

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Darryl Dwayne Burton — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE NINTH CIRCUIT

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

USCA 9 No. 16-17156

PETITION FOR WRIT OF CERTIORARI

DARRYL, DWAYNE BURTON

(Your Name)

P.O. BOX 3900

(Address)

ADELANTO, CA 92301

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

(1). Did the United States Court of Appeals for the Ninth Circuit and District Court materially err and turned a blind eye and deaf ear to the issue pursuant to *Houston v. Lack*, 487 U.S. 266 (1988) thereby give rise to a Due Process violation; (2) Did the district court materially err when it disregarded the ruling *Houston v. Lack*, 487 U.S. 266 (1988).

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:

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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 A to the petition and is

☐ reported at N/A; 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☐ is unpublished.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 B to the petition and is

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☐ is unpublished.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☐ is unpublished.

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

☐ reported at N/A; 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☐ is unpublished.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 Nov. 29, 2017

☐ 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: Nov. 29, 2017, and a copy of the order denying rehearing appears at Appendix A.

☐ 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: N/A

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

☐ A timely petition for rehearing was thereafter denied on the following date: N/A, 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 N/A (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

Fifth Amendment "Due Process" violation

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Houston v . Lack, 487 U.S. 266 (1988)	1
Jones v Blanas, 393 F.3d 918 (9th Cir. 2004)	5
Saffold v. Newland, 250 F.3d 1262 (9th Cir. 2000)	6
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Campbell v. Henry, 614 F.3d 1056 (9th Cir. 2010)	8
Lewis v. Mitchell, 173 Fed. Supp.2d 1057 (C.D. Cal. 2001)	8
Stillman v LaMarque, 319 F.3d 1199 (9th Cir. 2003)	8
Bulter v. Long, 752 F.3d 1177 (9th Cir. 2014)	8
harris v City of Orange, 682 F.3d 1126 (9th Cir. 2012)	8
United States v. Wilson, 631 F.2d 118 (9th Cir. 1980) .	8

STATUTES AND RULES

Fed.R.App.P. 25(a)(2)(C)

Fed.R.App.P 4(c)

OTHER

Posture of the Cause:

Claimant state a fact, in February of 2001 Burton was incarcerated in California penal system, he was housed at Pleasant Valley State Prison. After the denial of the § 2255 petition Burton filed a timely Objections Motion in conjunction with a 'Notice of Appeal.' These motions were placed in a prepaid, first-class postage affixed certificate of service attached along with under the penalty of perjury pursuant to 28 U.S.C. § 1746, (Fed.R.App.P., 25(a)(2)(c) now accompanies the timely filing of the Notice of Appeal) and then mailed pursuant to Houston v. Lack, 487 U.S. 266 (1988)(Prison Mailbox Rule) addressed to the:

Clerk of Courts
For the Eastern District of California
Fresno Division

then it was placed in the outgoing mail receptacle, including legal mail.

For unexplained reasons these documents (motions) never arrived or were misplaced by the Clerk of Courts officer in the Fresno California. These document were never placed on the active docket sheet. This occurred in 2001.

2016:

Burton was helping conduct research into this old case because the question had arisen as to why the motions discovered inside the old file was never answered by the courts. Burton then proceeded to conduct an inquiry into the factual record and notified the

district court through the Clerk's Office of the major discovery with the missing motions.

On November 3, 2016, the Court issued an Order construing the September 27, 2016 Order as a request to re-open the time for appeal and denying any such request, finding "the time for raising any missing or lost notice of appeal has long since passed." In according to the Court's docket, the November 3, 2016 Order was served on Defendant. Burton timely filed a notice of appeal from that Order. (Appeal No: 16-17156) Burton then requested a certificate of appealability (Docket Entry Nos. 5 & 12) was denied by a two judge panel on July 17, 2017.

Claimant state a fact, a timely motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 15) were denied. Along with a motion to take judicial notice (Docket Entry No. 14).

SYLLABUS

Burton having discovered that the Motion of Objections to the Magistrate's Report and a Motion serving Notice of Appeal had never been docketed with the Clerk's office, moved to correct the error. Claimant filed motion for reconsideration back before the district court which was reconstrued as one to re-open time for appeal and to file a motion for reconsideration. (See DK # 161) This was denied by the district court which formed the basis for appellate review. The relevant motion were all filed pursuant to Houston v. Lack 487 U.S. 266,276 (1988). Burton expressly stated the

assured right invoked pursuant to Fed.R.App.P., Rule 4(c)(1)(A)(i) and more importantly the holding pursuant to *Houston v Lack*, 487 U.S. 266, 270-76(1988). All courts have now shirked this issue of whether the motions were thus filed from the original date on the copied documents presented before district court. It is very troublesome that district court's ruling totally neglected to include a valid ruling of why the motions that were apparently - lost or misplaced should not have been deemed as filed on the 2001 date when they were placed in the prison mailbox! Thereby, granting Burton ample opportunity to re-open the § 2255 litigations including the chances for review in the Appellate Court.

Fed.R.App.P 25(a)(2)(C) accompanied by Fed.R.App.P. 4(c), which addresses filing of a notice of appeal in the district court, extends the holding in *Houston v. Lack* to all papers filed in the courts of appeals by persons confined in institutions.

(Fed.R.App.P. 4(c) mirrors the text of Fed.R.App.P. 25(a)(2)(C))

REASON FOR GRANTING THE PETITION

(1). Did the United States Court of Appeals for the Ninth Circuit and Disitriect Court materially err and turn a blind eye and deaf ear to the issue raised pursuant to *Houston v. Lack*, 487 U.S. 266 (1988).

Burton, acting in propria persona, signed, dated and deposited in the prison mail (mailing to district court) a documents entitled Notice of Appeal and Objections to the Magistrate's Report, stating an intention to appeal if the district court denied the Objections motion. These were placed in the mail box on Feburary 10th, 2001 at the Pleasant Valley State Prison.¹ The appropriate certificate of service with accompanying penalty of perjury (§1746) and with prepaid postage was affixed to the envelope. Meeting all the requirements set forth by the Supreme Court in *Houston v. Lack*. Pro se prison inmates are given a little or alot of flexibility with respect to these requirements under the prison mailbox rule. See *Houston v. Lack*, 487 U.S. 266 (1988). In such cases as this, it does not matter the actual date the document is received and filed with the court, so long as the inmate has deposited the notice "in the institution's internal mail system on or before the last day for filing." Fed.R. App.P. 4(c)(1)(codifying prison

¹ (Pleasant Valley Prison is located in Fresno County California)

mailbox rule). It was held in *Jones v. Blanas*, 393 F.3d 918, 926-927 (9th Cir. 2004)(explaining that the mailbox rule embodied in Rule 4(c) "applies broadly to any inmate confined in an institution" and that there are "no express limitation[s] of the rule's application to prisoners, or to penal institutional" (internal quotations marks omitted)).

Writing for the Supreme Court in *Houston*, Justice Brennan explained the impetus behind the Court's adoption of the mailbox rule "The situation of prisoners seeking to appeal without the aid of counsel," he said, "is unique," 487 U.S. at 270. Unrepresented prisoners "cannot take steps other litigants can take to monitor the processing of their notices of appeal...before the deadline." *Id.* at 270-71. The Court recognized 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 over or supervise and who may have every incentive to delay," and that a prisoner litigant'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. Unlike represented litigants and litigants who are not incarcerated, pro se prisoners have no control of their court filing after delivery to prison authorities: "No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped 'filed' on time." *Id.*

The Ninth Circuit in applying *Houston* to ascertain the date not only of a notice of appeal but also of a state habeas corpus filing, they

previously reasoned that unrepresented state prisoners filing state habeas petitions are equally "powerless and unable to control the time of delivery of documents to the courts," so "the conditions that led to the adoption of the mailbox rule are present." *Saffold v. Newland*, 250 F.3d 1262, 2168 (9th Cir. 2000), overruled on other grounds, *Carey v. Saffold*, 536 U.S. 214 (2002)

The case-at-bar represents unique circumstances that may have never occurred before. Burton observed every available established Federal Civil Procedure for proper filing of the Objections to the Magistrate's Report and in the event of denial, Notice of Appeal. Properly titled certificate of service, postage affixed to the envelope, under the penalty of perjury, mailed to the district clerk of courts in Fresno. Just so happens it was never filed and/or received into the file! Is Burton to be denied "Due Process" and now alleged to be time barred by the district court? The Ninth Circuit Court of Appeals denied to hear the claim on a certificate of appealability. Does "excusable neglect" apply to the case-at-bar?

Although district court recharacterized the original pleading and attempted to provide justification for denial, the law of the land supports Burton's position that he is not time-barred from district court answering the allegation(s). Claimant should not be penalized for the State of California's prison employee's or the United States employee's lost of the relevant documents. Nevertheless, new rules have shown substantial improvements in reliability now utilized.

Under the prison mailbox rule a prose prisoner's habeas petition is constructively filed when he gives it to prison authorities for mailing to the court. *Hernandez v. Spearman*, 764 F.3d 1071, 1074 (9th Cir. 2014). A court generally considers a prisoner's petition filed on the day it was signed, see *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir. 2014)(per curiam)(as amended). See *Lott v. Mueller*, 304 F.3d 918, 921 (9th Cir. 2002); *Campbell v. Henry*, 614 F.3d 1056, 1059 (9th Cir. 2010)(Applying the mailbox rule to both state and federal filings by prisoners). All of petitioner's filing dates reflect application of the prison mailbox rule unless otherwise noted. See *Lewis v. Mitchell*, 173 F. Supp.2d 1057, 1059 n.1 (C.D. Cal. 2001)(delivery for purposes of constructive filing under the prison mailbox rule is presumed to be the date of signing of the petition, absent evidence to the contrary); *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003); *Bulter v. Long*, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014)(assuming federal habeas petitioner "turned over his petition to prison authorities on the same day he signed it").

Burton request that the Court take judicial notice of the record and files as well as those of the Court of Appeals for the Ninth Circuit, as necessary herein. See Fed.R. Evid. 201(b)(2); *Harris v. City of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

Current authority supports the contention that there's no established time line once the document has been signed, dated, placed in the institutional mail, with attached declaration and under the penalty of perjury (§1746) on the document. Statutory tolling pauses the clock when a proper filed notice of appeal and/or Objections to the Magistrate's Report was placed in the mail pursuant to the holding in *Houston v. Lack*, 487 U.S.266, 276 (1988). Claimant cannot be held accountable for whatever then happened to the documents once they were delivered to prison authorities for forwarding to the court clerk.

In sum, there's no need for an equitable-tolling theory to justify admittance of the motions, because the thread upon which to make a determination is *Houston v. Lack* which clearly states once mailed the 'notice of appeal is deemed filed. If once mailed it's deemed to be filed then the date on the motion(s) would be February 10th of 2001. (See Affidavit of Truth; Attachment D) Thereby, the discussed motions must be considered duly filed in compliance with Fed.R.Civ.P., Rule 4 in effect at the time it was mailed in 2001. Claimant has a right to be heard on appeal and for "due process" in accordance with the Fifth Amendment, moreover, a right of full-reinstatement of the appellate rights which has been denied. As Justice Thomas has recently restated, the Due Process Clause may have originally been understood to require only "that our Government ...proceed according to the "law of the land-that is, according to written constitutional and statutory provisions" -before depriving someone of life, liberty, or property. *Johnson v United States*, 135 S. Ct. 2551 (2015)(Thomas, J., concurring in judgment)(quoting *Hamdi v. Rumfeld*, 542 U.S. 507 (2004)(Thomas, J., Dissenting)).

CONCLUSION

The Petition for writ of certiorari should be granted. This case warrants full examination based on the merits and *Houston v. Lack*, 487 U.S. 266, 275-76 (1988).

Autograph:


Darryl Burton
In Propria Persona

Date: Jan 22, 2018 A.D.