snyder, 705 A.2d 245 (Del. 1997), held that no prisoner mailbox rule applied to render timely a pro se inmate's untimely notice of appeal from the order denying his petition for a writ of habeas corpus, where the filing deadline expired on December 1, 1997, but the court did not receive the notice of appeal until December 3, 1997. Citing Carr v. State, 554 A.2d 778 (Del. 1989), this section, the court noted that the court had previously considered and refused to create a separate mailbox rule for prisoners. Because there was nothing in the record to indicate that the inmate's failure to file a timely notice of appeal was attributable to court-related personnel, the court reasoned, it did not fall within the exception to the general rule that mandates the timely filing of a notice of appeal and would be dismissed.

The court in Carr v. State, 554 A.2d 778 (Del. 1989), held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of his eighth postconviction relief motion. The court stated that under Delaware law (Del. Code Ann. tit. 10, § 147) and procedure (Del. Sup. Ct. R. 6), a notice of appeal is filed when it is received and filed by the office of the clerk, not at the moment it is placed in the mail. Such law and court rule clearly required a timely filing within a 30-day period, irrespective of the mailing date. The court pointed out that the United States Supreme Court in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), 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 *Houston* case did not compel the court to abandon its own precedent. The court concluded that the prison mailbox rule was inappropriate for Delaware for two reasons. First, a notice of appeal filing deadline was not subject to enlargement in Delaware as it was in the federal system. Second, the procedure used to mail letters in the Delaware prison system was very different from that employed in the federal penal system. Under the federal penitentiary system the pro se prisoner does not anonymously drop his notice of appeal in a public mailbox, he hands it over to prison authorities who have specific procedures for recording the date and time at which they receive papers for mailing and who can dispute a prisoner's assertions that he delivered the paper on a different date. In contrast in Delaware prisons, to mail his or her notice of appeal a prisoner simply places it into the required prison mailbox. In the Delaware prison system, no one would have any record of when a piece of mail was posted. Since the procedural protections of the federal system did not exist in Delaware, the policy grounds which favored the adoption of the prison mailbox rule in the federal system, led to the opposite result in Delaware. In the absence of compelling policy reasons to support a change in the court's longstanding interpretation of Delaware law, the court declined to adopt a separate prison mailbox rule. Accordingly, the court dismissed the pro se prisoner's appeal as untimely.

The court in Inoue v. State, 2006 WL 1492502 (Haw. 2006), order clarified, 2006 WL 2065399 (Haw. 2006) (unpublished opinion), held that the prisoner mailbox rule did not apply to render a pro se inmate's notice of appeal from the denial of his petition for postconviction relief timely, where the record did not indicate that the inmate tendered his notice of appeal to prison officials for forwarding to the clerk on or before the expiration of the 30-day period to appeal.

In Kauhi v. State, 2005 WL 1861899 (Haw. 2005) (unpublished opinion), the court held that the prisoner mailbox rule did not apply to a pro se inmate's notice of appeal from the denial of his petition seeking postconviction relief where, the court determined, the record did not indicate that the inmate tendered his notice of appeal to prison officials for forwarding to the court clerk on or before the expiration date of the filing period.

In State v. Parmar, 255 Neb. 356, 586 N.W.2d 279 (1998), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's poverty affidavit filed in connection with the prisoner's notice of appeal from the denial of his motion for postconviction relief. The court stated that when a poverty affidavit is substituted by an appellant for a

docket fee, it must be filed within the time and in the manner required for filing the docket fee. A poverty affidavit was insufficient to perfect an appeal unless it was filed during the 30-day period following rendition of judgment. Thus, the poverty affidavit filed by the postconviction petitioner prior to entry of the final order denying his motion for relief was insufficient to perfect his appeal. Likewise, the petitioner's second poverty affidavit, which was filed more than 30 days after the judgment, was untimely. The court declined to adopt a prisoner mailbox rule and held that the poverty affidavit submitted by the petitioner following denial of his motion for postconviction relief was filed when it was received in the office of the clerk of the district court, not when it was delivered to prison authorities for mailing. The court stated that although there may be good reasons to consider a prisoner's pro se notice of appeal and poverty affidavit filed when it is given to prison officials for forwarding to the district court, the court found that it had no power to do so without statutory authorization. The prisoner failed to file a poverty affidavit within the time period prescribed and consequently the court dismissed the appeal.

Although recognizing the prison mailbox rule contained in Tenn. R. App. P. 20(g), the court in Hough v. State, 2001 WL 394840 (Tenn. Crim. App. 2001) (unpublished opinion), held that it did not apply to render timely a pro se inmate's notice of appeal from the denial of his pro se petition for postconviction relief where, the court concluded, the inmate's claim that he filed his notice of appeal "on or about" the last day for timely filing was insufficient to establish that he did, in fact, do so.

CUMULATIVE SUPPLEMENT

Cases:

Mailbox rule did not apply to notice of appeal of the summary denial of postconviction motion filed by pro se movant who was not an inmate in custody, and therefore the notice of appeal would be considered filed as of the date the clerk of the circuit court received the notice. West's F.S.A. RCrP Rule 3.850; West's F.S.A. R.App.P.Rules 9.141(b)(1), 9.110(b), 9.020(h), 9.420(e); Fla. R. Jud. Admin. 2.514(a). Donaldson v. State, 136 So. 3d 1281 (Fla. 2d DCA 2014).

Even if disposition of prisoner's motion for post-conviction relief was properly before the appellate court, prisoner would not be entitled to requested relief, where, although prisoner delivered motion to prison authorities within three-year statute of limitations set forth in Mississippi Uniform Post-Conviction Relief Act, circuit court returned motion to prisoner as "incomplete," and prisoner did not file proper post-conviction relief motion with circuit court until after limitations period expired. West's A.M.C. §§ 99–39–5(2), 99–39–9. Shelton v. State, 984 So. 2d 320 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277 (Miss. 2008).

[Top of Section]

[END OF SUPPLEMENT]

2. Administrative Decisions Relating to Prison Discipline or Probation and Parole

§ 26. Petition for review of determination of prison disciplinary committee

The courts in the following cases held that the prisoner mailbox rule did not apply to a pro se prisoner's petition for review of an administrative determination of the prison disciplinary committee, board, department, or the like, under the facts and circumstances presented.

In Talley v. Diesslin, 908 P.2d 1173 (Colo. Ct. App. 1995), the court held that the prisoner mailbox rule did not apply to a prisoner's pro se complaint filed in district court, which sought review of a department of correction's disciplinary order. The complaint was received by the clerk of the district court after the expiration of the 30-day appeal period.

The prisoner argued that the prisoner mailbox rule should apply and that, under such rule, his complaint should be considered "filed" under the state rule of appellate procedure when it was delivered to the correctional facility on the 30th day. The court refused to adopt the prisoner mailbox rule. The court reasoned that since the provision of the rule under consideration (Colo. R. Civ. P. 106(b)) was unambiguous, it had to apply the plain meaning rule of statutory construction and construe the rule as written. The court concluded that the prisoner mailbox rule was contrary to the plain language of the procedural rule. The court concluded that the prisoner's delivery of the complaint challenging the disciplinary finding to prison officials did not constitute "filing" of the complaint, and thus, the prisoner's complaint was untimely.

The court in Holt v. Cooper, 2007 WL 491605 (Ky. Ct. App. 2007), held that, because the Kentucky Supreme Court in Robertson v. Com., 177 S.W.3d 789 (Ky. 2005) (also discussed in § 24), declined to adopt the prison mailbox rule, which deems a notice of appeal to be "filed" when the prisoner deposits it with prison authorities for mailing, the prison mailbox rule did not apply to render timely a pro se inmate's appeals from the determinations of the prison adjustment committee.

Comment

Again citing Robertson v. Com., 177 S.W.3d 789 (Ky. 2005) (also discussed in § 24), the court in Holt v. Cooper, 2007 WL 491605 (Ky. Ct. App. 2007), nevertheless found the pro se inmate's appeals timely filed, concluding that the deadline for filing was tolled on the date that the inmate placed the appeals in the prison mailbox within the time allowed for filing.

The court in Tibbs v. Dipalo, 2000 WL 1273854 (Mass. Super. Ct. 2000) (unpublished opinion), held that the prisoner mailbox rule did not apply to render timely a pro se inmate's complaint in the nature of certiorari appealing the findings of a prison disciplinary hearing, rejecting the inmate's assertion that his complaint should be deemed filed on the date on which he placed it in the prison mailbox. In so holding, the court distinguished the facts before it from those at issue in Com. v. Hartsgrove, 407 Mass. 441, 553 N.E.2d 1299 (1990) (also discussed in § 6), wherein the court applied the prison mailbox rule to a pro se inmate's appeal from his conviction. First, the court explained, Massachusetts courts have clearly held that, for purposes of certiorari, a complaint is deemed filed when the clerk of the court has received it. Second, the prisoner mailbox exception from the statute of limitations applied by the court in *Hartsgrove* is not applicable here because of the fundamental difference between an action appealing a conviction and an action appealing the findings of a disciplinary hearing, the court determined. If the former were reversed, reasoned the court, the plaintiff would be released from prison, whereas if the latter were reversed, the plaintiff would be spared a suspended sentence which would subject him to 15 days in isolation and deprive him of three weeks of canteen privileges. Although the imposition of isolation and loss of privileges should not be taken lightly, the court opined, it does not compare to the injustice that would be served if a prisoner were barred from appealing a conviction which resulted in his confinement. Moreover, a plaintiff appealing the finding of a disciplinary hearing has 60 days to file, whereas a plaintiff appealing a conviction has only 30 days, the court stated.

The court in Walker-Bey v. Department of Corrections, 222 Mich. App. 605, 564 N.W.2d 171 (1997), declined to adopt the prison mailbox rule of Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988) (also discussed in § 2), holding that no such rule applied to render timely a pro se inmate's petition for judicial review of a prison disciplinary decision, where the inmate's petition was not received by the court clerk until after the 60-day filing period had expired. The court noted that, because *Houston* was based upon an interpretation of a federal statute and court rules that were not applicable in the present case, the decision in *Houston* was not binding on this court. In the absence of ambiguity in the court rules and statute, the court reasoned, it was precluded from adopting a prison mailbox rule. The court determined that the applicable statute and rules unambiguously required that the petition for review be filed with the court clerk within the 60-day period, and that filing be with the court clerk, or a judge, with permission. Although sympathetic to the plight of the prisoner proceeding pro se, the court indicated its unwillingness to obliterate the line between textual construction and textual enactment (citing the dissent in *Houston*). The decision to adopt the prison mailbox rule, said the court, belongs to the Legislature and the state supreme court, which, if they see fit, are empowered to rewrite the statute and the court rules, respectively.

In Grant v. Senkowski, 95 N.Y.2d 605, 721 N.Y.S.2d 597, 744 N.E.2d 132 (2001), the New York Court of Appeals held that the prisoner mailbox rule did not apply to a pro se prisoner's petition for review of an administrative determination that he had violated a prison disciplinary rule. The court stated that the state procedural law's commencement-by-filing system for petitions (N.Y. C.P.L.R. 304), under which claims asserted are deemed interposed for limitations purposes at the time of filing, which is defined as delivery of notice of petition or order to show cause to the clerk of the court or any other person designated by the clerk of court for that purpose, does not include a pro se prisoner "mailbox rule" allowing petitions filed by prisoners to be deemed to have been interposed when the prisoner delivers notice of the petition or order to show cause to prison authorities. The court held that the inmate's delivery of an order to show cause and a verified petition to prison authorities for mailing to the appropriate court did not constitute "filing" which would allow the petition to be deemed to have been interposed for limitations purposes under the commencement-by-filing system. The court recognized the greater impediments pro se prisoners may face over most other litigants in filing their legal papers on time. However, absent any evidence that the Legislature intended to vary for their benefit the filing-by-receipt requirement, the court could not depart from the statutorily mandated filing requirements by incorporating a pro se prisoner mailbox exception.

Caution

Although the New York Court of Appeals in Grant v. Senkowski, 95 N.Y.2d 605, 721 N.Y.S.2d 597, 744 N.E.2d 132 (2001), did not expressly overrule an earlier decision in Mandala v. Jablonsky, 242 A.D.2d 271, 660 N.Y.S.2d 593 (2d Dep't 1997), which had held that a pro se prisoner's mailing of an unexecuted show cause order to a court clerk timely commenced a special proceeding for review of a sheriff's denial of the prisoner's administrative appeal of a prison's determination that he had violated a prison rule, on the basis that the prisoner's control over the processing of his papers ceased when he mailed them, the continuing validity of the holding in *Mandala* is questionable.

In Loper v. Selsky, 26 A.D.3d 653, 810 N.Y.S.2d 525 (3d Dep't 2006), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's petition for review of an administrative determination that he had violated prison disciplinary rules. The court stated that the special proceeding in which the prison inmate sought to challenge a determination finding him guilty of violating prison disciplinary rules was deemed commenced for statute of limitations purposes on the date on which the clerk of the court actually received the petition in valid form, and not on the mere mailing of the same.

The court in James v. Goord, 281 A.D.2d 825, 722 N.Y.S.2d 609 (3d Dep't 2001), held that the prisoner mailbox rule did not apply to a pro se prisoner's petition for review of a prison disciplinary determination. The petitioner argued that the court should adopt a mailbox rule whereby proceedings by pro se prisoners would be deemed commenced, for statute of limitations purposes, when a verified petition is delivered to prison authorities or placed in the prison mail system for forwarding to the appropriate court. The court declined to adopt such a mailbox rule and stated that no prison mailbox rule was available to render timely the pro se prisoner's otherwise untimely special proceeding for review of the prison disciplinary determination. The prisoner had placed a verified petition and application, unaccompanied by a proposed order to show cause or notice of petition, in the prison mail system seven days prior to expiration of the four-month limitations period.

Considering the timeliness of a pro se inmate's petition for review of an administrative determination that he had violated a prison disciplinary rule, the court in Norby v. Santiam Correctional Inst., 116 Or. App. 239, 841 P.2d 1 (1992), declined to adopt the prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), concluding that the timeliness of the inmate's petition at issue was determined by state statute, former Or. Rev. Stat. § 19.028, [33] applicable to petitions for judicial review, which provides that "filing" of a petition for review may be accomplished by mail and that timeliness depends on the date of mailing, but only if the notice is sent by registered or certified mail; otherwise, under the statute, filing occurs on the date that the petition is received by the court.

Comment

Oregon courts have reached different conclusions regarding the application of the prisoner mailbox rule depending on the state statute or rule governing the particular pro se filing at issue. In Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994) (also discussed in § 14), the court applied the prisoner mailbox rule to the filing of a pro se petition for judicial review of a determination of a prison disciplinary committee governed by Or. R. App. P. 1.35. The Oregon Supreme Court, however, in Stull v. Hoke, 326 Or. 72, 948 P.2d 722 (1997) (also discussed in § 29), distinguished *Hickey* and declined to apply the prisoner mailbox rule to the filing of a pro se prisoner's complaint in a tort cause of action, governed by Or. Rev. Stat. Ann. § 12.020. The court in Lovelace v. Board of Parole and Post-Prison Supervision, 188 Or. App. 35, 69 P.3d 1234 (2003) (also discussed in § 15), also declined to apply the prisoner mailbox rule to the filing of a pro se inmate's petition seeking judicial review of an order of the state parole board, which was governed by agency rules, the court concluding that the board's rules, not the court's prisoner mailbox rule, govern the timeliness of administrative review requests involving the board's parole release decisions, and because the board's interpretation of its rules was consistent with their wording, the court deferred to that interpretation.

The court in State ex rel. Tyler v. Bett, 257 Wis. 2d 606, 2002 WI App 234, 652 N.W.2d 800 (Ct. App. 2002), while recognizing the prison mailbox tolling rule announced in State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000) (also discussed in §§ 4, 14), held that it did not apply to a pro se inmate's petition for certiorari review of a prison disciplinary committee decision so as to toll the 45-day filing period from the day he placed his petition in the prison mailbox where the prisoner did not place all of the required documents and a disbursement request for the proper filing fee in the prison mailbox until the 45-day filing period had already expired.

§ 27. Appeal of decision of state probation and parole board

The following authority held that the prisoner mailbox rule did not apply to a pro se prisoner's appeal of a decision of a state probation and parole board, under the facts and circumstances presented.

The court in Purcell v. Dennison, 29 A.D.3d 1128, 814 N.Y.S.2d 787 (3d Dep't 2006), held that the prisoner mailbox rule did not apply to a pro se prisoner's petition to challenge a denial of his request for parole release. The court found that the petitioner's deposit of papers for commencing the proceeding to challenge the denial of his request for parole release in the prison mail system prior to the expiration of the statute of limitations did not constitute sufficient compliance with the statutory requirements for commencing the proceeding. The papers necessary to commence the proceeding were received by the clerk's office after the expiration of the four-month statute of limitations. Accordingly, the court affirmed the dismissal of the petition as time-barred.

In State ex rel. Tyler v. Alexander, 52 Ohio St. 3d 84, 555 N.E.2d 966 (1990), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal from the denial of his petition for mandamus challenging the revocation of his parole. The pro se prisoner's notice of appeal was due on January 29. The pro se prisoner claimed that he entrusted his notice of appeal to the prison mail room on January 27. However, the file stamp indicated that the notice was filed with the court of appeals on February 5. The pro se prisoner, citing the United States Supreme Court decision in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), argued that when a prisoner acting pro se seeks to appeal an adverse judgment, the court should consider his notice of appeal "filed" when he turns it over to the prison authorities for mailing. The court stated that *Houston* was not binding on the court because 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. The court stated that it did not find *Houston* persuasive. The court held that a notice of appeal from an adverse ruling by the court of appeals entered in an action in which a prisoner proceeded pro se was "filed" when received by the court of appeals, rather than when it was turned over to prison authorities for mailing. Accordingly, the court affirmed dismissal of the pro se prisoner's appeal as untimely.

See Kutnyak v. Department of Corrections, 923 A.2d 1248 (Pa. Commw. Ct. 2007), wherein the court, in dicta, held that the prisoner mailbox rule did not apply so as to render timely a pro se inmate's appeal of a decision of the Board of Claims dismissing his bail bond, where the inmate placed his legal documents in the prison's in-house mail system for copying by the librarian but did not place the documents in the hands of prison officials for purposes of mailing by the United States Postal Service. Contrasting these facts with those in Smith v. Pennsylvania Bd. of Probation and Parole, 546 Pa. 115, 683 A.2d 278 (1996), discussed in § 15, the court noted that there is no procedural rule that would deem a document filed as of the date a party copied the document and, unlike the inmate in *Smith*, the inmate in the present case did not obtain a cash slip showing payment of the fees for copying his legal documents.

§ 28. Request for administrative relief from state probation and parole board order filed by parolee's counsel

The following authority held that the prisoner mailbox rule did not apply to a request, filed by a parolee's counsel, for administrative relief from a state probation and parole board order, under the facts and circumstances presented.

The court in Christjohn v. Pennsylvania Bd. of Probation and Parole, 755 A.2d 92 (Pa. Commw. Ct. 2000), held that the prisoner mailbox rule did not apply to a request, filed by a parolee's counsel, for administrative relief from a Board of Probation and Parole's order. The parolee appealed from an order of the Pennsylvania Board of Probation and Parole (the Board) dismissing his request for administrative relief as untimely. The court found that the prisoner mailbox rule did not apply to the request, filed by the parolee's counsel, for administrative relief from the Board's order recommitting the parolee to a state correctional institution to serve back time as a technical and convicted parole violator, because although the request was postmarked within 30 days of the order, the prisoner mailbox rule only applied to appeals filed pro se. Accordingly, the court affirmed the dismissal.

B. Civil Proceedings

§ 29. Civil complaint

The following authority held that the prisoner mailbox rule did not apply to a pro se prisoner's complaint in a civil action, under the facts and circumstances presented.

The court in Thomas v. Motley, 2005 WL 2174616 (Ky. Ct. App. 2005), held that the prisoner mailbox rule did not apply to render a pro se inmate's complaint challenging prison disciplinary actions against him timely where the applicable state court rule required that a civil action be commenced by the filing of a complaint with the court, which the court rule further stated was required to be by filing the complaint with the clerk of the court. The court determined that the prison mailbox rule deviated from these explicit provisions and, finding no published Kentucky case law adopting the prison mailbox rule, concluded that the civil rules should be amended, if at all, by the Kentucky Supreme Court. As a result, the court declined to apply the prison mailbox rule.

The court in Milton v. Nevada Dept. of Prisons, 119 Nev. 163, 68 P.3d 895 (2003), declined to extend application of the prison mailbox rule to the filing of pleading commencing any civil action and, thus, affirmed the dismissal of a pro se inmate's complaint in a personal injury action against the state department of prisons. The inmate's complaint arose out of an incident which occurred on January 8, 1999. The applicable statute of limitations for personal injury actions, pursuant to Nev. Rev. Stat. § 11.190(4), is two years. The court clerk received the complaint on January 10, 2001. The inmate argued that his complaint was timely filed under the prison mailbox rule adopted by the court in Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992) (also discussed in §§ 7, 19), as he delivered it to prison official for filing on January 5, 2001. The court noted that, more recently, in Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002) (also discussed in § 24), the court refused to extend the prison mailbox rule to the statutory deadlines for filing postconviction petitions for writs of habeas corpus, noting the distinction between the timeliness problems in filing

notices of appeal, which must be accomplished within 30 days, and the timeliness problems attendant to petitions for postconviction relief, which are subject to deadlines of an entire year or more. In this instance, the court reasoned, the inmate had two years from the date of his injuries within which to file his lawsuit. The court stated that, as in *Gonzales*, it found no compelling policy reason to create a blanket mailbox rule for the filing of complaints for personal injuries.

The court in Stull v. Hoke, 326 Or. 72, 948 P.2d 722 (1997), held that the prisoner mailbox rule did not apply to a pro se prisoner's complaint in a tort cause of action. The prisoner brought a pro se action asserting various tort claims, and the defendants moved to dismiss. The lower court granted the motion on the basis that the claims were time-barred, and the prisoner appealed. In reaching its decision, the court rejected the assertion that, under Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), and Hickey v. Oregon State Penitentiary, 127 Or. App. 727, 874 P.2d 102 (1994) (also discussed in § 14), the term "filed" should be construed as to occur when an incarcerated plaintiff delivers his or her complaint to prison officials. The court distinguished *Hickey*, noting that the court in that case interpreted "filing" under the applicable court rule. In this case, reasoned the court, we are interpreting a statute and, regardless of any policy argument, the text and context of the term "filed" in Or. Rev. Stat. Ann. § 12.020 leads to the conclusion that, in the type of situation presented in this case, the operative moment for "filing" an action is when the court clerk or a person exercising the duties of that office receives the complaint. In the instant case, the trial court received the complaint on April 13, 1994. On that date, one of the plaintiff's claims for intentional infliction of emotional distress and the claim for conversion were not time barred. The remaining claims were time barred. Accordingly, the court affirmed in part, reversed in part, and remanded.

Caution

Other Oregon courts have also declined to adopt or apply the prison mailbox rule, concluding that the particular filing at issue was governed by state statute or rule. [34]

In Horrice v. Fondren, 2006 WL 416973 (Tex. App. Fort Worth 2006), the court held that prisoner mailbox rule did not apply to render timely a pro se inmate's claim alleging that prison officials had denied him "safekeeping housing," where the record contained no evidence that the inmate's petition was timely received by the proper prison authority. Under state law (Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b)), the plaintiff-inmate was required to file his claim within 31 days after he received the written decision of the prison grievance system denying his step-two grievance. The plaintiff received notice of denial of his grievance on October 3, 2003, making the deadline to file his claim November 3, 2003. Although the plaintiff dated his petition October 31, 2003, it was not file-marked until December 29, 2003. The plaintiff asserted that the 31-day period should be tolled because prison employees had confiscated his legal papers from another inmate who was helping the plaintiff prepare his lawsuit, an argument which the court found to be irrelevant, as the alleged confiscation occurred in July 2004—months after he filed suit. For the first time on appeal, the plaintiff alleged that he was prevented from timely filing suit because, on the 30th day after the grievance decision, an inexperienced prison employee could not figure out the indigent-prisoner mail system and told him to come back as this was her first day. The court acknowledged that, under Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16), a pro se inmate's petition that is placed in a properly addressed and stamped envelope is deemed filed at the time the prison authorities receive the document for mailing. Here, however, the record did not contain a copy of the envelope, if any, containing the plaintiff's petition, the court noted, and while the plaintiff wrote the date October 31 on his petition and related documents, he offered no evidence tending to show that a prison employee prevented him from mailing the petition in a timely manner; nor, the court reasoned, did the plaintiff raise this issue in the trial court.

In Dumas v. TDCJ-CID, 2005 WL 1797074 (Tex. App. Corpus Christi 2005), reh'g overruled, (Aug. 30, 2005), affirmed the dismissal of a pro se inmate's claim against the state Department of Criminal Justice—Institutional Division, noting in dicta that the prisoner mailbox rule did not apply to render the claim timely because there was no evidence in the record which would allow the court to determine when the inmate first tendered his petition to prison authorities for mailing or by what means he delivered his petition to the district clerk. As such, the court concluded, it could not determine

from the record whether, by virtue of the mailbox rule or the rule in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16), the documents would be deemed filed at an earlier date.

The court in Brooks v. TDCJ-ID, 2005 WL 1797071 (Tex. App. Corpus Christi 2005), reh'g overruled, (Sept. 15, 2005) and review denied, (Mar. 3, 2006), affirmed the dismissal of a pro se inmate's claim against the state Department of Criminal Justice—Institutional Division, holding that the prisoner mailbox rule did not apply to render the claim timely, the court finding that the record contained no evidence that the claim was timely received by the proper prison authority. The inmate conceded that the date by which he was required to file his claim was September 20, 2003, but the original petition was dated filed as of September 22, 2003. The court noted that the record did not establish the date the inmate properly deposited the original petition into the prison mail system and did not include a copy of the postmarked envelope, if any, containing the inmate's original petition.

The court in Scott v. Johnson, 2003 WL 22298724 (Tex. App. San Antonio 2003) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)), held that the prisoner mailbox rule did not apply to extend the 31–day filing period in which a pro se inmate was required to file his tort claim, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b), after exhausting administrative remedies within the penal grievance system and, thus, the court affirmed dismissal of the inmate's claim.

Caution

The decision in Scott v. Johnson, 2003 WL 22298724 (Tex. App. San Antonio 2003) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)), was expressly disapproved by the decision of the Texas Supreme Court in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16).

In Clark v. Hudspeth, 2001 WL 1243493 (Tex. App. Houston 1st Dist. 2001) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)), the court dismissed without prejudice, a pro se inmate's claim civil suit filed 75 days after the inmate received the denial of his final grievance, holding that the prisoner mailbox rule did not apply to render the claim timely filed where, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 14.005(b), the claim was required to have been filed within 31 days after receipt by the inmate of the final grievance decision. In so holding, the court indicated that Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), cited by the inmate for the proposition that a pro se prisoner's notice of appeal is deemed filed on the date it is delivered to prison authorities for forwarding to the clerk, dealt with federal rules and did not apply in the present case. Moreover, the court indicated, the statutory deadline cannot be modified by any court rule.

Caution

The decision in Clark v. Hudspeth, 2001 WL 1243493 (Tex. App. Houston 1st Dist. 2001) (disapproved of by, Warner v. Glass, 135 S.W.3d 681 (Tex. 2004)), was expressly disapproved by the decision of the Texas Supreme Court in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16).

In Willingham v. Irons, 2000 WL 145456 (Tex. App. Beaumont 2000), the court declined to determine whether the prisoner mailbox rule should apply absent compliance with Tex. R. Civ. P. 5, concluding that this was not the appropriate case to determine the issue in light of federal procedural law, [35] where the trial court could have rationally rejected the pro se inmate's claim that he placed his petition in this civil rights action in the prison mailbox on the asserted date.

Caution

The decision in Willingham v. Irons, 2000 WL 145456 (Tex. App. Beaumont 2000), was impliedly disapproved by the decision of the Texas Supreme Court in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16).

§ 30. Notice of claim

The following authority held that the prisoner mailbox rule did not apply to the filing of a pro se prisoner's notice of claim, under the facts and circumstances presented.

The court in Espinal v. State, 159 Misc. 2d 1051, 607 N.Y.S.2d 1008 (Ct. Cl. 1993), held that the prisoner mailbox rule did not apply to a pro se inmate's notice of claim against the state for injuries sustained in a prison assault. The prisoner's notice of intention to file a claim against the state was received by the attorney general beyond the statutory 90-day period. The prisoner argued that the notice of intention should be deemed timely because it was delivered to prison officials for mailing before the expiration of the statutory time limitation. The court of claims refused to adopt the prisoner mailbox rule, under which a notice of intention to file a claim against the state would be deemed timely if delivered to prison officials for mailing before the expiration of the statutory time limitation, in view of other safeguards available to pro se inmates. The applicable statute (N.Y. Ct. Cl. Act § 11) required that claims brought in the court of claims must be served on the attorney general by personal service or by certified mail, return receipt requested. By using certified mail, which is available to prisoners, the claimant obtains a signed return receipt that both informs him of the date on which service was completed and can be used as proof of timely service should the need arise. In addition, the court of claims had a practice of acknowledging, in writing, the receipt of every notice of intention and claim. Therefore, a pro se inmate claimant is quickly aware if his notice of intention was either filed or served too late. The court of claims concluded that these various protections provided safeguards over a prisoner's right to bring suit and his ability to monitor the process of his claim that were equal to, if not greater than, those achieved by a prisoner mailbox rule. Thus, the court of claims declined to adopt the prisoner mailbox rule and held that the prisoner's notice of intention was untimely.

§ 31. Notice of appeal

The following authority held that the prisoner mailbox rule did not apply to the filing of a pro se prisoner's notice of appeal in a civil action, under the facts and circumstances presented.

In Richardson v. Nichols, 2006 WL 1044473 (Ky. Ct. App. 2006), the court held that a pro se inmate's notice of appeal to the denial of his motion requesting genetic testing in connection with a family court case was not timely filed, as Kentucky had expressly declined to adopt the prisoner mailbox rule, citing Robertson v. Com., 177 S.W.3d 789 (Ky. 2005) (also discussed in § 24). The notice of appeal was filed more than 30 days after entry of the final order of the family court, and the matter was dismissed. The inmate argued in his motion for reconsideration that he had tendered his notice of appeal and the requisite payment to prison authorities within the time for filing the notice of appeal. In granting the motion to reconsider, said the court, this panel effectively endorsed the prison mailbox rule. Upon closer scrutiny, however, the court noted that Kentucky had not adopted the prison mailbox rule and, thus, the inmate's notice of appeal was clearly untimely.

The court in Johnson v. Purkett, 217 S.W.3d 341 (Mo. Ct. App. E.D. 2007), held that, because Missouri does not recognize a prison mailbox rule in the filing of a notice of appeal, a pro se inmate's appeal from the dismissal of his civil rights claim was not timely perfected. Under Mo. R. Civ. P. 81.04(a), a notice of appeal must be filed no later than 10 days after the judgment becomes final, the court explained. The trial court entered its judgment on May 4, 2006, the court explained, and thus, it became final on June 5, 2006, absent a timely filed postjudgment motion. The inmate filed a motion to reconsider on June 8, 2006, that is, after the judgment became final, and thus, the motion was not timely, said the court. The inmate's notice of appeal was thus due on or before June 15, 2006. The inmate filed two notices of appeal, the first of which, filed on June 8, 2006, was not accepted by the clerk as it was unaccompanied by the requisite filing

fee or a motion to proceed in forma pauperis. The inmate's second notice of appeal, along with his motion to proceed in forma pauperis, was filed on June 21, 2006, and was therefore untimely, the court concluded. Rejecting the inmate's assertion that he placed his notice of appeal in the mail on June 2, 2006, and it was therefore timely, the court reasoned that Missouri does not recognize a prison mailbox rule in the filing of a notice of appeal because Rule 81.04(a) expressly provides that the notice of appeal must be filed with the circuit court within 10 days of the finality of judgment. A paper is filed, the court indicated, when it is received by the proper officer and lodged in his or her office; the date a document is stamped as being received is evidence of the date of receipt, in this case, June 21, 2006, which was untimely.

Addressing the timeliness of a pro se inmate's notice of appeal of a judgment which was received 28 days after the filing deadline, the court in Lamotte v. Stoneberger, 2005 WL 488757 (Tex. App. Beaumont 2005), noted the existence of federal precedent for allowing a notice of appeal to be deemed filed on the date it was delivered to prison authorities, [36] but further noted that Texas courts directly deciding the issue had rejected such an approach, [37] the court ultimately concluded that it need not decide whether to apply the federal rule or to follow prior Texas precedent in this case, because the inmate failed to establish that he delivered the notice of appeal to the prison mail system on or before the filing deadline for filing.

Caution

While not expressly overruling any prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements.

On appeal from a judgment which modified the parent-child relationship between a daughter, her mother, and her inmate father, the court in In re Crawford, 2002 WL 31266123 (Tex. App. Amarillo 2002), held that timely deposit by the inmate-father of his notice of appeal in a prison mail receptacle did not constitute delivery to the proper clerk for filing, nor did such a deposit entitle the inmate to the benefit of the mailbox rule under Tex. R. App. P. 9.2(b)(1). The court, nevertheless, found that a motion for an extension of time was implied in the father's late notice of appeal and, thus, it had jurisdiction to consider the appeal where the father, in good faith, mailed the notice before the time to appeal had expired and the notice was received within 15 days after the filing deadline.

Caution

While not expressly overruling any prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements.

The court in In re K.A.C., Jr., 2002 WL 1492272 (Tex. App. El Paso 2002), held that an inmate father's notice of appeal of an order terminating his right to communicate with his child was not timely filed, noting that, even if it were to take as true the inmate's allegation that the prison mail system prevented him from receiving the order in a timely fashion, it could not entertain his appeal, citing Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000), this section, for the proposition that Tex. R. App. P. 2 (court has no authority to suspend operation of the rules governing the time for perfecting an appeal in a civil case) that prevented application of the mailbox rule to a notice of appeal "posted" in a prison mailbox.

Caution

While not expressly overruling any prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements.

In Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000), the court held that the prisoner mailbox rule did not apply to a pro se prisoner's notice of appeal in a civil action where the prisoner's notice of appeal was filed after the 30-day time period had expired. The prisoner urged the court to apply the federal prisoner mailbox rule set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which held that in federal courts, a pro se prisoner's notice of appeal is deemed filed on the date it is delivered to the prison authorities for forwarding to the trial court clerk. The court concluded, however, that it was not free to apply the federal mailbox rule. The court noted that an appeal is perfected when a written notice of appeal is filed with the trial court clerk or the appellate court clerk. The applicable state procedural rule (Tex. R. App. P. 9.2(a)) provided that a document is filed by delivering it to the clerk of the court or a judge of the court. It would be inconsistent with the literal words of Tex. R. App. P. 9.2(a), the court ruled, to hold that a document is filed with the trial or appellate clerk when it is delivered to the prison authorities. In addition, a prison mail receptacle was not a mailbox for purposes of the limited mailbox rule found in Tex. R. App. P. 9.2(b), as that limited mailbox rule expressly applied only if the document was sent by the United States Postal Service and deposited in the mail on or before the last day for filing. Accordingly, the court dismissed the inmate's appeal as untimely.

Caution

While not expressly overruling Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000), or any other prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements. In so doing, the court in *Ramos* rejected the respondents' assertion therein that placement in the prison mailbox was not equivalent to placing them in the United States mail as required under Tex. R. Civ. P. 5, concluding that it had held on more than one occasion that an inmate who does everything necessary to satisfy timeliness requirements must not be penalized if the document is ultimately filed tardily because of an error on the part of officials over whom the inmate has no control.

§ 32. Postjudgment motion

The following authority held that the prisoner mailbox rule did not apply to the filing of a postjudgment motion filed by a pro se prisoner in a civil action, under the facts and circumstances presented.

In King v. BASF Corp., 2006 WL 1331149 (Tex. App. Houston 14th Dist. 2006), review denied, (Nov. 3, 2006), the court held that the prisoner mailbox rule did not apply to a pro se inmate's postjudgment motion to modify a prior order granting summary judgment in favor of the defendants in the inmate's personal injury action. The order granting summary judgment against the inmate was signed on November 25, 2005. The inmate filed a pro se notice of appeal, albeit to the wrong court, which the court deemed correctly filed with the appropriate court the same day, February 23, 2006. Although the inmate mislabeled his response as a motion to reinstate under Tex. R. Civ. P. 165a, inapplicable in this instance, the court treated it as postjudgment motion seeking to modify the judgment. The inmate asserted that his motion was timely filed on December 12, 2005, when he placed it in the prison mail system; the motion in the court record, however, was file stamped on January 18, 2006, rendering it untimely. In so holding, the court acknowledged

that the Texas Supreme Court, in Warner v. Glass, 135 S.W.3d 681 (Tex. 2004) (also discussed in § 16), held that a pro se inmate's claim under the Inmate Litigation Act is deemed filed at the time the prison authorities duly receive the document to be mailed, the court in the present case declined to extend this interpretation of "filing" to a postjudgment motion, concluding that such an interpretation would contravene the rules governing the finality of judgments. A trial court loses plenary power of the judgment if a timely postjudgment motion is not filed within 30 days after the judgment is signed, the court reasoned, and an order reinstating a cause must be in writing and signed during the trial court's period of plenary power. To have a postjudgment motion received weeks later be considered timely filed because it had earlier been handed to prison mail officials would restore the trial court's plenary jurisdiction beyond the time that the judgment would have become final, the court concluded. Moreover, said the court, it is unclear what proof would be required to establish timely delivery to prison authorities. For these reasons, determined the court, and in the absence of further guidance from the Texas Supreme Court, it would decline to extend the application of *Warner* to these facts, and thus, it did not need to determine whether the inmate's unverified statement would be sufficient to demonstrate delivery.

Caution

Without expressly overruling any prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements.

The court in Wright v. Texas Dept. of Criminal Justice-Institutional Div., 137 S.W.3d 693 (Tex. App. Houston 1st Dist. 2004), held that the prisoner mailbox rule did not apply to render timely the pro se inmate's motion to reinstate a civil action pursuant to Tex. R. Civ. P. 165a(3), where it was filed more than 30 days after the court signed the order of dismissal. In so holding, the court noted, in dicta, that the inmate suggested that the court follow the federal approach set forth in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), which allows the notice of appeal of pro se prisoners to be deemed filed upon the date it is delivered to prison authorities. The court determined, however, that under the current rules of appellate procedure it was not permitted to alter the time allowed for perfecting an appeal in a civil case and was thus unable to apply the federal approach to notices of appeal for pro se prisoners, citing Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000) (also discussed in § 31).

Caution

Without expressly overruling any prior caselaw, the Texas Supreme Court, in Ramos v. Richardson, 228 S.W.3d 671 (Tex. 2007) (also discussed in § 19), held that the prisoner mailbox rule applied to notices of appeal in medical malpractice actions brought by a pro se prisoner and members of his family against a doctor and a hospital after the actions were dismissed by the trial court for noncompliance with applicable expert report requirements.

RESEARCH REFERENCES

West's Key Number Digest
West's Key Number Digest, Appeal and Error 351(1), 428(2), 432
West's Key Number Digest, Constitutional Law 2314, 2315, 2324, 2325
West's Key Number Digest, Courts 80(3), 209(1), 209(2)
West's Key Number Digest, Criminal Law 951(1), 1069(1), 1081(4.1), 1081(5), 1081(6), 1081.5, 1578, 1586, 1657
West's Key Number Digest: Habeas Corpus 664, 668, 677, 817.1
West's Key Number Digest, Pleading 333
West's Key Number Digest, Prisons 9, 10, 12

West's Key Number Digest, Time 3.5, 8.5

Westlaw Databases
Criminal Procedure Handbook (CRIMPRHB)
Trial Motions (MOTIONS)
Postconviction Remedies (PCREM)
Trial Pleadings (PLEADINGS)
Rights of Prisoners (3d ed.) (RGTSPRISON)
State Briefs All (STATE-BRIEF-ALL)
WESTLAW® Search Query: "PRISONER MAILBOX" "PRISON MAILBOX"

A.L.R. Library
A.L.R. Index, Mail and Mailing
A.L.R. Index, Prisons and Prisoners
A.L.R. Index, Time and Date
West's A.L.R. Digest, Appeal and Error 351(1), 428(2), 432
West's A.L.R. Digest, Constitutional Law 2314, 2325
West's A.L.R. Digest, Courts 80(3), 209(1), 209(2)
West's A.L.R. Digest, Criminal Law 1081(4.1), 1578, 1586, 1657
West's A.L.R. Digest, Habeas Corpus 668, 677
West's A.L.R. Digest, Pleading 333
West's A.L.R. Digest, Prisons 9, 10.1
West's A.L.R. Digest, Time 3.5
Validity, Construction, and Application of State Prison Litigation Reform Acts, 85 A.L.R.6th 229
Construction and Application of Interstate Corrections Compact and Implementing State Laws—Equivalency of Conditions and Rights and Responsibilities of Parties, 56 A.L.R.6th 553
Validity, Construction, and Application of Interstate Corrections Compact and Implementing State Laws—Jurisdictional Issues, Governing Law, and Validity and Applicability of Compact, 54 A.L.R.6th 1
Construction and Application of Uniform Mandatory Disposition of Detainers Act, 37 A.L.R.6th 357
Rights of Prisoners in Private Prisons, 119 A.L.R.5th 1
Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 A.L.R.4th 430
Censorship and evidentiary use of unconvicted prisoners' mail, 52 A.L.R.3d 548
Censorship of convicted prisoners' "nonlegal" mail, 47 A.L.R.3d 1192
Censorship of convicted prisoners' "legal" mail, 47 A.L.R.3d 1150
Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 A.L.R. 161
Character and sufficiency of evidence to show that letter was mailed, 86 A.L.R. 541
Presumption as to delivery of letter from mailing other than at postoffice or in street letter box, 63 A.L.R. 931
Determination of Timely Filing of Tax Return, Claim, Statement, or Other Tax Document Under Internal Revenue Code § 7502 (26 U.S.C.A. § 7502), 188 A.L.R. Fed. 1
Validity and Construction of "Three Strikes" Rule Under 28 U.S.C.A. § 1915(g) Barring Prisoners from In Pauperis Filing of Civil Suit After Three Dismissals for Frivolity, 168 A.L.R. Fed. 433
What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 U.S.C.A. § 2254 in federal court of state prisoner's Fourth Amendment claims, 75 A.L.R. Fed. 9
Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus, 60 A.L.R. Fed. 481
Propriety of federal court's considering state prisoner's petition under 28 U.S.C.A. § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631
Relief under Federal Civil Rights Acts to state prisoners complaining of interference with access to courts, 23 A.L.R. Fed. 6

Legal Encyclopedias

Am. Jur. 2d, Appellate Review §§ 311, 342 to 348
Am. Jur. 2d, Clerks of Court § 25
Am. Jur. 2d, Habeas Corpus and Postconviction Remedies § 120
Am. Jur. 2d, Penal and Correctional Institutions §§ 57, 68
C.J.S., Habeas Corpus § 404
C.J.S., Limitations of Actions § 267

Trial Strategy

Pleading and Proving Ineffective Assistance of Counsel in a Federal Habeas Corpus Proceeding: A Primer, 88 Am. Jur. Proof of Facts 3d 1
Prisoners' Rights Litigation, 22 Am. Jur. Trials 1

Law Reviews and Other Periodicals

Harris, Pettibone v. Pennsylvania Board of Probation and Parole: The Commonwealth Court of Pennsylvania Extends the "Prisoner Mailbox Rule" to Pro Se Administrative Appeals Filed With the Board of Probation and Parole, 11 Widener J. Pub. L. 329 (2006)
Substantive Rights Retained by Prisoners, 35 Geo. L.J. Ann. Rev. Crim. Proc. 929 (2006)

Footnotes

1 This annotation supersedes the electronic-only annotation, Construction and Application under Common Law and State Statutes of "Prisoner Mailbox Rule", 2007 A.L.R.6th 8.

2 Determination of Timely Filing of Tax Return, Claim, Statement, or Other Tax Document Under Internal Revenue Code § 7502 (26 U.S.C.A. § 7502), 188 A.L.R. Fed. 1.

3 See State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005).

4 See Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988), referring to Fed. R. App. P. 4(c)(1).

5 See Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988).

6 See State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005).

7 State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000).

8 See State v. Goracke, 210 Ariz. 20, 106 P.3d 1035, 29 A.L.R.6th 745 (Ct. App. Div. 1 2005), review denied, (May 24, 2005).

9 Mayer v. State, 184 Ariz. 242, 908 P.2d 56 (Ct. App. Div. 1 1995).

10 Com. v. Jones, 549 Pa. 58, 700 A.2d 423 (1997).

11 Boofer v. Lotz, 797 A.2d 1047 (Pa. Commw. Ct. 2002), rev'd on other grounds, 577 Pa. 12, 842 A.2d 333 (2004) (allowing appeal nunc pro tunc where there was evidence of an apparent breakdown in prison's mail system).

12 State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976) (also discussed in § 6); State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998) (unpublished opinion) (also discussed in § 8); State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6); Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992) (unpublished opinion) (also discussed in § 19); State v. Anderson, 11 Ohio St. 2d 252, 40 Ohio Op. 2d 217, 228 N.E.2d 312 (1967) (per curiam); State v. Nesbitt, 1984 WL 4579 (Ohio Ct. App. 8th Dist. Cuyahoga County 1984); State v. Bell, 2002-Ohio-2182, 2002 WL 987536 (Ohio Ct. App. 3d Dist. Marion County 2002) (unpublished opinion); and Mosely v. Dragon, 1990 WL 145744 (Ohio Ct. App. 11th Dist. Ashtabula County 1990), dismissed without opinion, 57 Ohio St. 3d 723, 568 N.E.2d 1226 (1991) (unpublished opinion).

13 See also, State v. Cutler, 2000-Ohio-2587, 2000 WL 1617820 (Ohio Ct. App. 7th Dist. Jefferson County 2000) (also discussed in § 21); and State v. Clement, 1995 WL 390795 (Ohio Ct. App. 10th Dist. Franklin County 1995), both noting the conflict between *Williamson* and *Tyler*.

14 Appeal by Christopher J. Golini, in pro per, Docket No. 22890, consolidated for purposes of this appeal with the civil appeal of another pro se inmate (also discussed in § 19).

15 Milton v. Nevada Dept. of Prisons, 119 Nev. 163, 68 P.3d 895 (2003) (also discussed in § 29).

16 Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002) (also discussed in § 24).

17 State v. Westfall, 46 Ohio St. 2d 31, 75 Ohio Op. 2d 97, 346 N.E.2d 282 (1976) (also discussed in § 6); State v. Polen, 1998 WL 404207 (Ohio Ct. App. 7th Dist. Carroll County 1998) (unpublished opinion) (also discussed in § 8); State v. Owens, 121 Ohio App. 3d 34, 698 N.E.2d 1030 (2d Dist. Montgomery County 1997) (also discussed in § 6); Baird v. Bryan, 1992 WL 154162 (Ohio Ct. App. 4th Dist. Ross County 1992) (unpublished opinion) (also discussed in § 19); State v. Anderson, 11 Ohio St. 2d 252, 40 Ohio Op. 2d 217, 228 N.E.2d 312 (1967) (per curiam); State v. Nesbitt, 1984 WL 4579 (Ohio Ct. App. 8th Dist. Cuyahoga County 1984); State v. Bell, 2002-Ohio-2182, 2002 WL 987536 (Ohio Ct. App. 3d Dist. Marion County 2002) (unpublished opinion); and Mosely v. Dragon, 1990 WL 145744 (Ohio Ct. App. 11th Dist. Ashtabula County 1990), dismissed without opinion, 57 Ohio St. 3d 723, 568 N.E.2d 1226 (1991) (unpublished opinion).

18 See also, State v. Cutler, 2000-Ohio-2587, 2000 WL 1617820 (Ohio Ct. App. 7th Dist. Jefferson County 2000) (also discussed in § 21); and State v. Clement, 1995 WL 390795 (Ohio Ct. App. 10th Dist. Franklin County 1995), both noting the conflict between *Williamson* and *Tyler*.

19 Lovelace v. Board of Parole and Post-Prison Supervision, 188 Or. App. 35, 69 P.3d 1234 (2003) (also discussed in § 15) (declining to apply prisoner mailbox rule to pro se inmate's petition seeking judicial review of an order of the state parole board, which was governed by agency rules); Norby v. Santiam Correctional Inst., 116 Or. App. 239, 841 P.2d 1 (1992) (also discussed in § 26) (declining to apply prisoner mailbox rule to pro se inmate's petition for review of an administrative prison disciplinary determination, governed by state statute, former Or. Rev. Stat. § 19.028).

20 Citing, inter alia, State ex rel. Shimkus v. Sondalle, 239 Wis. 2d 327, 2000 WI App 238, 620 N.W.2d 409 (Ct. App. 2000), this section.

21 For a more detailed discussion of the court's rationale in adopting the prisoner mailbox tolling rule, see § 4.

22 Accord In re Crawford, 2002 WL 31266123 (Tex. App. Amarillo 2002); and In re K.A.C., Jr., 2002 WL 1492272 (Tex. App. El Paso 2002) (also discussed in § 31), both citing *Kinnard*.

23 Appeal by William A. Kellogg, in pro per, Docket No. 22561, consolidated for purposes of this appeal with the criminal appeal of another pro se inmate (also discussed in§ 7).

24 Milton v. Nevada Dept. of Prisons, 119 Nev. 163, 68 P.3d 895 (2003) (also discussed in § 29).

25 Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002) (also discussed in § 24).

26 Accord In re Crawford, 2002 WL 31266123 (Tex. App. Amarillo 2002); and In re K.A.C., Jr., 2002 WL 1492272 (Tex. App. El Paso 2002) (also discussed in § 31), both citing *Kinnard*.

27 Accord In re Crawford, 2002 WL 31266123 (Tex. App. Amarillo 2002); and In re K.A.C., Jr., 2002 WL 1492272 (Tex. App. El Paso 2002) (also discussed in § 31), both citing *Kinnard*.

28 As to the application of the prisoner mailbox rule to an appeal from an order denying a motion to withdraw a guilty plea, see § 21.

29 Citing Hamel v. State, 338 Ark. 769, 1 S.W.3d 434 (1999), this section.

30 Milton v. Nevada Dept. of Prisons, 119 Nev. 163, 68 P.3d 895 (2003) (also discussed in § 29).

31 Referring to State v. Smith, 123 Ohio App. 3d 48, 702 N.E.2d 1245 (2d Dist. Montgomery County 1997), this section; and State v. Finfrock, 1998 WL 726478 (Ohio Ct. App. 2d Dist. Montgomery County 1998).

32 Referring to State v. Bowens, 1998 WL 553049 (Ohio Ct. App. 11th Dist. Ashtabula County 1998); and State v. Vroman, 1997 WL 193168 (Ohio Ct. App. 4th Dist. Ross County 1997), both discussed this section.

33 Renumbered in 1997 to Or. Rev. Stat. § 19.260.

34 Lovelace v. Board of Parole and Post-Prison Supervision, 188 Or. App. 35, 69 P.3d 1234 (2003) (declining to apply prisoner mailbox rule to pro se inmate's petition seeking judicial review of an order of the state parole board, which was governed by agency rules) (also discussed in § 15); Norby v. Santiam Correctional Inst., 116 Or. App. 239, 841 P.2d 1 (1992) (declining to apply prisoner mailbox rule to pro se inmate's petition for review of an administrative prison disciplinary determination, governed by state statute, former Or. Rev. Stat. § 19.028) (also discussed in § 26).

35 Citing Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988).

36 Citing Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245, 11 Fed. R. Serv. 3d 849 (1988).

37 Citing Wright v. Texas Dept. of Criminal Justice-Institutional Div., 137 S.W.3d 693 (Tex. App. Houston 1st Dist. 2004) (also discussed in § 32); and Kinnard v. Carnahan, 25 S.W.3d 266 (Tex. App. San Antonio 2000), this section.

End of Document

936 P.2d 1118
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Terence L. PARKER, Defendant and Appellant.

No. 940735-CA.
|
April 10, 1997.

Defendant was convicted in the District Court, Salt Lake Department, Tyrone Medley, J., of attempted burglary, and he appealed. The Court of Appeals dismissed defendant's appeal as untimely, and defendant filed petition for rehearing. On rehearing the Court of Appeals, Billings, J., held that prison delivery rule did not apply in determining whether defendant's notice of appeal was timely filed.

Affirmed.

Attorneys and Law Firms

***1118** Terence Lee Parker, West Jordan, Pro Se.

Jan Graham and Thomas B. Brunker, Salt Lake City, for Plaintiff and Appellee.

Before WILKINS, Associate P.J., and BILLINGS and ORME, JJ.

OPINION

BILLINGS, Judge:

Defendant Terence L. Parker seeks reversal of our prior ruling dismissing his appeal for lack of jurisdiction because his notice of appeal was filed with the district court clerk more than thirty days after entry of judgment. After considering his petition for rehearing, we dismiss defendant's appeal.

FACTS

Defendant pleaded guilty to attempted burglary. The trial court held the plea in abeyance pending defendant's compliance with certain conditions. Defendant failed to comply with one condition, and the trial court ruled that defendant had violated the terms of the plea-in-abeyance agreement and accepted defendant's guilty plea. Defendant was incarcerated at the Utah State Prison.

The trial court entered its judgment on October 25, 1994. Defendant dated his notice of appeal November 18, 1994, and certified that he mailed the notice through the prison mail on November 19, 1994. The district court clerk did not date stamp his notice of appeal until nine days later-November 28, 1994. With the notice of appeal, ***1119** defendant included a Motion for Extension dated November 19, 1994, which also was date stamped on November 28, but the trial court never acted on the motion.

Defendant timely filed with this court his Docketing Statement on December 21, 1994, and his brief on July 21, 1995. On September 13, 1995, the State moved, under Utah Rule of Appellate Procedure 10, to dismiss defendant's appeal for lack of jurisdiction because he filed his notice of appeal one day after the time limit. [1] This court dismissed defendant's appeal in an unpublished memorandum decision on October 19, 1995, concluding this court lacked jurisdiction to extend the time for filing a notice of appeal.

Defendant then filed a petition for rehearing, which this court granted. This court ordered the case remanded to the trial court for a ruling on defendant's timely motion to extend the time for appeal. On remand, the trial court denied defendant's motion to extend the time for appeal. Based on the trial court's denial of the motion, this court ordered plenary consideration of the issue now before us: Whether the "prison delivery rule" should be adopted and applied to interpret Rule 4 of the Utah Rules of Appellate Procedure, thereby making defendant's appeal timely.

ANALYSIS

Defendant argues this court should not have dismissed his appeal as untimely because we should adopt the "prison delivery rule," articulated by the United States Supreme Court in *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), to interpret our state rules of appellate procedure. In response, the State argues we have

already rejected the prison delivery rule in *State v. Palmer,* 777 P.2d 521 (Utah Ct.App.1989) (per curiam).

In *Palmer,* this court summarily dismissed, in a per curiam opinion, a pro se prisoner's appeal because his notice of appeal was filed more than thirty days after entry of judgment. *See id.* at 523 (per curiam). The *Palmer* court concluded "the notice of appeal was not timely filed under any plausible interpretation of our rules." *Id.* at 522 (per curiam). The court reasoned that Rule 4 provides that a notice of appeal must be "filed" with the trial court, and that "[t]o hold that filing in the trial court is complete upon mailing is inconsistent" with the plain language of Rule 4. *Id.* (per curiam). However, the *Palmer* court did not discuss nor mention *Houston*' s prison delivery rule. Therefore, we take this opportunity to specifically consider whether *Houston* 's prison delivery rule should be adopted in Utah.

In *Houston v. Lack,* 487 U.S. 266, 268-69, 108 S.Ct. 2379, 2381, 101 L.Ed.2d 245 (1988), a pro se prisoner sought appellate review of a federal district court judgment dismissing his pro se habeas corpus petition. The prisoner deposited his notice of appeal with prison authorities three days before the deadline, but the notice was not filed by the district court clerk until one day after the deadline. *See id.* The United States Supreme Court held that an incarcerated pro se prisoner's notice of appeal was timely filed when the prisoner delivered it to prison authorities for forwarding to the district court clerk within the thirty-day period required by Federal Rule of Appellate Procedure 4(a)(1). *See id.* At the time of *Houston,* Federal Rule of Appellate Procedure 4(a)(1) was nearly identical to the current version of Utah Rule of Appellate Procedure 4(a).[2] *See Houston,* 487 U.S. at 276, 108 S.Ct. at 2385.

Because *Houston* was an interpretation of the federal rules, we are not bound by its holding. However, most states have considered *Houston* to be persuasive authority. *See, e.g.,* ***1120** *Mayer v. State,* 184 Ariz. 242, 908 P.2d 56, 58 (Ct.App.1995); *Commonwealth v. Hartsgrove,* 407 Mass. 441, 553 N.E.2d 1299, 1302 (1990); *Hickey v. Oregon State Penitentiary,* 127 Or.App. 727, 874 P.2d 102, 105 (1994). Similarly, in construing other procedural rules, Utah courts have recognized that when the Utah rule "is essentially similar" to the federal rule of procedure, "in addition to applicable Utah cases, we look to the abundant federal experience in the area for guidance." *Landes v. Capital City Bank,* 795 P.2d 1127, 1130 (Utah 1990); *see also Miller v. Brocksmith,* 825 P.2d 690, 693 (Utah Ct.App.1992) (recognizing when a federal and state rule of procedure "are substantively identical, 'we freely refer to authorities which have interpreted the federal rule' " (quoting *Gold Standard, Inc. v. American Barrick Resources Corp.,* 805 P.2d 164, 168 (Utah 1990))); *State v. Pearson,* 818 P.2d 581, 583 (Utah Ct.App.1991) ("While this issue is one of first impression in this state, it has been addressed by the federal courts. We may look to federal cases in interpreting the rules when the Utah and federal rules are identical.").

Utah Rule of Appellate Procedure 4(a) provides:

> In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by rule 3 *shall be filed with the clerk of the trial court within 30 days after date of entry of the judgment or order appealed from.*

(Emphasis added.)

The plain language of Rule 4 provides that an appellant must file his or her notice of appeal in the district court within thirty days. When the language of a rule or statute is unambiguous, we have consistently held that a court must follow its plain meaning. *See Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick,* 890 P.2d 1017, 1020 (Utah 1995) (" 'When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction.' " (citation omitted)); *Bonham v. Morgan,* 788 P.2d 497, 500 (Utah 1989) (per curiam) ("Unambiguous language in the statute may not be interpreted to contradict its plain meaning."); *Allred v. Utah State Retirement Bd.,* 914 P.2d 1172, 1175 (Utah Ct.App.1996) (concluding that "[u]nless statutory language is 'unreasonably confused, inoperable, [ ]or in blatant contradiction to the express purpose of the statute,' this court applies the statute's literal wording" (citation omitted) (alteration in original)). Therefore, we decline to stretch the plain meaning of Rule 4 to encompass the prison delivery rule.

Our approach is consistent with that taken by other states faced with this issue. In *Talley v. Diesslin,* 908 P.2d 1173,

1175 (Colo.Ct.App.1995), the Colorado Court of Appeals refused to adopt the prison delivery rule in a case involving the timeliness of a prisoner's pro se complaint filed in district court, which sought review of a Department of Correction's disciplinary order. The court reasoned that if "the provision of the rule under consideration is unambiguous, we must apply the plain meaning rule of statutory construction and construe the rule as written." *Id.* Therefore, the court concluded the prison delivery rule was contrary to the plain language of its procedural rule. *See id.* Also, in *State ex rel. Tyler v. Alexander,* 52 Ohio St.3d 84, 555 N.E.2d 966, 967 (1990) (per curiam), the Ohio Supreme Court refused to adopt the prison delivery rule, concluding the plain language of " 'filed in the court from which the case is appealed' " could not be construed to mean " 'delivered to the prison mail room.' "

Nevertheless, the reasoning of *Houston* and the policies underlying the prison delivery rule are compelling. If we were in a position to write appellate procedural rules, we might well conclude a rule for pro se prisoners-such as the current Federal Rule of Appellate Procedure 4(c), which incorporates the prison delivery rule [3] -makes sense.

***1121** In holding the filing was timely, the *Houston* Court emphasized that an incarcerated pro se defendant's lack of control over the filing of his or her notice of appeal is unique. The Court's language is worth quoting at length:

> Such prisoners cannot take 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. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. 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. And if other litigants do choose to use the mail, they can at least ... follow [the notice's] progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to prison authorities, he can never be *sure* that it will ultimately get stamped "filed" on time.

Houston, 487 U.S. at 270-71, 108 S.Ct. at 2382.

The Court noted "the rationale for concluding that receipt constitutes filing in the ordinary civil case is that the appellant has no control over delays between the court clerk's receipt and formal filing of the notice." *Id.* at 273, 108 S.Ct. at 2383-84. In applying that rationale to the context of a pro se prisoner, the Court concluded the time of filing should be the moment at which the pro se prisoner loses control over and contact with the notice of appeal-i.e., at the moment of delivery to prison authorities. *See id.* at 276, 108 S.Ct. at 2385.

> Unskilled in law, unaided by counsel, and unable to leave the prison, [a pro se prisoner's] control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access-the prison authorities.

Id. at 271, 108 S.Ct. at 2382-83.

Furthermore, the Court recognized that the rejection of the mailbox delivery rule in other contexts has been based, in part, on concerns of uncertainty over when filing occurred. *See id.* at 275, 108 S.Ct. at 2384. However, in the context of a pro se prisoner, there is not the same concern because a well-run prison will invariably keep a log of outgoing mail and/or date stamp the mail it receives from prisoners. Thus, the prison delivery rule is a "bright-line rule." 487 U.S. at 275, 108 S.Ct. at 2385.

We understand why many of our sister states have decided to adopt *Houston*'s interpretation of the federal rules to their own state rules of procedure. [4]

***1122** However, we conclude adoption of such a rule exceeds our authority and should be left to our supreme court, which has the ultimate authority for drafting our rules of appellate procedure. *See Talley,* 908 P.2d at 1175 (concluding "authority to adopt rules relative to review of decisions pursuant to [Colorado rules of procedure] is the sole function of [the state's] supreme court"); *Turner v. Commonwealth,* 137 Pa.Cmwlth. 609, 587 A.2d 48, 49 (1991) ("Even if this Court wished to follow *Houston,* it has no authority to adopt a rule which is in direct contravention with [a state appellate rule], a rule promulgated by our own Pennsylvania Supreme Court. Any such revision of that rule would have to come from the court which promulgated it."). [5]

CONCLUSION

We decline to adopt *Houston* 's prison delivery rule as it is not consistent with the plain language of Utah Rule of Appellate Procedure 4. Therefore, we affirm our prior ruling dismissing defendant's appeal for lack of jurisdiction.

All Citations

936 P.2d 1118, 314 Utah Adv. Rep. 58

Footnotes

1 Defendant's notice of appeal was due on Friday, November 25, 1994, which makes the date his notice was filed, Monday, November 28, 1994, one day past the thirty-day limit provided by Utah Rule of Appellate Procedure 4.

2 Federal Rule of Appellate Procedure 4(a)(1) (amended 1993) provided:

> 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....

3 Federal Rule of Appellate Procedure 4 was amended in 1993 to reflect the prison delivery rule. Thus, the prison delivery rule is now firmly established in the federal system. *See* Fed. R.App. P. 4(c) ("If an inmate confined in an institution files a notice of appeal in either a civil case or a 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.").

4 The states adopting the prison delivery rule include Alabama, Arizona, California, Florida, Louisiana, Massachusetts, Nevada, Oklahoma, and Oregon. *See Holland v. State,* 621 So.2d 373, 375 (Ala.Crim.App.1993); *Mayer v. State,* 184 Ariz. 242, 908 P.2d 56, 59 (Ct.App.1995); *In re Jordan,* 4 Cal.4th 116, 13 Cal.Rptr.2d 878, 887, 840 P.2d 983, 992 (1992); *Haag v. State,* 591 So.2d 614, 617 (Fla.1992); *Tatum v. Lynn,* 637 So.2d 796, 799 (La.Ct.App.1994); *Commonwealth v. Hartsgrove,* 407 Mass. 441, 553 N.E.2d 1299, 1302 (1990); *Kellogg v. Journal Communications,* 108 Nev. 474, 835 P.2d 12, 13 (1992) (per curiam); *Woody v. State,* 833 P.2d 257, 259 (Okl.1992); *Hickey v. Oregon State Penitentiary,* 127 Or.App. 727, 874 P.2d 102, 104-05 (1994).

> The states rejecting the prison delivery rule include Arkansas, Delaware, Montana, New York, Ohio, and Pennsylvania. *See Key v. State,* 297 Ark. 111, 759 S.W.2d 567, 568 (1988) (per curiam); *Carr v. State,* 554 A.2d 778, 780 (Del.1989) (per curiam); *O'Rourke v. State,* 782 S.W.2d 808, 809 (Mo.Ct.App.1990) (per curiam); *Espinal v. State,* 159 Misc.2d 1051, 607 N.Y.S.2d 1008 (Ct.Cl.1993); *State ex rel. Tyler v. Alexander,* 52 Ohio St.3d 84, 555 N.E.2d 966, 967 (1990) (per curiam); *Turner v. Commonwealth,* 137 Pa.Cmwlth. 609, 587 A.2d 48, 49 (1991).

5 We note that we do not reach the issue of whether our strict application of Rule 4 violates a pro se prisoner's due process or equal protection rights because these issues have not been sufficiently briefed and the record before us precludes an adequate exploration of these important issues. *See Gramlich v. Munsey,* 838 P.2d 1131, 1132 (Utah 1992); *State v. Yates,* 834 P.2d 599, 602 (Utah Ct.App.1992). However, we note that other courts have found application of similar

appellate procedural rules violated pro se prisoners' equal protection rights in certain circumstances. *See People v. Slobodion,* 30 Cal.2d 362, 181 P.2d 868, 872 (1947); *Haag,* 591 So.2d at 617.

End of Document

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 10, 2016
Re: Rule 84. Forms.

The Management Committee of the Utah Judicial Council recently approved the creation of a standing committee on court forms. They have asked that the rules creating the committee be adopted on an expedited basis, which the Policy and Planning Committee will do in December. In light of this new body and its charge to address all court forms, Rule 84 should be repealed due to its near future obsolescence.

This step in Utah will also be in line with our federal counterpart's recent action. Recognizing the many alternative sources for forms on its rules, the Federal Civil Rules Committee abrogated its own Rule 84 effective December 1, 2015.

As an aside, Rule 84's language was problematic anyway. It states that the forms are sufficient under the rules, but were in fact never reviewed by the Utah Supreme Court for sufficiency. So that statement is a fallacy and should have already been stricken.

~~**Rule 84. Forms.**~~

~~The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.~~

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 10, 2016
Re: Rule 37

The 2015 amendments to Federal Rule of Civil Procedure 37(e) address failure to preserve electronically stored information. The committee determined at its March meeting that Utah should adopt the federal amendments. Utah's rule 37(e), though, addresses not only electronically stored information, but also other, non-electronically stored information. I have taken the federal language and merged it into Utah's language so that the rule continues to address the non-electronically stored information and now better addresses the electronically stored information.

Following our September meeting, Paul Stancil asked me to look into case law on "the inherent power of the court" to sanction parties (this language is found in paragraph (e)). Paul said that it is worthwhile to look at the interplay between the court's inherent power and the proposed language in paragraph (e)(1). Attached is a memo my extern, Randall Morris, prepared with this research.

In an email to the committee prior to the October meeting, Paul made the following comment about these proposed changes:

> First, the basic idea is one that our entire subcommittee endorsed: it makes sense for Utah to embrace the principles underlying the new FRCP 37(e), which limits the sanctions available to the court in connection with failure to preserve Electronically Stored Information (ESI). Specifically, the new federal rule takes so-called "death penalty" sanctions (adverse inference instruction or presumption/dismissal or default judgment) off the table as sanctions for failure to preserve ESI unless the court finds that a party "acted with the intent to deprive another party of the information's use in the litigation." We unanimously agreed that this was a good approach.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Second, I am in favor of the language Nancy provided in connection with today's meeting. I still think we may need one additional clause at the beginning of R.37(b): "Except as provided in Rule 37(e), . . ."

Third, the discussion about inherent power/inherent authority is included in your materials because of the way in which our existing Rule 37 is drafted. Our current rule 37(e) states:

"Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty."

Because URCP 37(b) includes both dismissal and adverse inference among the sanctions available to the court, I asked Nancy to take a look at Utah law regarding inherent power; my read of the memo suggests that the Utah Supreme Court is unlikely to see much problem with the proposed revision. The Court of Appeals decision Nancy's extern cites, is effectively agnostic on whether there should be an intent requirement for a dismissal/default judgment sanction, and does not need to reach that question because the district court had found that statements like, "If [throwing a laptop computer off a building and running it over with a vehicle] gets into trouble, I hope we're prison buddies" suggested intentional conduct.

Long story short, I would either amend the rule as proposed, or add a clause at the beginning of R. 37(b) further clarifying that the listed sanctions are available only to the extent consistent with the limitations in the amended R. 37(e).

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(a)(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(a)(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(6)(A) decide the issues on the pleadings and papers;

(a)(6)(B) conduct a hearing by telephone conference or other electronic communication; or

(a)(6)(C) order additional briefing and establish a briefing schedule.

(a)(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) that the discovery not be had or that additional discovery be had;

(a)(7)(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(a)(7)(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(a)(7)(E) that discovery be conducted with no one present except persons designated by the court;

(a)(7)(F) that a deposition after being sealed be opened only by order of the court;

(a)(7)(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(a)(7)(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(a)(7)(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(a)(7)(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(a)(7)(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(a)(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(a)(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b) Motion for sanctions. Except as provided in paragraph (e), ~~U~~unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(b)(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(b)(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(b)(3) stay further proceedings until the order is obeyed;

(b)(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(b)(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(b)(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable

costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(c)(1) the request was held objectionable pursuant to Rule 36(a);

(c)(2) the admission sought was of no substantial importance;

(c)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(c)(4) that the request was not proportional under Rule 26(b)(2); or

(c)(5) there were other good reasons for the failure to admit.

(d) Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e) Failure to preserve evidence. Except as provided in paragraph (e)(1), ~~N~~nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, ~~electronic data~~ or other evidence in violation of a duty.

(e)(1) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(e)(1)(A) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(e)(1)(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(e)(1)(B)(1) presume that the lost information was unfavorable to the party;

(e)(1)(B)(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(e)(1)(B)(3) dismiss the action or enter a default judgment.

(e)(1)(C) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

New note (add to Advisory Committee Notes):

The 2016 amendments to paragraph (e) merged the 2015 amendments to Federal Rule of Civil Procedure 37(e). The federal amendments “addressed the serious problems resulting from the continued exponential growth in the volume of [electronically-stored] information” by providing “measures a court may employ if information that should have been preserved is lost.” Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Unlike the federal rule, Utah’s rule 37(e) also addressed non-electronically stored evidence. The committee preserved the language addressing that subject.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Currentness

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; amended by Pub.L. 96-481, Title II, § 205(a), October 21, 1980, 94 Stat. 2330, effective October 1, 1981; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711."

1970 Amendment

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth v. Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa.1948); *Campbell v. Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y.1951). In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson v. Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489-490 (1958).

Subdivision (a). Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1). This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has "inherent power" to compel a party deponent to answer. *Lincoln Laboratories, Inc. v. Savage Laboratories, Inc.*, 27 F.R.D. 476 (D.Del.1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2). This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3). This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g.*, *Cone Mills Corp. v. Joseph Bancroft & Sons Co.*, 33 F.R.D. 318 (D.Del.1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4). This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial

justification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust--as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b). This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, "Contempt" and "Other Consequences," respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to reflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery--*e.g.*, Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g.*, *United Sheeplined Clothing Co. v. Arctic Fur Cap Corp.*, 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y.1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c). Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party give inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp. v. National Theatres Corp.*, 15 F.R.D. 339 (E.D.N.Y.1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co. v. Stern, Morgenthau & Co.*, 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp. v. Hudson Lumber Co.*, 127 F.Supp. 489, 497-498 (S.D.N.Y.1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 426-430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d). The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. E.g., *Gill v. Stolow*, 240 F.2d 669 (2d Cir.1957); *Saltzman v. Birrell*, 156 F.Supp. 538 (S.D.N.Y.1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554-557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfullness. E.g., *Milewski v. Schneider Transportation Co.*, 238 F.2d 397 (6th Cir.1956); *Dictograph Products, Inc. v. Kentworth Corp.*, 7 F.R.D. 543 (W.D.Ky.1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn v. Pa. R.R.*, 96 F.Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc. v. United Packinghouse Workers*, 26 F.R.D. 139 (D.Kans.1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins v. Wayland*, 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois v. El Paso Natural Gas Co.*, 20 F.R.D. 358 (S.D.N.Y.1957); *Loosley v. Stone*, 15 F.R.D. 373 (S.D.Ill.1954), with *Scarlatos v. Kulukundis*, 21 F.R.D. 185 (S.D.N.Y.1957); *Ross v. True Temper Corp.*, 11 F.R.D. 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra*, 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, *Federal Practice and Procedure* 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, *Federal Practice and Procedure* 306-307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell v. General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y.1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. Cf. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Subdivision (e). The change in the caption conforms to the language of 28 U.S.C. § 1783, as amended in 1964.

Subdivision (f). Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rep.No. 1535, 89th Cong., 2d Sess., 2-3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

1980 Amendment

Subdivision (b)(2). New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

Subdivision (e). Subdivision (e) is stricken. Title 28, U.S.C. § 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

Subdivision (g). New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. § 2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase “after opportunity for hearing” is changed to “after affording an opportunity to be heard” to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.*, the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

2000 Amendment

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see 8 Federal Practice & Procedure* § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure "to amend a prior response to discovery as required by Rule 26(e)(2)." In addition, one minor phrasing change is recommended for the Committee Note.

2006 Amendment

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" -- the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

2007 Amendment

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2013 Amendment

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

Changes Made After Publication and Comment

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial" were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

2015 Amendment

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources -- statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control -- the computer room may be flooded, a “cloud” service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

Notes of Decisions (2801)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
Including Amendments Received Through 2-1-16

End of Document

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Nancy Sylvester
From: Randy Morris
Date: September 30, 2016
Re: Rule 37(e) and "inherent power"

The Utah Supreme Court in *Goggin* strongly suggested that courts have the inherent power to sanction both attorneys and parties. "It is well established that courts have inherent powers to sanction attorneys. And although we have never held that courts possess a similar inherent power to sanction parties, we have suggested that such a power may exist. Specifically, in upholding a court's award of attorney fees as a sanction for an *attorney's* bad behavior, we noted that 'such awards are within the inherent powers of the court and are in fact imposed regularly as a means of controlling the conduct of attorneys *and litigants.*' Additionally, the Utah Court of Appeals has expressly held that, under the court's inherent sanction power, courts may properly award attorney fees that were caused by the opposing *party's* misbehavior." *Goggin v. Goggin*, 2013 UT 16, ¶ 35. If the inherent sanction power of courts extends to parties, then it exists independent of any statutory grant of authority. *See Maxwell v. Woodall*, 2014 UT App 125, ¶ 6. Based on Justice Durham's opinion in *Goggin* and other considerations, I believe the sanction powers of courts *does* extend to parties that don't properly preserve electronically stored information.

Doctrine of Unclean Hands

"The doctrine of unclean hands expresses the principle that 'a party [who] comes into equity for relief ... must show that his ... conduct has been fair, equitable, and honest as to the particular controversy in issue.' In other words, a party will not be permitted to take advantage of his own wrongdoing or claim the benefit of his own fraud." *Goggin v. Goggin*, 2013 UT 16, ¶ 60. This is exactly the principle being incorporated into Rule 37(e). Rule 37(e)(1)(A) – (C) only applies to "electronically stored information that should have been preserved in the anticipation or conduct of litigation." When a party fails to follow basic discovery rules, putting the opposing party at a disadvantage, that party should not benefit from their own wrongdoing. Rule 37(e)(1)(B)(1) – (3) allows the court to correct the effects of such misconduct by removing the advantage gained by the wrongdoing party.

Statutory Grant of Sanction Powers

"Every court has authority to:
…
(3) provide for the orderly conduct of proceedings before it or its officers;
(4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;
(5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;" Utah Code Ann. § 78A-2-201. The court has authority granted by statute to control the proceedings before it and maintain order. This authority would be meaningless without an enforcement mechanism. *See Barnard v. Wassermann*, 855 P.2d 243, 249 (Utah 1993). Allowing for the mishandling or destruction of electronically stored information without balancing it with a remedy would make 78A-2-201 meaningless. Rule 37(e)(1)(B)(1) – (3) provides a remedy that allows the court to maintain order in the proceedings before it.

Discovery Sanctions Currently – Rule 37

Currently, courts "are given broad discretion regarding the imposition of discovery sanctions." *Darrington v. Wade*, 812 P.2d 452, 457 (Utah.Ct.App.1991). Case law allows for discovery sanctions under Rule 37 when a court finds "willfulness, bad faith, or fault" in the non-complying party. *See Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997). Rule 37(e)(1)(A) continues to give the courts broad discretion. The only limitation is that the measures taken must be "no greater than necessary to cure the prejudice." When the court finds that the noncompliant party acted with intent, it allows for three extreme measures: (1) a presumption that the lost information was unfavorable to the party, (2) instructions to the jury to presume that the lost information was unfavorable to the party, (3) dismissing the action or entering a default judgment. The third remedy, dismissing the action, has been found to be within the courts' discretion under the current language of Rule 37. *See Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997). In the context of sanctions for destruction of electronic data, the court has also held that a default judgment was appropriate following the destruction of a laptop, even without a finding that the destruction was willful. *Daynight, LLC v. Mobilight, Inc.*, 248 P.3d 1010. Given the broad discretion granted to the courts under the current language of Rule 37, all the remedies provided in Rule 37(e)(1)(B)(1) – (3) should be available under current law, especially since Rule 37(e)(1) & (2) are less drastic than dismissal of the case.

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: November 10, 2016
Re: Rule 60 and *Logue v. Court of Appeals*, 2016 UT 44

This item is informational only. In *Logue v. Court of Appeals*, 2016 UT 44, the Supreme Court directed its advisory committees to address an important procedural issue raised by Mr. Logue regarding newly discovered evidence and a request for a new trial.

Mr. Logue was convicted in 2015 for aggravated murder, his conviction based in part on the testimony of a prison witness. While Mr. Logue's appeal was pending, the prison witness, Brandon Wright, confessed to an unrelated 20-year-old murder. Mr. Logue petitioned for—and was denied—extraordinary relief for purposes of seeking a new trial based on newly discovered evidence. He argued that denying him relief means he must wait months or years to pursue a new trial due to his pending direct appeal. The Utah Supreme Court said it "share[d] Mr. Logue's concerns that there may be a period of time during which defendants in Mr. Logue's shoes are procedurally unable to press potentially meritorious claims." But as the rules currently read, the Court could not grant the relief he requested. The court noted,

> Rule 24(c) of the Utah Rules of Criminal Procedure generally requires that a motion for new trial be made "not later than 14 days after entry of the sentence." The Utah Rules of Civil Procedure likewise require litigants to seek relief from judgment based on new evidence no later than ninety days from the entry of judgment against them. See UTAH R. CIV. P. 60(b)(2), (c).1 Moreover, it appears that Mr. Logue may not petition for postconviction relief until he exhausts his direct appeal. See UTAH CODE §§ 78B-9-102(1), 78B-9-107(1)–(2).2 Thus, it appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial.

Id. ¶ 5

Jonathan Hafen and I are meeting with the Supreme Court on Monday, November 14 to discuss this issue. We expect that they will form a subcommittee with representatives from the Appellate, Criminal and Civil Rules committees to explore and address it.

This opinion is subject to revision before publication in the Pacific Reporter

2016 UT 44

IN THE

SUPREME COURT OF THE STATE OF UTAH

DANNY LOGUE,
Petitioner,

v.

COURT OF APPEALS, STATE OF UTAH, and THIRD DISTRICT COURT,
Respondents.

No. 20160498
Filed October 20, 2016

Fourth District, Provo
The Honorable Derek P. Pullan
No. 111401543

On Petition for Extraordinary Writ

Attorneys:

Herschel Bullen, Salt Lake City, for petitioner

Sean D. Reyes, Att'y Gen., Tyler R. Green, Solic. Gen.,
Thomas B. Brunker, Deputy Solic. Gen., Mark C. Field, Asst. Solic. Gen.,
Salt Lake City, for respondents

Nancy J. Sylvester, Salt Lake City, for respondent
Administrative Office of the Courts

PER CURIAM:

¶ 1 In a petition for extraordinary relief, Danny Logue asks us to direct the district court to entertain a motion for a new trial based on newly discovered evidence, despite the fact that the time for filing such a motion has already expired. We deny Mr. Logue's petition for two reasons: (1) it fails to comply with the pleading requirements prescribed in rule 19(b) of the Utah Rules of Appellate Procedure, and (2) Mr. Logue has failed to carry his burden of showing that the newly

discovered impeachment evidence in this case justifies our granting extraordinary relief.

¶ 2 After a fourteen-day jury trial, Mr. Logue was convicted of aggravated murder, possession of a dangerous weapon by restricted person, and obstruction of justice. Brandon Wright was one of the State's witnesses at trial. He testified that Mr. Logue admitted to the aggravated murder in 2014 when they were both serving prison time on the same cell block. The jury also heard evidence of Mr. Wright's lengthy criminal record, including his prior gang affiliation.

¶ 3 Mr. Logue was sentenced on May 14, 2015. He filed a motion for a new trial, which was denied on December 9, 2015. On December 28, 2015, he filed his notice of appeal. Approximately three months later, while Mr. Logue's appeal was pending, Mr. Wright walked into a police station and confessed to an unrelated twenty-year-old murder.

¶ 4 Mr. Logue now petitions for extraordinary relief based on Mr. Wright's confession. Mr. Logue argues that unless we exercise our authority to issue an extraordinary writ, he will be unable to seek a new trial based on this newly discovered evidence until after he has exhausted his direct appeal—a process that could take months or years.

¶ 5 We broadly take Mr. Logue's point. Rule 24(c) of the Utah Rules of Criminal Procedure generally requires that a motion for new trial be made "not later than 14 days after entry of the sentence." The Utah Rules of Civil Procedure likewise require litigants to seek relief from judgment based on new evidence no later than ninety days from the entry of judgment against them. *See* UTAH R. CIV. P. 60(b)(2), (c).[1] Moreover, it appears that Mr. Logue may not petition for postconviction relief until he exhausts his direct appeal. *See* UTAH CODE §§ 78B-9-102(1), 78B-9-107(1)–(2).[2] Thus, it appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal

---

[1] The Utah Rules of Civil Procedure may apply in criminal proceedings when "there is no other applicable statute or rule." UTAH R. CIV. P. 81(e).

[2] Because Mr. Logue does not seek to raise a claim of factual innocence, we do not reach whether factual innocence claims may be exempt from this limitation. *See* UTAH CODE § 78B-9-402.

before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial.

¶ 6 We share Mr. Logue's concerns that there may be a period of time during which defendants in Mr. Logue's shoes are procedurally unable to press potentially meritorious claims. We nevertheless deny Mr. Logue's petition because we conclude that Mr. Logue failed to carry his burden of showing that the newly discovered impeachment evidence in this case justifies our issuing an extraordinary writ. *See Kettner v. Snow*, 375 P.2d 28, 30 (Utah 1962) ("[T]he burden of showing facts to justify [granting extraordinary relief] is upon him who seeks such relief."). Mr. Logue contends that Mr. Wright's posttrial confession to an unrelated murder shows that he "seriously perjured himself by the material omission of the fact that he had committed a murder in Washington State for which he had not been brought to justice." But Mr. Logue has not explained how Mr. Wright's omission of this fact amounts to perjury. Moreover, the jury knew that Mr. Wright had a lengthy criminal record, including prior affiliation with a prison gang. Mr. Logue has not persuaded us that the jury's assessment of Mr. Wright's credibility would have been significantly affected by the additional information that he had committed an unsolved serious crime. *See State v. Pinder*, 2005 UT 15, ¶ 66, 114 P.3d 551 (newly discovered evidence does not warrant a new trial if it is merely cumulative); *see also State v. Boyd*, 2001 UT 30, ¶ 28, 25 P.3d 985 ("As a general rule, newly discovered evidence does not warrant a new trial where its only use is impeachment."); *State v. Worthen*, 765 P.2d 839, 851 (Utah 1988) (denying motion for new trial when newly discovered evidence had only "minor impeachment value").[3]

¶ 7 We accordingly decline to exercise our discretion to grant Mr. Logue's petition for extraordinary relief. But we will direct the appropriate standing committee on the rules of procedure to consider

[3] We also note that Mr. Logue did not comply with rule 19(b) of the Utah Rules of Appellate Procedure. This rule requires a petition for an extraordinary writ to contain, among other things, "[a] statement of the reasons why no other plain, speedy, or adequate remedy exists and why the writ should issue." UTAH R. APP. P. 19(b)(4). Mr. Logue's petition does not even attempt to explain why his inability to pursue a new trial until after he has exhausted his appeal deprived him of a "plain, speedy, or adequate remedy." Indeed, nowhere in Mr. Logue's petition does the phrase "plain, speedy, or adequate remedy" even appear.

revising them so that they do not act as a categorical bar to motions for new trials in cases like these.
