

ORIGINAL

20-7005

No. _____

FILED

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

IN THE

SUPREME COURT OF THE UNITED STATES

Andre James King — PETITIONER
(Your Name)

VS.

Warden McFadden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT of Appeals of THE
FOR THE FOURTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andre James King
(Your Name)

McCormick C.I.
386 Redemption Way
(Address)

McCormick
South Carolina 29899
(City, State, Zip Code)

(Phone Number)

QUESTION PRESENTED

- 1: WHETHER THE FOURTH CIRCUIT COURT OF APPEAL ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT COURT TO SUMMARILY DISMISS THE PETITIONER MOTION TO REOPEN THE APPEAL PURSUANT TO *HOUSTON V LACK* 487 US 266 (1988) WITHOUT EITHER AN EVIDENTIARY HEARING OR TO EXPAND THE RECORD, ESPECIALLY WHEN A QUESTION OF FACT IS INVOLVED IN THE PETITIONER CASE
- 2: WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT JUDGE TO ABUSE ITS DISCRETION TO DENY THE PETITIONER THE RIGHT TO APPEAL PURSUANT TO *HOUSTON V LACK* 487 US 266 (1988) WHEN HE HANDED HIS NOTICE OF APPEAL TO PRISON MAILING OFFICIALS TO BE MAILED OFF TO THE DISTRICT COURT
- 3: WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT COURT TO ABUSE ITS DISCRETION IN APPLYING HABEAS Rule 3 (D) AND Rule 4 (C)(1)(A)(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN AN UNCONSTITUTIONAL MANNER WHERE IT HAS IMPLICATED THE DUE PROCESS CLAUSE

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5, 9
REASONS FOR GRANTING THE WRIT	26
CONCLUSION.....	28

INDEX TO APPENDICES

APPENDIX A and amend	petitioner January 18, 2015 affidavit to his motion to Alter Judgment
APPENDIX B	petitioner November 17, 2016 letter to the District Court
APPENDIX C lack	petitioner May 22, 2019 motion to Reopen pursuant to Houston v Lack
APPENDIX D	petitioner May 22, 2019 Habeas Rule 3(d) and Houston v Lack affidavit of when he gave prison officials his legal mail. (First affidavit)
APPENDIX E to appeal	District Court May 31, 2019 dismissal order of the petitioner right to appeal
APPENDIX F	petitioner June 27, 2019 motion to Alter and Amend

Appendix (G) petitioner June 27, 2019, Habeas Rule 3(d) and Houston v lack affidavit of when he gave prison officials his legal mail (second - affidavit)

Appendix (H) petitioner September 21, 2019 Notice of Appeal

Appendix (I) Respondent Response to the petitioner motion to Alter

Appendix (J) petitioner September 13, 2019 Informal brief in the 4th circuit Court of Appeal, Appeal No # 19-6955 (First Appeal)

Appendix (K) 4th circuit Court of Appeal dismissing the petitioner First Appeal. Appeal No # 19-6955

Appendix (L) District Court December 9, 2019 Dismissal order of the petitioner Rule 59(d) motion to Alter and Amend Judgment

Appendix (M) petitioner second initial brief in the 4th circuit Court of Appeals on February 18, 2020. Appeal No # 20-6062

Appendix (N) 4th circuit Court of Appeal January 13, 2020 order directing the District Court to either grant or deny the petitioner Certificate of Appealability (COA)

Appendix (O) The District Court COA denying the petitioner the Right to Appeal

Appendix (p) 4th circuit Court of Appeals May 27, 2020 dismissal order
of the petitioned the right to appeal pursuant to Hartman v. Lawrence. Appeal
No # 20-6062

TABLES OF AUTHORITIES CITED

CASES

PAGE NUMBER

Am. United Life Ins. Co. v Martinez	
480 F.3d 1043 (11th Cir. 2007)	14, 24
Barrow v Scott 136 F.3d 1053 (5th Cir. 1998)	14
Carroll v Fort James Corp., 470 F.3d 1171 (5th Cir. 2006)	14
Fisher v Baker 203 US 174 (1906)	13
Gibay v United States 131 Fed. Appx 180 (11th Cir. 2005)	21
Houston v Lacy 487 US 266 (1988)	6, 11, 13, 14, 15, 19, 20, 23, 26
Heizer v Cary 273 F.3d 1220 (9th Cir. 2001)	21, 26
Jeffette v United States 748 F.3d 1310 (11th Cir. 2014)	
Jefferson Fourteenth Assocs. v Wometo de P.R. Inc.	
695 F.2d 524 (11th Cir. 1983)	
Jenkins v Superintendent of Laurel Highlands	
705 F.3d 80 (3d Cir. 2013)	23
Lindsey v Norment 405 US 56 (1972)	17
Machibroda v US 368 US 487 (1962)	13
Marshall v Holt 369 F.2d 940 (5th Cir. 1966)	11
Matthew v Eldridge 424 US 319 (1976)	15, 24
Mordkay v Fantasy House 867 F.2d 798 (3rd Cir. 1989)	11
Nelson v Adams USA, Inc. 529 US 460 (2000)	14, 15
O'Leary v Zurich Holding Co. of America	
123 F.2d App. 557 (4th Cir. 2005)	11
Panhorst v US 241 F.3d 367 (4th Cir. 2000)	11
Phillip Morris USA v Williams 127 S.Ct. 1057 (2007)	17
Plyer v Doe 457 US 202 (1982)	15

Roberts v McKenzie. No. Aw-12-Cv-2474, 2013 WL 3179102, at # 4 (D. Md. June 2013), aff'd 566 F. Appx 276 (4th Cir. 2014)	26
Saunders v Shaw 244 U.S. 317	15
Sine v Local No. 992, Intern. Brotherhood of Teamsters 790 F.2d 1095 (4th Cir. 1986)	11
United States v McNeill 523 Fed. Appx 979 (4th Cir. 2013)	17

STATUTES AND RULES

Rule 601 (A)(1) SCRC	5
Rule 403 SCRC	5
Rule 59 (e) of Fed. R. Civ. P.	11, 12, 17
Rule 4(A)(4)	11, 16, 22, 25
28 USC § 2243	14
28 USC § 1784	23
Rule 4 of the Rules Governing section 2254	14, 24
Habeas Rule 3(d)	15, 17, 22, 24, 25, 27
Habeas Rule 7	15, 25
Habeas Rule 8	15, 25
Fed. R. Civ. P. 15	
Fed. R. Civ. P. 1	15, 16
5th	15
14th	15

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix (K)-(P) to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix (E)-(L) to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Habeas Rule 3(d) Governing section 2254

(d) Inmate Filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this Rule. Timely filing may be shown by a declaration in compliance with 28 USC § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Habeas Rule 4 Governing section 2254

The clerk must promptly forward the petition to a judge under the court assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner . . .

Rule 4 of Federal Rules of Appellate procedure

Appeal by an Inmate Confined in an institution

Rule 4(c)(1)(A)(i)-(ii)

If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 USC § 1746 - or a notarized statement - setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid

5th Amendment Due process clause

"No person shall be ... deprived of life, liberty, or property, without due process of law ..."

PROCEDURAL HISTORY STATEMENT OF THE CASE

On January 10, 2014, the petitioner had filed a federal writ of Habeas Corpus in the United States District Court of South Carolina. The petitioner had raised on his writ of Habeas Corpus the following issues:

GROUND ONE: Whether the Court erred by ruling appellant could be impeached with his prior conviction for being an accessory after the fact of armed robbery since the unduly prejudicial effect of allowing this impeachment evidence outweighed its probative value under Rule 601 LA)(1) SCRE and Rule 403 SCRE

GROUND TWO: (a) Ineffective assistance of counsel (b) Denial of 6th Amendment (c) Denial of 14th Amendment: (A) for conceding petitioner guilty in closing argument to the jury? (B) For failing to object to trial court jury instruction that shifted the burden of proof in violation of due process? (C) For failing to object when the trial court failed to instruct the jury they could accept or reject the inference of malice from the use of a deadly weapon? (D) For failing to request a King instruction? (E) For failing to object to the court jury instruction of self defense that shifted the burden of proof in violation of due process?

GROUND THREE: whether per Judge erred in Refusing to find Counsel ineffective for failure to object to jury charge in regard to the inference of malice from the use of a deadly weapon when the charge was a mandatory presumption rather than a permissive inference?

On May 22, 2014, the Respondent had filed a motion for summary judgment against the petitioner issues in his writ of Habeas Corpus. On the same day the District Court had issued a Roseboro order for the petitioner to respond to the Respondent motion for summary judgment. On December 9, 2014, the magistrate Judge Shiva v. Hodges had issued a Report and Recommendation to the District Court Judge for the Respondent motion for summary judgment to be granted and among other motions to be denied of the petitioner. On December 31, 2014, the District Court Judge J. Michelle Childs had granted the magistrate Judge Report.

On January 5, 2015, the petitioner objection to the magistrate Judge Report was filed in the District Court. On January 18, 2015, the petitioner had sent a motion to Alter and Amend judgment and an affidavit to the District Court regarding he timely gave Lieber Correctional Institution (Lieber C.I.) his objection to the magistrate Judge Report pursuant to *Houston v. Lack*, 487 US 266 (1988). In the petitioner affidavit concerning Lieber C.I. mail Room -

Officials, the petitioner stated the following:

" paragraph (par) 2 on December 9, 2014, the magistrate Judge issued its Report and Recommendation (Report) relating to the issues and claims presently before this Court . . .

As is apparent by this Record [The petitioner] 14 days began to Run on December 9, 2014, and petitioner not being served until December 16, 2014.

" par. 3 on December 29, 2014, petitioner Reported to the Educational Building, (where copies are made), and was afforded the opportunity to have his objection pleadings photocopied.

After leaving the Educational Building petitioner Reported to the mail Room so that he could serve and mail the objection pleadings.

Once at the mail Room window, Ms Bryant, mail Room supervisor, Lieber C.I., informed petitioner that the mail Room was closed and she would not accept nor debit his inmate account so that the legal pleadings could be served and postage added for that purpose. For an hour petitioner attempted to get Ms Bryant to understand that his last day for filing and/or mailing was December 30, 2014, and he desperately need her to have possession of these legal pleadings so that he could have the Court to recognize them as timely served. She was adamant in her refusal to have possession of these pleadings.

September 9, 2015, and on September 21, 2015 the petitioner had gave his motion / notice of appeal to Lieber C.I. prison officials to be mailed to the District Court.

STATEMENT of THE CASE

Because the petitioner did not hear anything from the District Court after he'd written the Court several times, see Appendix (B), and due to almost four (4) years passing from the time the petitioner had filed a notice of appeal in the District Court pursuant to *Houston v Lacs supra* by handing the appeal to Lieber C.I. prison officials, and due to the petitioner family member calling the District Court regarding the status of the petitioner appeal, in which the Court had told his family member that no appeal was on record from the petitioner, on May 24, 2019, the petitioner had filed a motion to reopen the appeal pursuant to *Houston v Lacs supra*. See Appendix (C) Attached to the motion was a sworn affidavit pursuant to *Houston v Lacs supra* informing the Court "that on September 21, 2015 [he] handed [his] legal mail to Lieber Correctional institution mail room officials to be mailed to this Court." See Appendix (D)

Instead of the District Judge Childs ordering the respondents to submit to the Court a copy of the petitioner Lieber C.I. mail-log and for the Court ordering an evidentiary hearing regarding

Whether or not the petitioner timely placed his September 21, 2015 notice of appeal in the prison mail, the District Court Judge on May 31, 2019, had summarily dismissed the petitioner motion on the grounds that:

"Based on the facts before the Court, the Court cannot conclude that petitioner delivered a notice of appeal to the prison authorities on September 21, 2015. First petitioner has not provided the Court with any documentation supporting his claims that he delivered a notice of appeal to the Lieber Correctional mail room on September 21, 2015 . . ."

See Appendix (E)

On June 27, 2019, the petitioner had filed a motion to Alter and amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. See Appendix (F) Attached to the petitioner motion to Alter, the petitioner again attached an affidavit, and a copy of the notice of appeal that was dated September 21, 2015, declaring under the penalty of perjury that he'd given the Lieber C.I. prison mail room officials the notice of appeal to be mailed to the District Court of South Carolina. See Appendix (G)-(H) The Respondents also filed a response to the petitioner motion to Alter but the Respondent never presented any evidence whether or not the petitioner deposited his notice of appeal in Lieber C.I. mail room. See Appendix (I)

At the same time the petitioner had filed his Rule 59(e) motion in the District Court, the petitioner also filed an appeal in the United States Court of Appeals for the 4th Circuit regarding the *Houston v Lacs* issue. See Appendix (J) Despite Rule 59(e) motion tolls the time to appeal, the 4th Circuit Court of Appeals had heard and ruled on the petitioner informal brief concerning the *Houston v Lacs* issue. Id Appendix; See *Marxham v Holt* 369 F.2d 940 (5th Cir. 1966) (Effect of filing of motion to alter or amend a judgment previously entered or to amend or make additional findings of fact is to suspend running of time for appeal and effectively remove the finality of the original judgment); *O'Grady v Zurich Holding Co. of America* 123 Fed. Appx 557 (4th Cir. 2003); Fed. R. App. p. 4 (A)(4)(iv); *Panhorst v US* 241 F.3d 367 (4th Cir. 2001) (If a party files a timely motion in the district court to alter or amend judgment, time to file a timely a notice of appeal runs from the entry of the order disposing of motion...); *Sine v Local No. 992, Intern. Brothers of Teamsters* 790 F.2d 1095 (4th Cir. 1986) (plaintiff first notice of appeal was premature where notice was filed while plaintiff post trial motions... were still pending); *Mondrow v Fountain House* 867 F.2d 798 (3rd Cir. 1989) (Unlike a timely notice of appeal, a premature notice of appeal does not divest the district court of jurisdiction)

On December 9, 2019, the same day that the 4th circuit Court of appeals had heard the petitioner first appeal Contrary to Rule 59 (e), see Appendix (K) the District Judge childs had denied the petitioner Rule 59 (e) motion to Alter on the grounds of:

" In the may order (ECF No. 52), the Court cited to appropriate substantive Case law and provided specific Reasoning to support its decision to find that petitioner did not deliver a notice of Appeal on time. The may order Expressly Explains why (1) petitioner affidavit lacks Credibility, (2) an Evidentiary hearing is unnecessary, and (3) Appellate Rule 44) is inapplicable based on the Record before the Court. (See ECF. No. 52 at 6-8) . . . "

See Appendix (L)

Again, the petitioner had filed a notice of appeal to the Court Regarding the Houston v laws issue. See Appendix (M) The fourth circuit Court of Appeals had directed the District Court to determine whether or not the Court was going to grant the petitioner Certificate of appealability (COA) in order to appeal to the 4th circuit Court of appeals. See Appendix (N) on January 16, 2020, the District Court issued an order denying the petitioner COA status to the 4th circuit Court of appeals. See Appendix (O)

Again, on February 7, 2020 the petitioner had filed another informal brief to the 4th Circuit Court of Appeals regarding Houston v Lack issues. See Appendix (M) on May 27 2020 the 4th Circuit Court of Appeals had denied the petitioner relief on the Houston v Lack issues. See Appendix (P)

QUESTION 1 :

WHETHER THE FOURTH CIRCUIT COURT OF APPEAL ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT COURT TO SUMMARILY DISMISS THE PETITIONER MOTION TO REOPEN THE APPEAL PURSUANT TO HOUSTON V LACK 487 US 266 (1988) WITHOUT EITHER AN EVIDENTIARY HEARING OR TO EXPAND THE RECORD, ESPECIALLY WHEN A QUESTION OF FACT IS INVOLVED IN THE PETITIONER CASE

PART I

In *Machibroda v US* 368 US 487, 514 (1962), this Court have set the legal principles available to the district court judges regarding three possible ways of, depending on the facts of the case, proceeding on hearing civil actions in federal court. See *Fisher v Baker* 203 US 174, 181 (1906) (It is well settled that habeas corpus is a civil proceeding) The first method is summary dismissal. The second is the expansion of the court record. And, lastly, an Evidentiary Hearing with or without the petitioner presence. See *Machibroda v US* supra

Rule 4 of the Rules Governing section 2254 Cases in the United States District Courts and 28 USC § 2243 both authorize a habeas petition to be summarily dismissed. The District Court utilized those procedures erroneously in the *Houston v Lack* stage of determining whether or not the petitioner had deposited his legal mail on September 21, 2015 in the Liebel C.I. mailing system. The District Court failed to afford the petitioner due process when it dismissed his motion to Reopen pursuant to *Houston v Lack* without affording the petitioner and the Respondent to put up evidence. See *Carroll v Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006); *Bazrow v Scott*, 436 F.3d 1053, 1054 (5th Cir. 1998) (A district court can only dismiss an action on its own motion as long as the procedure employed is fair) To employ fair procedure, a district court must generally "provide the plaintiff with notice of its intent to dismiss or an opportunity to respond." See *Am. United Life Ins. Co. v Martinez*, 480 F.3d 1043, 1069 (11th Cir. 2007); *Jefferson Fourteenth Assocs. v Wometco de P.R., Inc.*, 695 F.2d 524, 527 (11th Cir. 1983)

The petitioner case is similar to *Nelson v Adams USA, Inc.*, 529 US 460, 466-68 (2000). In *Nelson*, after acquiring a judgment against a plaintiff corporation, the district court permitted defendants to use Federal Rule of Civil Procedure 15 to add the corporation president as party. See *Nelson*, 529 US at 460. The United States Supreme Court held that this action violated due process because the president did not have the opportunity to defend himself prior to entry of the judgment against him. See *Nelson*, 529 US at 460.

The 5th and 14th amendment due process clauses are the same to the extent life, liberty, and property is being deprived by either the federal and/or state governments. see e.g. *Plyer v Doe* 457 us 202 (1982) Furthermore, both the 5th and 14th amendment due process clause has the same legal standards when applied to either federal and/or state governments. see *Mathews v Eldridge* 424 us 319 (1976) with that in mind, in the case of *Saunders v Shaw* 244 us 317, it was held that the submission and determination of a case without giving a party thereto the opportunity of presenting his evidence on a material issue resulted in a denial of due process guaranteed by the fourteenth amendment to the Federal Constitution. The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of valid claim.

The District Court Judge had summarily denied the petitioner motion to reopen pursuant to *Houston v Lacs* without allowing the petitioner to put up evidence, and to be heard according to the habeas Rule 7 and/or 8. This violates due process. see e.g. *Nelson v Adams USA, Inc* 529 us 460 (2000) (The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees) The habeas Rules are too designed to further the due process or federal Habeas Corpus. Although habeas Rule 3(d) doesn't have any due process procedures for determining on how to apply Rule 7 and/or 8 regarding *Houston v Lacs* issues, just like

Rule 1 of the Federal Rules of Civil Procedure that states that [the Rules] "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. . . ." the same principles applies to the habeas rules.

The District Court Judge had failed to follow Rule 1 principles of the Fed. R. Civ. P. In the District Court order denying the petitioner the right to appeal pursuant to *Houston v Lacy*, the court stated in pertinent parts:

"Based on the facts before the court, the court cannot conclude that petitioner delivered a Notice of Appeal to the prison authorities on September 21, 2015. First, petitioner has not provided the court with any documentation supporting his claim that he delivered a Notice of Appeal to the Weber Correctional mail Room on September 21, 2015. See Fed. R. App. P. 4(c)(1)(A) ("If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution internal mail system. . . .") This is particularly curious given that with the instant motion, petitioner provided the court with a copy of the November 17, 2016 letter he asserts he sent to the court inquiring about the status of his appeal. (See ECF No. 51-2) In that letter, petitioner stated that he attached a copy of the Notice of Appeal he sent on September 21, 2015, to the letter. (See *id.* at 1) However, though peti-

" par. 4 petitioner returned to the mondo unit where he is assigned, and had an opportunity in which to speak with Lt Terrence Forde (unit supervisor), CPL Collins, OFC. Rapley, and classification case worker (CCW) Turner concerning his inability to have his legal document served.

CCW Turner went into her office and stated she would contact Captain Clark, Administrative Captain supervisor for all shifts and get him to intervene so that access may have been granted to this petitioner in mailing these documents.

" par. 5 Captain Clark informed CCW Turner to have petitioner to report back to the mail room and he would ensure the legal documents would be accepted and documented . . . petitioner was permitted to move to the mail room. At this time, Ms. Bryant accepted the legal documents and debited petitioner inmate account for additional amounts required to adequately serve these documents."

See Appendix (A)

On August 18, 2015, the District Court Judge had granted the petitioner motion to Alter and Amend Judgment and vacated its order adopting the magistrate Judge Report and Recommendation. On August 26, 2015, the District Court Judge had again adopted the magistrate Judge Report granting the petitioner motion for summary Judgment. The petitioner had received the District Court Judge said order on

tioner provided the Court with a copy of the November 17, 2016 letter, he did not provide the Court with a copy of the Notice of Appeal. . .

See Appendix pg. 6-7

Remember, the District Court summarily dismissed the petitioner motion to Reopen pursuant to *Houston v Lacy* without allowing the petitioner to put up evidence such as the copy of September 21, 2015 Notice of appeal. However, in the Rule 59 motion, the petitioner did submit another affidavit pursuant to Rule 3(d) of the habeas Rules with a copy of the September 21, 2015 Notice of appeal. See Appendix (G)-(H) but the District Court denied the petitioner Rule 59 (e) without further evidence. See Appendix (I)

Also, the summary dismissal by the District Judge of the petitioner motion to Reopen pursuant to *Houston v Lacy* without the petitioner putting up a defense violates the fundamental fairness doctrine of the due process clause. See *Lindsey v Norment*, 405 US 56, 66 (1972); *Phillip Morris USA v Williams* 127 S.Ct 1057 (2007) For example, in *United States v McNeill*, 523 Fed. Appx 979, 981 (4th Cir. 2013), in which both the District Judge orders denying motion to Reopen pursuant to *Houston v Lacy*, see Appendix (E)-(H) the fourth circuit court of appeals stated that once the petitioner meets the threshold of filing an affidavit pursuant to 28 USC § 1746 regarding when the petitioner

had placed his notice of appeal in the prison mail then the prison officials must come forth with evidence such as the mail log that the petitioner did not place his notice of appeal on September 21, 2015. Id In Contrary to the fundamental fairness doctrine, the District Judge was not fair and impartial because the Court assumed question of facts regarding when the petitioner deposited his notice of appeal in the prison mailing system. This is violation of the habeas Rules and due process, especially when the District Judge summarily dismissed the motion to Reopen pursuant to *Hawton v Lacy* without allowing the Respondent and the petitioner to put up evidence.

The assumed question of facts that the District Judge had placed in it order denying the petitioner motion to Reopen pursuant to *Hawton v Lacy* is the following:

" . . . Moreover, between January 10, 2014, when petitioner filed his habeas petition with the Court, and September 21, 2015, when petitioner claims to have delivered his notice of appeal to prison officials, the Court received eight (8) other filings from petitioner, including some in which the prison mailbox rule was at issue (see ECF Nos. 23, 24, 27, 34, 35, 41, 42, 43.) These eight (8) other successful filings call into question petitioner claim in his affidavit that he delivered four (4) Filings (a notice of appeal and three (3) letters) to the Lieber Correctional Institution mailroom that were never received by the Court, because up until that point, it appears that every mailing petitioner

deposited in the Lieber Correctional Institution mail room were received by the Court. [Citation omitted] According, as petitioner has submitted no independent proof of the mailing of his notice of Appeal, and the Court received several other mailings from petitioner prior to when petitioner claims to have delivered his notice of Appeal to prison officials, the Court finds petitioner did not deliver a notice of appeal on time, and must deny petitioner motion. [Citation omitted]"

See Appendix (E)

The Court of Appeals erred as a matter of law in allowing the District Judge to abuse its discretion on this issue.

QUESTION 2:

WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT JUDGE TO ABUSE ITS DISCRETION TO DENY THE PETITIONER THE RIGHT TO APPEAL PURSUANT TO *HOUSTON V LACK* 487 US 266 (1988) WHEN HE HANDED HIS NOTICE OF APPEAL TO PRISON MAILING OFFICIALS TO BE MAILED OFF TO THE DISTRICT COURT

PART II

The petitioner crave reference to and incorporate Question 1 facts in this section for relief.

In *Houston v Lack* 487 US 266 (1988) the United States Supreme Court had stated:

" . . . [T]he prose 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 prose prisoner delivers his notice to the prison authorities he can never be sure that it will ultimately get stamped "filed" on time . . . "

Id

As stated in more details in the procedural history statement of the facts section above, see Appendix. The petitioner can only assume that the reason why prison mail room officials did not mail his notice of appeal on September 21, 2015 because on December 29, 2014 the petitioner had gone to higher prison officials in order to get his objection to the magistrate judge report sent out that day to the District Court. Id

Appendix. Through family member in May 2019, and by the District Judge on May 31, 2019, the petitioner had found out that U.S. mail room officials did not send the petitioner Notice of appeal to the District Court. See Appendix (D)-(G)-(H). But as long as the petitioner gave his September 21, 2015 Notice of appeal to prison officials, according to *Houston v Lack*, the notice of appeal is still considered

Filed in the District Court. See *Gracey v United States* 131 Fed. Appx. 180 (11th Cir. 2005); *Huizar v Casey* 273 F.3d 1220, 1222 (9th Cir. 2001) ("The mailbox Rule applies even when the petition 'is never received or filed by the court.'")

The District Judge, along with the 4th circuit Court of Appeals, denied the petitioner the Right to appeal because the petitioner could not show he'd handed his Notice of appeal to prison officials on September 21, 2015. See Appendix (c) p. 8

This Court had stated in *Houston v Lacs* the difficulties in prisoners like the petitioner putting up evidence of when he'd deposited his notice of appeal in the prison mailing system:

"... And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received..."

Id

The 4th circuit Court of appeals erred as a matter of law in allowing the District Court to abuse its discretion on this issue.

QUESTION 3

WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ALLOWING THE DISTRICT COURT TO ABUSE ITS DISCRETION IN APPLYING HABEAS Rule 3(d) AND Rule 4(c)(1)(A)(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN AN UNCONSTITUTIONAL MANNER WHERE IT HAS IMPLICATED THE DUE PROCESS CLAUSE

PART III

The petitioner leave reference to and incorporate the facts in question 1, 2 in this section for relief.

Habeas Rule 3(d) states in full:

"A paper filed by an inmate confined in an institution is timely if deposited in the institution internal system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this Rule. Timely filing may be shown by declaration in compliance with 28 USC § 1746 or by a notarized statement, either of which must set forth the date of deposit and state the first class postage has been prepaid."

Id

The plain language of Habeas Rule 3(d) shows two requirements the petitioner Houston v lack affidavit / Declaration pursuant to 28 USC § 1746 must meet:

- 1). set forth the date of deposit; and
- 2). state the first class postage has been prepaid.

See Jenkins v Superintendent of Laurel Highlands, 705 F.3d 80, 84 n2 (3d Cir. 2013) ("In order to benefit from [the prisoner mailbox] Rule, the inmate is required to make a declaration that sets forth the date of deposit and that first class postage has been prepaid")

In Houston v lack, this Court has placed the burden to disapprove whether or not the petitioner had placed his September 21, 2015 notice of appeal in the prison mailing system to the prison officials and not the petitioner because the petitioner is not in possession of the records such as the mail logs. See Houston 487 US at 276 ("The prison authorities will be the only party with access to at least some of the evidence needed to resolve such questions — one of the vices the general rule is meant to avoid — and evidence or any of these issue will be hard to come by for the prisoner confined in his cell, who can usually only guess whether the prison authorities, the post service, or the court clerk is to blame for any delay"); Jeffery v United States 748 F.3d 1310, 1314 (11th Cir. 2014) ("Absent evidence to the contrary we assume that a prisoner delivered a filing

to prison authorities on the date he signed it", and the burden is on the Government to prove the motion was delivered to prison authorities on a date other than the date the prisoner signed it)

Because Habeas Rule 3(d) doesn't have a procedural due process mechanism for determining the process that is due regarding the petitioner's federal statutory right to appeal, it appears the 4th Circuit Court of Appeals had allowed the District Court to utilize habeas Rule 4 in an inappropriate manner, especially where the District Court did not give the petitioner the right to put up evidence, see *Am. United Life Ins. Co. v Martinez*, 480 F.3d 1043, 1069 (11th Cir. 2007) (To employ fair procedure, a district court must generally "provide the plaintiff with notice of its intent to dismiss or an opportunity to respond" or the Government to respond to the petitioner's affidavit. See Appendix C)(C)

This Court has determined that when a state / federal official violates the due process clause by the implementation of state / federal statutory or laws, this Court must apply the *Mathews v Eldridge* 424 US 319 (1976) procedures in determining what process is due:

1) The private interest that will be affected by the official action; 2) the risks of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; 3) The Governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Private Interest At stake

The petitioner Federal statutory Right to appeal the Federal cause of action of ineffectiveness of Counsel from state Court proceeding that was raised on Federal Review for Relief is at stake.

The Risk of Erroneous Deprivation

The Codification of Habeas Rule 3(d) and Rule 4(c)(1)(A)(i) of the Appellate Court Rules of procedure has caused the Federal Courts to interpret this Court precedent of *Houston v Lacks* procedural framework outside of the original context where Federal circuit Court Rule making authority, without this Court and/or Congress permission, of Habeas Rule 3(d) and Rule 4(c)(1)(A)(i) of Fed. R. App. P. has Really started a Separation of power issue and/or defying this Court legal precedent of *Houston v Lacks* in an unconstitutional manner. Due process is flexible and this Court Extension of Habeas Rule 7 and 8 in determining Rule 3(d) burden of proof and/or standard of Review will cause in the future no erroneous determinations in the Federal Court of *Houston v Lacks* issues that stems from prison officials not properly sending out legal mail or the postal service losing mail and/or some other reasons outside of the petitioner and the Respondent Control.

The Government Burden

The Federal circuits unanimity of the Courts Rules and statutes,

let alone *Houston v Lack*, is essential to this Court since the founding of this nation. There is absolutely no fiscal restraints from the federal Courts utilization of the Existing Habeas Rules, nor is there a burden on the Federal Courts Regarding complying with due process of law, because everyday the Federal Court duty and responsibility are the implementation of due process clause to federal Court Rules, statutes, and laws.

REASON FOR GRANTING THE PETITION

This Court can grant this petition if there is a disagreement between the Federal Circuits Regarding the interpretation of *Houston v Lack*. There is a disagreement between the 9th Federal Circuit, see *Huizar v Carey* 273 F.2d 1220 (2011) and the 4th and 11th Federal Circuits Regarding the due diligence legal standard to *Houston v Lack*. The 11th and 4th circuit doesn't apply the due diligence legal standard to *Houston v Lack* but the 9th circuit does.

Also, there is a disagreement among the Federal Circuit Regarding the burden of producing evidence of when a prisoner had placed his legal mail in the prison mailing system, see *Roberts v Muxenzic*, No. AW-12-CV-2474, 2013 WL 3179102, at *4 (D. Md. June 2013), *aff'd*, 566 F. Appx 226 (4th Cir. 2014) (when a court does not receive a pleading within a reasonable time after the date

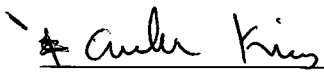
upon which an inmate claims to have mailed it, it is appropriate to require independent proof of the mailing date, such as mail-logs, prison trust funds records, or receipt for postage before giving the inmate the benefit of the prison mailbox Rule) and the 11th circuit follows both this Court precedent in *Houston v. Lacy* and Habeas Rule 3(d) regarding the sufficiency of affidavit under *Houston* of when the petitioner has placed his legal mail in the prison mail system.

The petitioner pray that this Court grant this petition and/or such other and further relief this Court seen just and proper.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 10/13/20