

NO. 18-8545

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED
STATES

OFFICE OF THE CLERK
SUPREME COURT, U.S.

DEBRA ANN LOHRI

PETITIONER

V

SPECIALIZED LOAN SERVICING LLC.

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES

PETITION FOR A WRIT OF CERTIORARI

LIST OF PARTIES AND COUNSEL

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III. STATEMENT REGARDING ORAL ARGUMENT

Appellant challenges the subject matter jurisdiction of the trial court. A determination of jurisdiction is a matter of law and should be clear from the facts of the case therefore, no oral argument is requested or necessary.

Should the court determine that oral argument will aid the resolution of this matter, Appellant requests the opportunity to present oral argument.

IV. QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the policy of the Mail box rule should apply to all government agencies across the board including the bankruptcy court's notice of appeal as being filed once deposited with the United States Postal Service.
- 2) Whether the policy making the Mail Box rule as being deposited being not allowed with the USPS is discrimination against Pro Se's litigants since it is not always convenient to drive to a Federal location to file in person and mailing a notice although mailed early and timely when the USPS doesn't deliver to the Clerk in a timely manner whether notice is lost by USPS should be considered filed with the clerk.
- 3) If allowing the inmate filing to be considered filed by the post office rule why doesn't apply to all as filed timely in the mail box rule?
- 4) why cant the Mailbox Rule apply to all government agencies if it applies to one, it should apply to all?
- 5) Why cant a USPS mail notice to the Bankruptcy court for notice of appeal even apply under special circumstances when the post office loses the notice and causes the delay?
- 6) The question presented is:

This rule applies in the Supreme Court and should apply to all filings including notices of appeal whether in the bankruptcy court or any other administrative, civil or criminal court. Petitioner Lohri is not asking for an exception, but seeks to change the law to include all filings and pleadings as deposited or filed once they are time stamped by the United States Postal Service and should be given such consideration by the court as is deemed appropriate under all the circumstances. Civil Rule 5 of the Mailbox Rule should

apply to all agency's filings including bankruptcy courts, and any other administrative, civil or criminal courts. So why shouldn't all pleadings that are time stamped by the United States Postal Service all be considered Timely Filed?

- 7) why there is prejudice and bias against Pro Se litigants with regards the Mail box rule?

V. JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on December 6, 2018, and denied a petition for rehearing on August 8, 2008. See Federal Rules of Appellate3 Procedure 34a-43a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

VI. TIMELINESS OF APPEAL

On the 9th day of November, 2017 the bankruptcy court for the Eastern District of Texas dismissed Relator's bankruptcy. (*see Appendix A*)

On the 15th day of December, 2017 Relator filed a timely notice of appeal to the Federal District Court for the Eastern District of Texas. (*see Appendix B*)

On the 14th day of February, 2018 the Eastern District of Texas District Court dismissed Relator's appeal. (*see Appendix C*)

On the 26th day of February, 2018 Relator filed a notice of appeal in the Eastern District of Texas District Court. (*see Appendix D*)

On the 15th day of December, 2018 the Fifth Circuit dismissed Relator's appeal for untimely filing. (*see Appendix E*)

VII. STATEMENT OF THE ISSUES PRESENTED

Relator brings a single issue concerning the application of the "Mailbox Rule." Relator will argue that the rule should not be so strictly construed so as to deny a litigant access to the court when a delay in filing an appeal was on the part of the United States Postal Service and not by any error or omission of a party.

VIII. STATEMENT OF THE CASE

ON the 11th day of August, 2017 Relator filed for bankruptcy in the Eastern District of Texas Sherman Division Bankruptcy court in Dallas, TX.

On the 27th day of November, 2017 the bankruptcy court issued a final ruling in the case.

On the 4th day of March, 2019 Relator filed her appellate brief by way of the United States Postal Service addressed to the Fifth Circuit Court.

The mailing was represented by the United States Postal Service to take two days for delivery. In the instant case, the mailing was mishandled by the United States Postal Service and did not deliver until 8 days later.

Appellant was denied access to the court by strict application of the mailbox rule where it was the government itself that caused the delay.

IX. THE ARGUMENT.

Appellant Lohri mailed the Notice of Appeal on December 7, 2017 well before the date the Notice of Appeal was required. Lohri had no expectation the filing would be received late by the Court until it was already late, as it was mailed four (4) days before the Notice of Appeal was due and the U.S.P.S. receipt estimated delivery on December 9, 2017.

X. UNIVERSAL SERVICE OBLIGATION

Relator had a right to a reasonable expectation of good faith and fair dealing from the United States Government when Relator used the United States Postal Service instead of one of it's competitors as the United States Postal Service is bound under its Universal Service Obligation. In the instant case, the United States Postal Service failed to provide the service Relator paid for and a strict enforcement of the mail box rule in this instance would implicate the United States Postal Service in the loss incurred by Relator due to an error or omission by the postal service.

A. Extension of Extraordinary Exception Precedence

Relator argues for the extension of extraordinary exceptions already in law to cover instance of failures of the United States Postal Service. There is currently in place a "mailbox rule

exception" that states that prisoners are considered to have timely filed "Notices" and other documents with the courts on the date they are filed with the prison for mailing after being logged in the system for delivery by U.S.P.S. Mail. As this is an extraordinary circumstance exception BEYOND the mailbox rule and addresses only incarcerated persons, the Courts should allow that ANY filing timely deposited directly in the U. S. Mail be considered timely filed by anyone else and not be restricted only for certain documents addressed to the offices of the clerk of the Court.

B. Denial of Due Process

Currently, the filing party (Appellant Lohri) is without recourse and left standing in quicksand. Not everyone owns a reliable car or lives within walking distance to the Courts. The mailbox rule already does apply to timely filing of briefs, and should in fairness apply to any document, timely mailed, postage prepaid and properly addressed to the Clerk of the Court. Pro se litigants who are not able to file documents electronically are dependent upon U.S.P.S. mail, unless they are capable of physically going to the Courthouse.

1. Internal Revenue use of Mailbox Rule

"Section 7502 of the Internal Revenue Code and its accompanying regulation 26 C.F.R. § 301.7502-1 (a provide that if the envelope containing the petition has a United States Post Office postmark date which falls within the ninety-day period, the petition is deemed timely filed, even if actually received after that period." Marquardt v. C.I.R., 9 F.3d 1552. The Federal Rules of Civil Procedure Rule 4 also relies on the U.S.P.O. A District of Colorado Court held that, "Service by mail is proper and is deemed completed upon mailing. Rule 5(b), Fed.R.Civ.P.", Lash v. City of Trinidad, 2006 WL 3054305. U.S.P.S. employees interviewed believe that the Mailbox Rule applies to all filings due in all Courts. (RECORD ON APPEAL.18-40174.773)

2. Texas Court of Criminal Appeal Mailbox Rule

Castillo v. State, 369 SW 3d 196 - Tex defined timeliness of filing in the following manner:

".....Normally, a notice of appeal is "filed" when it is physically delivered to, and received by, the clerk of the trial court. [11] Thus, a notice of appeal may be timely delivered to the clerk by any means: personal delivery, private courier, U.S. mail, or, as permitted or required by local rules, by electronic means, such as fax or e-mail. [12]

A long-standing exception to this "physical delivery" filing requirement was the common-law mailbox rule. As the United States Supreme Court stated in 1884.

The rule is well settled that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. [13]

The rationale for the “timely mailed, timely filed” mailbox rule is two-fold. First, many citizens who must file a document with a governmental entity live too far away to personally deliver that document to the entity; they should not be penalized by being required to send their documents earlier than those citizens who happen to live in close proximity to that entity. Second, the law assumes that governmental entities, such as the United States Postal Service, perform their jobs diligently, if not always in a timely manner. [14]

In 1954, Congress codified a version of the common law “timely mailed, timely filed” mailbox rule for documents filed with the Internal Revenue Service. “The codified rule was designed to alleviate taxpayer hardship resulting from the vagaries of the I.R.S. and the postal system[.]” [15] Under that statutory mailbox rule, a document that must be filed on a certain date is considered to be timely filed if it is postmarked on that date and timely deposited in the United States mail system on that date. [16] The plain, unambiguous language of that statute has been strictly construed to cover only those documents that have been delivered to and postmarked by the United States Postal Service, so delivery by private couriers, such as FedEx and UPS, is not covered by the mailbox rule. [17] *Castillo v. State*, 369 SW 3d 196 - Tex: Court of Criminal Appeals 2012

3. Texas Rules of Civil Procedure Mailbox Rule

Texas has long followed that same mailbox rule in its Rules of Civil Procedure and Rules of Appellate Procedure. Rule 5 of the Texas Rules of Civil Procedure is titled “Enlargement of Time.” It was amended, effective March 1, 1950, to codify the “timely mailed, timely filed” mailbox rule. [18] Rule 5 continues to provide an exception to the rule that documents are filed upon physical delivery. It currently reads:

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service shall be *prima facie* evidence of the date of mailing. [19]

4. Texas Rules of Appellate Procedure Mailbox Rule

The mailbox rule in Civil Rule 5, like the federal statute, applies only to documents that are deposited with the U.S. Postal Service, not to documents delivered by a private courier. [20]

That same “timely mailed, timely filed” mailbox rule is in the Texas Rules of Appellate Procedure. Rule 9.2(b) applicable to both civil and criminal cases—reads,

(b) Filing by Mail.

Timely Filing. A document received within ten days after the filing deadline is considered timely filed if:

(A) it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail;

- (B) it was placed in an envelope or wrapper properly addressed and stamped; and
- (C) it was deposited in the mail on or before the last day for filing.

Proof of Mailing. Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing:

- (A) a legible postmark affixed by the United States Postal Service;
- (B) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or
- (C) a certificate of mailing by the United States Postal Service."

5. US Supreme Mailbox Rule

The Supreme Court of the United States has already determined that a filing is timely if mailed before the due date with the United States Postal Service (RECORD ON APPEAL.18-401.74.775) in *Houston v. Lack*, 487 US 266 - Supreme Court 1988:

"To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, .."

"Analyzing the rationale behind Houston the appeals court held that while prisoners cannot personally deliver their legal papers to court clerks for filing, courts may "demand that he take reasonable steps to prove the relevant date-when the notice of appeal left his control." The court held that when a prisoner mails his legal filings in a manner which can be expected to create documentary evidence of when it was mailed (i.e. mail logs, date stamp, etc.) or actually creates indisputable circumstantial evidence that the papers left his control on a date prior to the expiration period for appeal (i. e. receipt the day after it was due by the court) the material is deemed filed on the date established. "However if a prisoner just sends the notice on its way without providing some reliable evidence of the date on which he relinquished control he bears the risk of delay just like any other party." *Koch v. Ricketts*, 38 F. 3d 455 (9th Cir. 1994).

Supreme Court Rule 29.2 – the Court's Mailbox Rule – operates so that a document is filed if, on or before its due date, it is: 1). Received by the Clerk; 2). Shipped to the through the United States Postal Service using postmarked first-class mail (a commercial postage meter cannot be used); or 3). Handed to a third-party commercial carrier for delivery to the Clerk within three calendar days. The Supreme Court Rule 29.2 is not restricted as to who may timely file using U.S.P.S. or which documents may be so filed.

XI. EXAMPLES

The bankruptcy court is at odds with other governmental agencies when accessing the "Mailbox Rule" as shown by the following:

C. Notice Timely Received

[11] TEX.R.APP. P. 25.2(b ("In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal."); 25.2(c)(1) ("Notice must be given in writing and filed with the trial court clerk."); 9.2(a)(1) ("A document is filed in an appellate court by delivering it to ... the clerk of the court in which the document is to be filed[.]"). Under Rule 25.2(c)(1), the notice of appeal is filed

if it is timely received by the court of appeals, because the clerk of that court will "immediately record on the notice the date that it was received and send the notice to the trial court clerk." See *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex.1993) ("In a long line of cases, this court has held that a document is 'filed' when it is tendered to the clerk, or otherwise put under the custody or control of the clerk.").

D. No Technical

("Documents may be permitted or required to be filed, signed, or verified by electronic means by order of the Supreme Court or the Court of Criminal Appeals, or by local rule of a court of appeals. A technical failure that precludes a party's compliance with electronic-filing procedures cannot be a basis for disposing of any case.").

E. Presumption Is Not Conclusive

[13] *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884) The Supreme Court quoted an earlier case explaining that "the presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business; and, when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not." *Id.* at 193-94, 4 S.Ct. 382.

F. Prisoner Mailbox Rule

[14] See note 15 infra. These same two rationales also supports the "prisoner mailbox" rule, which deems the pleadings of a pro se inmate filed at the time they are delivered to prison authorities for forwarding to the court clerk. *Campbell v. State*, 320 S.W.3d 338, 344 (Tex.Crim.App.2010 see also *Houston v. Lack*, 487 U.S. 266, 271, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) ("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.... 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 well-developed procedures for recording the date and time at which they receive papers for mailing").

G. Timely Mailing

[15] Kimberly C. Metzger, Interpretation of the Section 7502 Timely-Mailing, Timely-Filing Requirements: *Carroll v. Commissioner* and the Liberal/Conservative Interpretation Dilemma, 28 U. TOL. L.REV. 767, 768 (1997) The rationale for that codification is that[i]n filing a tax return by mail, two bureaucracies come into play, the IRS and the Postal Service. Each is geared to handle high volumes of work, and each functions correctly most of the time. Nevertheless, all bureaucracies can mishandle individual items, and the IRS and the Postal Service are no exceptions. The Postal Service has been known to apply illegible postmarks or no postmark at all and has detained mail addressed to the IRS. For its part, the IRS has lost, mishandled, and, in some cases, actually destroyed tax returns.

H. Proof of Filing

Kenneth H. Ryesky, *Mailing is Filing Only if Proof of Mailing is Incontrovertible*, 54 TAX'N FOR ACCT. 153, 154 (1995 see also *Drake v. Commissioner*, 554 F.2d 736, 738 (5th Cir. 1977) ("Prior to enactment of the 1954 [I.R.S] Code, there was no similar provision with regard to timely mailing equaling timely filing. Timely filing depended upon the time of delivery of a petition to the tax court in Washington, D.C. and varied with the geographical area of mailing and the vicissitudes of the mails."); *Sylvan v. Commissioner*, 65 T.C. 548, 551, 1975 WL 3165 (1975

("Prior to the enactment of section 7502, timely filing depended on the vicissitudes of the mail, with the time of delivery varying as to the geographical area of mailing, the seasonal demands imposed on the post office, and the postal performance in the individual case presented. In order to alleviate hardships resulting from delays in particular cases, a presumption of timely delivery was often employed.... Congress enacted section 7502 to eliminate the inequities resulting from variations in postal performance when a document is timely mailed.").

I. IRS Mailbox Rule

[16] 26 U.S.C. § 7502(a)-(b).

(a) General rule

(1) Date of delivery

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements

This subsection shall apply only if—

(A) the postmark date falls within the prescribed period or on or before the prescribed date—

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) Postmarks This section shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

[17] See Petrusis v. Commissioner, 938 F.2d 78, 80-81 (7th Cir.1991); Pugsley v. Commissioner, 749 F.2d 691, 693 (11th Cir.1985) ; Correia v. Commissioner, 58 F.3d 468, 469 (9th Cir. 1995).

J. Texas Mail Box Rule

[18] **TEX.R. CIV. P. 5** The 1950 amendment read: Provided, however, if a motion for new trial, motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, and the envelop or wrapper containing same bears a postmark showing such deposit, the same, if received by the clerk not more than ten days tardily shall be filed by the clerk and be deemed filed in time. See *Phillips v. Reese*, 256 S.W.2d 162, 164-66 (Tex.Civ.App.-El Paso 1952, writ ref'd n.r.e.) (discussing the 1950 amendment to Rule 5 and

holding that appellate court had obtained jurisdiction over appeal when record and motion for extension were filed on the day before the amendment took effect, which was also the day before the motion for extension was due).

K. Texas Civil Procedure Rule 21a

[19] **TEX.R. CIV. P. 5. Rule 21a**, dealing with methods of service, also incorporates the mailbox rule for timely delivery of pleadings, and papers in civil lawsuits ("Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.").

L. Private Carrier Not Accepted

While a private carrier cannot be trusted and is not trusted by the Courts to timely deliver, the United States Postal Service is a part of the very government we all rely on. If we cannot rely on that, if the courts choose to deny the citizen the reasonable expectation of good faith and fair services to from the postal service, then the public is denied reliable access to the courts.

[20] Carpenter v. Town and Country Bank, 806 S.W.2d 959, 960 (Tex.App.-Eastland 1991, writ denied) (appellate court lacked jurisdiction to consider appeal when appellant sent its motion for new trial "by UPS, a private courier, and not by the United States mail. Therefore, the time for filing cannot be enlarged, and the motion was not timely filed."); see also Texas Workers' Comp. Comm'n v. Hartford Accident & Indem. Co., 952 S.W.2d 949, 952-53 (Tex.App.-Corpus Christi 1997, writ denied).

XII. SUMMARY OF ARGUMENT

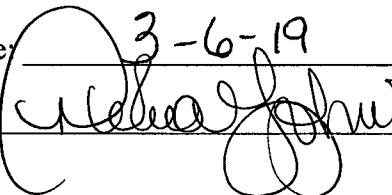
The "Mailbox Rule" of the Supreme Court is based on a presumption of reliability of the Postal Service and third party commercial carriers like FedEx and UPS. Parties who must depend on the U.S. Mail to communicate with the court or file documents when transportation to the Court becomes an issue. Prisoners have an exemption to the "mailbox rule" in that they only have to deposit the filing into the prison mail system to be logged before being put into the United States Postal Service control.

The subject Notice of Appeal was timely mailed, certified mail, and postage paid as required with expected two day delivery. Lohri had no expectation of the filing being received late by the Court until it was already late, being mailed four (4) days before it was due. Appellant was deprived of her Right to Appeal by the late receipt of the filing of the Notice of Appeal.

XIII. CONCLUSION

Pro se litigants and others who do not have access to electronic filing for the filing of documents are at a most distinct disadvantage when documents timely mailed and postage paid and timely submitted to the United States Postal Service does not also mean timely filed, regardless of the document.

Appellant requests this Court to extend "Mail Box Rule" to include all filings with the Court to be "Timely mailed is timely Filed" providing the mailing is postage paid and addressed to the Clerk of the Court, through the United States Postal Service.

Date: 3-6-19
 Debra Ann Lohri, Pro Se Appellant