

CASE NO. 19-5210

ORIGINAL

Supreme Court, U.S.
FILED

JUN 18 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

THERIAN WIMBUSH - Petitioner
RECARDO WIMBUSH - Petitioner

v.

STATE OF GEORGIA
CHRISTOPHER M. CARR, Georgia Attorney General
GEORGIA DEPARTMENT OF FAMILY AND CHILDREN SERVICES
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO

SUPREME COURT OF GEORGIA
S19C0013

PETITION FOR WRIT OF CERTIORARI

THERIAN WIMBUSH
#1001955340
DULASKI STATE PRISON
P.O. BOX 839
HAWKINSVILLE, GA 31036

RECARDO WIMBUSH
#1001955757
WASHINGTON STATE PRISON
P.O. BOX 206
DAVISBORO, GA 31018

RECEIVED

JUN 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JUNE 16, 2019

QUESTIONS PRESENTED

1. Should the 'Mailbox Rule' be extended to ALL Notices of Appeal, that must be filed in the trial court, filed by pro se prisoner litigants?
2. Should the 'Mailbox Rule' be extended to pro se prisoners in Georgia who are GRANTED discretionary applications to appeal, which requires that the Notice of Appeal be filed in the trial court within ten (10) days of the Order granting the discretionary application?
3. Does a ten (10) day requirement for filing a Notice of Appeal deny a pro se prisoner litigant access to the Courts?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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APPENDIX A

Extension of time to file the Petition for Writ
of Certiorari granted on May 30, 2019,
extending the time to and including June 18, 2019

Side Note: The opinion of the state highest court,
the Supreme Court of Georgia was submitted to
this Court with the Application for Extension
of time to file the petition for writ of Certiorari,
Application No. 18A1240, as Exhibit A.

TABLE OF AUTHORITIES

CASES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears in the Exhibits attached to Application No. 18A1240, Exhibit 'A', petitioner's Motion for Extension of time to file a petition for writ of Certiorari, and is unpublished.

The opinion of the Court of Appeals of Georgia appears in the Exhibits attached to petitioner's ~~application for~~ Petition for Writ of Certiorari filed in the Supreme Court of Georgia, case no. 19AC0013, and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was February 18, 2019. A copy of that decision is included in petitioner's application for an extension of time to file the petition for writ of Certiorari, Application No. 18A1240.

An extension of time to file the petition for a writ of Certiorari was granted to and including June 18, 2019 on May 30, 2019 in Application No. 18A1240.

The jurisdiction of this Court is invoked under 28 USC § 1257(a).

STATEMENT OF THE CASE

On January 13, 2016, the State of Georgia, thru the Gwinnett County Department of Family and Children Services, by and thru counsel, filed a petition to Terminate petitioners' Parental rights with respect to ALL ten (10) of their biological children.

It must be noted that a Notice of Appeal was filed on March 16, 2015 of the Gwinnett County Juvenile Court's Order of Adjudication finding petitioners' children dependent. Said Notice of Appeal was NEVER transmitted to the Court of Appeals of Georgia for docketing and to this date remains pending in the Court of Appeals of Georgia, appeal. The subsequent orders of the Juvenile Court, after March 16, 2015, are Null and void due to the pending appeal of the very order of dependency, rendered February 25, 2015, that the order, especially of Termination of Parental Rights, leans on.

On November 17, 2017, the Gwinnett County Juvenile Court issued an Order of Termination of Parental Rights of both petitioners with respect to ALL ten (10) of their biological children. Said order was subsequently served on petitioners by the Sheriff's Department of Pulaski and Washington Counties, the counties in which their respective prisons are located, on December 13, 2017.

In the State of Georgia, under OCGA § 5-6-35(a), appeals from orders terminating parental rights require an application for discretionary appeal in the appellate court.

Only as a direct result of the Mailbox Rule in the Supreme Court of Georgia, and that Court's Rule of transferring cases improperly docketed in that Court, to the Court of

Appeals of Georgia, were petitioners able to docket their discretionary application to appeal the Gwinnett County Juvenile Court's order on December 15, 2017.

Subsequently, the Court of Appeals of Georgia GRANTED the discretionary application to appeal on February 12, 2018. Petitioners did NOT receive the order granting the discretionary application until Friday, February 16, 2018.

Petitioners mailed their Joint Notice of Appeal to the Gwinnett County Juvenile Court on Monday, February 19, 2018, which happened to be a holiday, on which mail did NOT run. Yet, the Notice of Appeal was not filed until Friday, February 23, 2018, ONE DAY past the deadline.

It must be noted that pursuant to OCGA § 5-6-35(g) within 10 (ten) days AFTER ~~the~~ an order granting the discretionary appeal, to secure a review of the issues, the applicant shall file a Notice of Appeal as provided by law. The procedure thereafter shall be the same in other appeals.

On May 1, 2018, case no. A18A1671 was docketed in the Court of Appeals of Georgia. After petitioners attempted to file their Appellant's Brief on May 16, 2018, and the Court of Appeals refused filing stating that petitioners did NOT include a filing fee that is NOT required for pro se prisoners, in the Court of Appeals, nor the Supreme Court of Georgia, the Appeal was dismissed on May 29, 2018.

On June 7, 2018, petitioners filed a Motion for Reconsideration which was subsequently denied on July 12, 2018. Petitioners filed their Notice of

Intent to file Certiorari to the Georgia Supreme Court on July 18, 2018.

It must be noted that AFTER petitioner filed a Petition for Injunction in the Supreme Court of Georgia against the Clerk of the Court of Appeals of Georgia, Stephen Castle (case no. S1801334), did petitioners ~~Brief~~ Appellants Brief get filed on July 3, 2018.

On July 29, 2018, petitioners docketed their Petition for Writ of Certiorari in the Supreme Court of Georgia, which was subsequently denied on February 18, 2019 and is the subject of this petition.

Petitioner ^{mailed} ~~filed~~ her second Motion for an Extension of time to this Court on Thursday, June 6, 2019, requesting an additional 30 (totaling 60) days extension to file this petition. As of this day, June 16, 2019, petitioner has NOT received a response.

REASONS FOR GRANTING THE PETITION

Mailbox Rule

The United States Supreme Court adopted a mailbox rule for pro se prisoners in Houston v. Lack, 482 US 266 (1988), holding that a Notice of Appeal was deemed filed on the date the pro se prisoner handed it to prison authorities for mailing to the clerk of the District Court. The Court reasoned that a mailbox rule was NEEDED because of the unique obstacles faced by those who are both imprisoned and unrepresented. Unlike litigants who are not incarcerated, pro se prisoners cannot monitor the

processing of their appellate filings to ensure that the Clerk of Court timely receives them. They cannot personally travel to the courthouse to see that their filings are stamped 'FILED' timely, and they cannot regularly call the clerk of court to monitor whether their filing has been received, knowing that a last minute trip to the courthouse will save them if their papers have not arrived by the due date. Massaline v. Williams, 274 Ga. 552 (2001)

The Supreme Court of Georgia agreed that a mailbox rule was needed for pro se prisoners pursuing review of their habeas corpus, ONLY, because of the unique obstacles faced by those who are both imprisoned and unrepresented, and adopted the mailbox rule for notices of appeals in habeas corpus cases ONLY. Massaline, supra.

The Supreme Court of Georgia further asserted that Georgia's prison mailbox rule mitigates the considerable challenges presented to a pro se prisoner's ability to pursue his constitutional right to a 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 petition to Georgia Courts. Accordingly, the mailbox rule does NOT exempt a pro se prisoner from complying with the statutory requirements to file a timely notice of appeal in any non-habeas, criminal or civil, filing. Riley v. State, 280 Ga. 267 (2006)

The Court of Appeals of Georgia has further stressed that this mailbox rule applies ONLY to habeas petitions, NOT DIRECT APPEALS, and does NOT exempt a pro se prisoner from complying with the statutory requirements to file a notice of appeal in any non-habeas,

Criminal or civil, filing. McCroskey v. State, 291 Ga. App. 15 (2008)

Pursuant to OCGA § 5-6-34, in DIRECT APPEALS, the appellant has 30 (thirty) Days in which to file a Notice of Appeal, in the trial Court. The same goes for the timeframe for filing an Application for Discretionary Appeal in the Georgia appellate courts, the appellant/applicant has 30 (thirty) in which to file said application. OCGA § 5-6-35

Furthermore, it must be noted that both the Supreme Court of Georgia (Rule 13) and the Court of Appeals of Georgia (Rule 4) have adopted a Mailbox Rule for Pro se prisoners.

Supreme Court of Georgia Rules, Rule 13 states, "a document submitted by a prisoner who is not represented by counsel shall be deemed filed on the date the prisoner delivers the document to prison officials for forwarding to the Supreme Court clerk. In the absence of an official United States Postal Service postmark showing a date on or before the filing deadline, such delivery shall be shown by the date on the certificate of service." Rule 13(2)

Like wise, Court of Appeals of Georgia Rule, Rule 4 (d) states, "In the absence of an official United States Postal Service postmark showing a date on or before the filing deadline, a document submitted by a prisoner who is not represented by an attorney shall be deemed filed on the date the prisoner delivers the document to prison officials for forwarding to the clerk of the Court of Appeals. This delivery shall be shown by the date on the Certificate of service.

It must be noted that in both Georgia appellate courts,

as in the federal courts, the mailbox rule does NOT apply to Motions for Reconsiderations.

The significance in this case is that petitioners did file a timely application for discretionary application to appeal the order terminating their parental rights, despite the trial court clerk's direct attempt to deny petitioners their right of appeal by having the order served on them, just four (4) days before the deadline to file said application, by the sheriff's office. Petitioners were subsequently GRANTED the application to appeal, and filed a Noticed Appeal within 11 Days of the order granting the application. Yet, because of OCGA § 5-6-35(g)'s requirement that a Noticed Appeal be filed within 10 DAYS, not 30 DAYS ~~the~~ like in every other appeal including direct appeals, we petitioners denied access to the Georgia Appellate Court forum to appeal, of all things, the termination of their parental rights that leads not only on a VOID judgment of conviction and sentence, but also ~~on~~ said order of termination of parental rights is ALSO NULL and VOID due directly to the pendency of an appeal of the dependence order.

If it were that petitioners had 30 days in which to file the Notice of Appeal or alternatively, if the mailbox rule, that applies to ALL documents filed by pro se prisoners in Georgia's appellate courts, applied to ALL Notices of Appeal filed in Georgia's trial courts, petitioners' appeal would NOT have been dismissed and subsequently SHALL have been reversed due to the pendency of an appeal from a previous order.

Hence, petitioners assert that at least one of two things must occur, either: 1) ALL notices of appeals filed by pro se prisoners must be governed by the mailbox rule and 2) this Court must rule that a 10 day time limit within which to

file a Notice of Appeal, for a pro se prisoner, AFTER having been granted discretionary review, is UNCONSTITUTIONAL.

The obstacles facing prisoners does NOT change based on the type of case filed and this particular case demonstrates the national importance of having this Court to decide the questions involved, as ultimately this results in the denial of pro se prisoners First Amendment right to Access the Courts.

CONCLUSION

For the reasons identified above, petitioners pray that a petition for writ of Certiorari be granted.

Respectfully submitted.

THEIRIAN WIMBUSH
Petitioner, Pro se
Pulaski State Prison
P.O. Box 839
Hawkinsville, GA 31036

RECARDO WIMBUSH
Petitioner, Pro se
Washington State Prison
P.O. Box 206
Davisboro, GA 31018

JUNE 16, 2019