SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
PRENTISS HOUSTON,	)	
	)	
Petitioner	)	Case No. 87-5428
	)	
v.	)	
	)	
LARRY LACK, WARDEN	)	

PAGES: 1 through 39

PLACE: Washington, D.C.

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ON BEHALF OF THE UNITED STATES SUPREME COURT

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Respondent	)	

Supreme Court
Washington, D.C.

Wednesday,
April 27, 1988

The above-entitled matter came on for oral argument, pursuant to notice, at 1:58 p.m., Chief Justice Rehnquist presiding.

APPEARANCES:

On behalf of the Petitioner:

Penny J. White
Johnson City, Tennessee

On behalf of the Respondent:

JERRY L. SMITH
Dep. Atty. General of Tennessee
Nashville, Tennessee

P R O C E E D I N G S

(1:58 p.m.)

CHIEF JUSTICE REHNQUIST: Ms. White, you may proceed whenever you are ready.

MS. WHITE: Thank you.

ORAL ARGUMENT BY PENNY J. WHITE, ESQ.

ON BEHALF OF PETITIONER

MS. WHITE: Mr. Chief Justice, and may it please the Court, Prentiss Houston, a pro se inmate, gave his notice of appeal in a brief to prison authorities for mailing on February 3, 1986. Those documents were stamp filed at the Clerk's Office some 81 miles away on February 7th, which happened to be 30 days and eight and one half hours after entry of the order denying his petition for habeas corpus.

Not until March 21st, when the Sixth Circuit entered an order directing Houston to show cause why his appeal should not be dismissed, did he learn of his untimeliness. After receiving his reasons for delay, and being directed to this Court's authority in Fallen v. United States, the Sixth Circuit appointed counsel, and directed counsel as one of the issues to be briefed to consider the applicability of Fallen to the case before it.

Having been appointed by that court to brief the issue of jurisdiction, as well as the merits of the case, which were noted to be a first impression in the district, and having urged that court to allow Mr. Houston's appeal under Rule 4(a)(5), or under

the precedent of Fallen v. United States, and having been told by that court summarily from the bench in open court that they were without jurisdiction, and that Fallen was of no help to the Petitioner, we apply to this Court for relief from that judgment of the Sixth Circuit Court of Appeals which we submit is plainly wrong.

That judgment is plainly wrong for four reasons. Two of those reasons require reversal of the Sixth Circuit order, and a consideration by the Sixth Circuit on the merits.

The other two issues, at the very least, require remand for consideration of Rule 4(a)(5), or for consideration of when Mr. Houston's notice was actually received. I will address the issues in that order.

First, turning to the precedent of Fallen v. United States, almost 25 years ago this Court recognized in the pro se Petitioner aspect that when a prisoner does all that he reasonably can do to affect a timely appeal, that his appeal should be heard. In the words of this Court, the rules are not, and were not, intended to be a rigid code, to have an inflexible meaning irrespective of the circumstances.

Q That was a direct appeal? That was during the process of direct appeal?

MS. WHITE: Justice Rehnquist, that is correct, but, in fact, that proposition, that quote, in Fallen v. United States, was quoted by the Advisory Committee to the rules of appellate

procedure, particularly under Rule 3. It was quoted in conjunction with four other cases, one of which was a civil case, and in conjunction with Coppedge v. United States, which in its footnote refers to either 2255 and 2254 petitions.

We suggest that what the Court focused on and found was not the nature of the case, but the nature of the rules. The state, in fact, urges you to distinguish Fallen based on the fact that it was a criminal case, and a direct appeal.

As the Court has pointed out, that is a factual difference. It is a distinction that does not make a difference. In Fallen--

Q Well, isn't there a statute here that we have to come to grips with, and there wasn't for the direct appeal?

MS. WHITE: Justice O'Connor, the state points out that 20 USC Sec. 2107 is a statute that says that in civil cases an appeal must be brought within 30 days. Quite frankly, the point I am about to address is not adequately pointed out in our brief, and I think it is of significant importance.

The state relies on that statute for its argument that time limits are jurisdictional. That statute says that an appeal must be filed within 30 days. As this Court recognized in Shack v. United States, when we were dealing with court rules, and not statutes, court rules aren't jurisdictional. The meaning of the word file does not come from a promulgation of Congress. It comes from Rule 25 of the Federal Rules of Appellate Procedure.

In fact, Rule 25 says that papers must be filed by receipt, but briefs may be filed by mailing. It is a cruel irony in this case that Mr. Houston mailed a notice of appeal and a brief on the same day. His brief, I suggest to you, was filed the day he mailed it. His notice of appeal under Rule 25 was filed the day the Clerk stamped it as received.

It is also a cruel irony that had Mr. Houston been petitioning this Court for certiorari mailing, would have been filing.

So I suggest --

Q Well, he would have had to -- would he have had to have a certificate, some affidavit?

MS. WHITE: That's an intersting question. Certainly Rule 28.02 says he'd have to have a certificate from a practicing member of this Court, but I would suggest that's an interesting equal protection problem there if the inmate would not be allowed to proceed that way.

Q That's terribly hard on the pro se indigent prisoner, isn't it, that rule? It's always bothered me, I'd like to say. I think we are unfair on these people.

MS. WHITE: I think that that is illustrated greatly by this case.

The point is that Mr. Houston filed a brief, which conforms with the rules of appellate procedure requirement of what a notice of appeal is. His brief on the cover said he was

appealing from the United States District Court to the United States District Court of Appeals, which in his pro se language was what the court was. It also stated the names of the parties.

That brief was filed the day it was mailed; however, his notice of appeal which accompanied it, which was filed the day it was received, was not received until eight and a half hours too late.

As this court recognized in Fallen, when a pro se inmate does all that he reasonably can do under the circumstances, perhaps mailing should be filing. At least two members of this Court, Justice Brennan and Blackmun, recognize that in those situations prison authority should be the Clerk, because look at the situation we have. Mr. Houston has to reply on his adversary to note his appeal. Once he goes to prison authorities and hands over that appeal, there is absolutely nothing else he can do to make sure it gets there.

Q So you suggest that we should simply construe the word "filed" as used in the rules as being satisfied if he has delivered his notice of appeal to the prison authorities in ample time?

MS. WHITE: I suggest that is one thing that the Court could do, and since those are rules that are to be applied with elasticity, and rules written and approved by this Court, the Court can do that.

Q That was Justice Stewart's suggestion, wasn't it, in Fallen?

MS. WHITE: Justice Warren wrote the opinion, Chief Justice Warren, but there was a concurring opinion in which the mailbox rule was proposed. There were four Justices that joined in that.

Q What if the post office takes ten days to -- you know, some of us feel just as helpless putting it in the mailbox as a prisoner might feel delivering it to the warden. What if a post office takes this ten days? Should that litigant, whether pro se, or otherwise, be given any less consideration?

MS. WHITE: A number of cases have recognized that reliance upon normal delivery of mail is excusable neglect, is good reliance, and, in fact, I think what the Court would have to determine is what is reasonable.

If he put it in the mail on the last day perhaps it is not reasonable to expect it to get there. Of course, in this case it only had to travel 81 miles. But there are numerous cases, even where attorneys wait too late to mail, that the Court said that reasonable reliance on the mail is sufficient to allow an untimely appeal.

Q To meet a jurisdictional deadline?

MS. WHITE: The jurisdiction aspect of it is only filing. What is filing is created by court rule, and this Court has recognized in the unique circumstances line of cases, and in other cases, that equitable totaling may occur, so that actual

receipt is not required.

For example, about three years ago in the case of United States v. Lack, the issue was whether or not the Federal Land Mining claim, which had to be filed on a certain day, could be filed a day late, and Justice Marshall noted that, in fact, that was a statute, and there could be no late filing. However, the doctrine of equitable estoppel was recognized in his opinion, and in a concurring opinion of Justice O'Connor, and that case was directed back for remand to determine whether or not estoppel was appropriate.

Q Well, do you think we should incorporate all those doctrines into something where you are trying to talk about whether the Court of Appeals has jurisdiction of a case? I would think there you would want to have probably the strongest possible stand against things that are just going to make every- - the timeliness of every appeal very uncertain.

MS. WHITE: If I understand your question, I do think that the simplest way to cure the matter would be to define filing for all papers in the Circuit Court as occurring upon the same act.

We are dealing with a pro se inmate who mailed a brief, and a notice of appeal, on the same day. The rule tells him that papers must be received, but that briefs must be mailed in order to be timely. To a pro se inmate the fact that one of his documents was called a brief may not have indicated to him that his other document came under that definition of papers.

Q We just had a case the other day, Ms. White, about a post office employee who was dismissed for keeping mail in the trunk of his car for a year and never delivering it. I mean, if the Chief Justice is talking about some certainty as to whether there has been an appeal filed, is the case over, or isn't it, to make it effective upon mailing certainly puts the other side at a lot of risk. You just sort of have to hope that the post office has picked the right mail carrier, that it is not in the trunk of somebody's car, or whatever else.

Don't we need something a little more certain than that?

MS. WHITE: Yes, sir, I understand that reservation, Justice Scalia, but we don't have that case before the court. We have a notice of appeal that arrived.

Q But you're suggesting a rule that leaves itself open to that kind of uncertainty. Any mailbox rule, the other side, really doesn't know. You can hope that the mails were delivered properly, but as the Chief Justice says, we're talking about the jurisdiction of the court, we are talking about whether litigation is finally terminated.

MS. WHITE: I am not suggesting that that rule is the only way the Court can go. I'm suggesting that at least four members of this Court thought that that was the way to go in 1964 in the case of Fallen.

There are other means by which this Court can allow Mr. Houston's appeal to be heard. One of those is present in a line

of cases from this Court beginning with Harris Truck Lines, and concluding with two INS cases, Thompson and Wolfsohn.

Those cases recognize that when a litigant, and may I suggest that in all three of those cases we were dealing with a litigant represented by a lawyer, when a litigant detrimentally relies on some action of the District Court, and doesn't timely note his appeal, then his appeal should be deemed timely.

In this case what happened between the day Mr. Houston presented his notice for mailing, and March 21st, is that Mr. Houston received a certificate of probable cause from the District Judge; he received a briefing schedule from the Court of Appeals; and he received a correspondence that required him to designate parts of his record. He did all of that, thinking, as a pro se inmate would, that things were proceeding normally with the appeal.

It was not until sometime after March 21st, long after any time had expired within which he could do something about his lateness, that anyone bothered to tell him he was late.

Q Well, in the cases you're talking about, the District Court had indicated that a motion to grant an extension would be granted, or at least assured the people that what they proposed to do would be timely, although he was, in fact, wrong.

Here there was no such explicit assurance to your client.

MS. WHITE: You're absolutely correct in the case of Harris Truck Lines. In that case the appellant's attorney was out

vacationing, and the lawyer asked the District Judge to allow him to file his appeal late after the attorney returned from vacation, and the Judge said, "yes, you may file a late appeal." In that case the Judge did say something in order to make those parties detrimentally rely.

However, in the case of Thompson and Wolfsohn, what happened particularly in Thompson is that the litigant filed a tolling motion, a Rule 52 or Rule 59 motion, too late, and the Judge heard the motion, and the other party, the Government, did not raise the lateness, and so then when the appeal was perfected the Court of Appeals threw it out and said your first motion didn't toll because it was two days beyond the ten day limit.

So in that case certainly the District Judge did not extend the appeal time. In fact, the lawyers detrimentally relied on their own ignorance, yet this Court said in those circumstances it would be unfair to deny them an appeal.

Certainly I would agree that a lawyer who received a certificate of probable cause or a briefing schedule, would not detrimentally rely upon that, but we are dealing with an unskilled inmate, a person who this Court has called an unlettered prisoner without friends or funds. We are not dealing with someone who understands what a certificate of probable cause is.

Q Do you think that the inmate then is not required to conform to the rules of civil procedure if he is going pro se in

a way that other parties are?

MS. WHITE: Absolutely.

Q Absolutely what?

MS. WHITE: Absolutely. I think that he is not required to conform with the letter the way that other litigants are. I think this Court has consistently recognized that, particularly in the habeas corpus area where we are dealing with the great writ, the writ that holds the key to the prison doors.

This Court has said in Harrison v. Nelson, the Kerner case, and a couple of other habeas corpus cases whose names escape me at the moment, that pro se inmates are not to be held to the same level of expertise and skill.

Q In the Kerner case, that was a statement that they are not held to the same level of expertise in drafting a complaint. Don't you see any difference between that and requirement that everybody comply with the same rule as to jurisdiction?

MS. WHITE: That's true that the Kerner case dealt with the 12(b)(6) dismissal of a complaint, and the Court said we don't hold pro se inmates at the same level. But, Your Honor, I would point out the cases of Price v. Johnston; Holiday v. Johnston; and Darr v. Burford, in which the Court recognized the general principle that when we deal with pro se inmates we are dealing with unskilled inmates, or unskilled litigants, who we cannot hold to the same level of skill.

Q Do any of those cases say that those -- that pro se

inmates could not conform with the jurisdictional rule, either Darr, or Price against Johnston, or Holiday against Johnston?

MS. WHITE: I would suggest that this Court --

Q Could you answer the question?

MS. WHITE: Sir, none of those cases dealt directly with applying -- with complying with an appellate rule, but this Court said that when it approved rule of appellate procedure 7, I believe it is, in which it says "a notice of appeal will not be thrown out because it doesn't conform with the requirements of this rule so long as it substantially complies."

I would suggest that that rule, and of course, as well, the rules governing habeas corpus in general, suggest that this Court does take a different look at pro se papers.

Q It seems to me there are two factors involved here when you say substantially complies, and when you say unlettered litigant, whatever. You don't have to be lettered to know 30 days means 30 days. I mean, certainly there are some rules that are so rudimentary that everybody has to be held to it. I can't see what difference it makes that someone is unlettered whether he complies with the 30 day deadline or not.

And secondly, you talk about substantial compliance. There is no possibility of substantial compliance with a 30 day time limit. Thirty-one days is not 30 days. Otherwise, you can't have any time limits. Is 35 substantial? Is 45? It seems to me substantial compliance with 30 days is 30 days.

MS. WHITE: In regards to your first point, I think if you would indulge me, we are assuming that Petitioner Houston knew that it was 30 days. I would suggest that what Petitioner Houston had to do was first find out if it was 30 days, which would certainly be a simple matter for you or I to go to a rule book and look it up, but we are dealing with a person who is not familiar with rule books. He first had to determine whether it was 30 days. And then he reads Rule 3 and it says "notice of appeal shall be filed within 30 days." And then he goes to Rule 25, and Rule 25 says filing means mailing. If it's a brief or an appendices, filing means receipt if it's a paper.

And the most crucial point is he mailed the document, he delivered it to his custodian, within time to meet any one of those rules. He gave it to the custodian four days before it had to travel 81 miles, yet it did not get there.

Q That could happen to anybody no matter how literate you are. I mean, that is not a function of his lack of intellect.

MS. WHITE: But when it happens to me, when I mail on the 27th day, I can call the Clerk, I can travel to the Clerk's Office to make sure it got there. Mr. Houston could do absolutely nothing else but give that to his adversary and say "mail it."

And to suggest that we don't have some sort of solicitude in that situation suggests that the adversaries of pro se inmates can, in effect, make sure there are never any appeals.

Q You are not trying to tell me that a prisoner doesn't know about the calendar, and the days? They can count days faster than anybody else can.

MS. WHITE: Yes, sir, they may have quite a bit of experience in counting the days. They have to know where to count from, and where it has to be on that 30th day.

Q And they know how to do it. I don't think that helps you at all. I think the point is that -- the best they can do is to give it to the jail authorities. He can't go out and mail it.

MS. WHITE: That's exactly what he did in this case. He gave it to the jail authority.

I would suggest to the Court that in the event the Court is hesitant to apply Fallen to these circumstances, which we suggest applies, and in the event the Court is hesitant to apply the unique circumstances line of cases, that the rules themselves allow this Court to determine that Mr. Houston's appeal was timely filed for two reasons.

As the Court is well aware, Rule 4(a)(5) says that an appeal can be extended. The District Court can grant an extension for up to 30 days because of good cause or excusable neglect.

Now, prior to 1979 every single time that a pro se inmate's notice of appeal occurred in that second 30 days, he was -- it was interpreted to be a motion for an extension of time, and if, in fact, there was excusable neglect prior to 1979, it was

allowed even though it occurred in the second 30 days.

In 1979 the rules were amended, and the rules were amended for three reasons, none of which deal with this act. Judge Friendly, in the case of Inre Orbitec, had found a problem with occurs when you ask for an extension of time within the 30 days, but don't get your order within the 30 days. So that was one reason that the rules were amended to allow you to -- to allow a District Judge to extend the time up to ten days beyond his order.

The second reason that the rules were amended was to add a good cause allowance so that if an inmate -- or, excuse me, if any litigant had good cause they could ask for an extension regardless of whether it was excusable neglect.

The third reason that the rules were amended was to require a motion to be filed for request in the first 30 days. From the time the rules were implemented until today, a motion has always been required for request in the second 30 day period. Yet, since 1979 the circuits who have dealt with it, with the exception of one circuit, has said now you can no longer treat the late filed notice as a motion. You must have a specific motion.

I would suggest to this Court that Judge Hainsworth in the Fourth Circuit opinion of Shah v. Hutto, correctly viewed this problem. That change in the rule had absolutely nothing to do with the situation of a motion in the second 30 days.

So when Mr. Houston sent his notice of appeal, he certainly implied he meant he wanted to appeal, and he wanted to do anything necessary to appeal. The Court received it, gave him absolutely no notice that it was late, notwithstanding the fact that two years earlier the Sixth Circuit had said "you Clerks ought to give notice when these pro se inmates are late," gave no notice. He knew nothing about the situation until the second 30 days had expired, and he could not make a motion.

I would suggest that the proper construction of Rule 4(a)(5) is to treat that notice as a motion, just as it had been done for countless years prior to 1979. I would suggest that the changes do not affect that second 30 day requirement at all.

Q -- the date on which the prison authorities turned the notice over to the mailman?

MS. WHITE: No, sir, you do not. What you know is that the prison authorities logged in Mr. Houston's mail on February 3rd. That's in the joint appendix at 28. We don't know when it was mailed.

Q And then Mr. Clerk got it on February 7th?

MS. WHITE: Correct, which is another interesting point, and it's actually my last point. The District Court logged that in at 8:30 a.m. on February 7th. Every paper of Mr. Houston which arrived at the District Court, was logged in at either 8:00 a.m., or 8:30 a.m.. The District Court occupies a post office building, and has a post office box. The circumstances at least

suggest should this Court be unable on the facts, or unable under the law to allow Mr. Houston's appeal, the circumstances at least suggest at a minimum that Mr. Houston is entitled to a remand to determine when that letter -- notice, excuse me -- was actually received.

Q How distant was the District Court from the prison?

MS. WHITE: Eighty-one miles.

Q Twenty miles a day for the delivery. You really think four days is a whole lot of time? I mean, an extraordinary amount of time to get a letter delivered?

MS. WHITE: In a post office?

Q Yeah. Even in the same metropolitan area. Are you always sure that the letter you mailed will get there in four days?

MS. WHITE: No, I'm not always sure, but I can pick up the phone and call, and I can go down and see if it got there.

I would suggest that 81 days is supposedly next day delivery with the post office that proclaims next day delivery within 100 miles, and nonetheless, it got there a day late.

Now, the state is going to suggest to you that he put the wrong address on it. Regardless --

Q Was there a postmark on it?

MS. WHITE: We don't know that either. We don't know what- - where it went -- we don't know when it left, or where it went, between the time it left, and the time it arrived.

Q And you're suggesting because of the filing stamp in the morning, and that a lot of stuff is filed that early in the morning, it might have been received the day before?

MS. WHITE: I'm suggesting there's enough of a possibility there to entitle this litigant to a remand if the Court cannot find timely filing on any other basis.

Q Ms. White, was that argument made below?

MS. WHITE: No, ma'am, it was not.

Q This is the first time that we -- anyone has heard that?

MS. WHITE: I'm sorry, I didn't mean to interrupt.

None of these arguments were made below. None of these arguments were made below because what happened is the Sixth Circuit assumed jurisdiction over the jurisdiction issue, appointed me to represent Mr. Houston, amd said "brief jurisdiction, and brief the merits."

I arrived in the Sixth Circuit for oral argument having briefed jurisdiction on these arguments of Fallen in Rule 4(a)(5), and the Sixth Circuit under Rule 16 of their procedures. Sua Sponte from the bench dismissed the appeal.

Q And you didn't make the argument about -- that it might have been received in the post office?

MS. WHITE: You are absolutely correct, I did not. I did not at that point in time.

It is our position that in a situation where we are dealing

with a pro se inmate who does all that he can do, who substantially complies with the rules, who, in fact, detrimentally relies on the action of a District Judge, or of a District Court, more correctly, and who, in fact, may have gotten his appeal there timely under the circumstances in this case, that his day in court should not be taken from him.

Q And your argument is that it doesn't make any difference whether he gave it to prison authorities or not under your rule. All he had to do within time was to -- within the allotted time was to put it in the mailbox.

MS. WHITE: No, sir, not exactly, because if he put it in a mailbox that was not a functioning mailbox, I certainly wouldn't be making this argument.

Q Well, no, but he put it in the regular prison mailbox to go out, and he put it in on the day long before the time expired. And you say he should -- he should be deemed to have complied with the rule then?

MS. WHITE: I'd like to respond in two ways. Fortunately we don't have to bank on that in this case because he logged it in, and the prison authorities did that, and --

Q The prison authorities may have put it in the mail right then.

MS. WHITE: Yes, sir.

Q And then the only problem would be the mail.

MS. WHITE: That's correct.

Q Well, so he drops it in the mailbox instead of giving it to the prisoner, and it doesn't arrive in time.

MS. WHITE: If under the circumstances of dropping it in the mailbox he did all he reasonably could do under the circumstances, then, yes, that appeal would be timely.

Q I don't think four days is reasonable. I wouldn't trust four days. If I knew I wasn't going to make a phone call or anything else, I'd be sure to get it in the mailbox more than four days before. Wouldn't you?

MS. WHITE: You wouldn't because you would have known the 30 days. You would have known exactly what to do.

In this situation we have an inmate who is in an institution, whose library has been destroyed by a riot, who has moved from that institution to another institution during the first week, and during that period he is placed in an orientation where he is busy six days a week and unable to get to the library, and I don't think the Court can assume he knew the rules of appellate procedure.

Q Should that make the difference? You can always say that. Everytime someone doesn't know the rules of appellate procedure we can just say, well, that's --

MS. WHITE: We expect that of lawyers.

Q So then that's irrelevant.

MS. WHITE: No, it's not irrelevant.

Q Every non-lawyer, we can't hold them to the 30 days.

MS. WHITE: No, sir, every pro se inmate who does everything he reasonably can do under the circumstances to timely note his appeal should have his day in court.

Q Okay. That's a different issue from whether he knows the 30 days or not.

MS. WHITE: It is different.

Q We can hold him to knowing the 30 days period, can't we? Do we have to examine each individual litigant to see whether he is unlettered enough to know the 30 days?

MS. WHITE: Not if you rule that a late filed notice is a motion for extension of time, you certainly do not.

But if the case of Fallen v. United States is the basis for this Court's decision, then that is by its nature a factual inquiry, and it requires the Court to look at the facts.

May I reserve, if there are no questions, my remaining time for rebuttal?

CHIEF JUSTICE REHNQUIST: Yes, you may. Thank you, Ms. white.

I will hear now from you, Mr. Smith.

ORAL ARGUMENT OF JERRY L. SMITH, ESQ.

ON BEHALF OF RESPONDENT

MR. SMITH: Thank you, Mr. Chief Justice, and may it please the Court.

There are four or five things that I think I should disabuse the Court of any notion that may have been suggested by counsel

concerning this particular inmate, and this particular record.

First of all, there is nothing in this record that suggests that Mr. Houston is as unlettered as counsel suggests that he is.

Secondly, there is nothing in this record that suggests that Mr. Houston was not allowed by prison authorities to call the Clerk's Office and inquire after his notice of appeal.

There is nothing in this record that suggests that prison authorities delayed in any way the mailing of the notice of appeal after it was given to them by Mr. Houston.

Q There is nothing to indicate in the record when they actually mailed it either.

MR. SMITH: No, that's corect, Your Honor. There is nothing in the record.

Q Well, they might have sat on it for two or three days.

MR. SMITH: It is conceivable.

Q What if they did? Would that make any difference to you?

MR. SMITH: No, Your Honor, it would not.

Q Because? Why wouldn't Fallen cover it then?

MR. SMITH: Well, because I think Fallen is a criminal case, first of all, and as a criminal case there are no congressionally set deadlines, filing deadlines.

Q Suppose we reject that argument and say that Fallen would apply anyway if it otherwise would apply?

MR. SMITH: Well, then I think that Fallen may apply in the

case of -- it is a case that I submit to you --

Q If it's clear -- do you think the Fallen might well apply if it were clear the prison authorities just sat on it for a week?

MR. SMITH: Oh, I think it's conceivable that Fallen would apply in that particular kind of case. I think there is, though given the --

Q You might not even need Fallen. You might have a due process objection if that were the case.

MR. SMITH: That's correct, it may not be necessarily Fallen. There may be a due process objection.

There are also certainly another way out of this box for him had prison officials sat on this for a week, and that's the Rule 60 argument, I think, that would have available to the Petitioner if, in fact, such an extraordinary thing had happened as the prison authorities deliberately interfered with his right to file an appeal. I think that would be available to him.

I think it is noteworthy as counsel did mention, that Mr. Houston addressed his notice of appeal to the wrong post office box, and the wrong zip code, and I think it highly probable, given that fact which is undisputed, that that may have had something to do with the delay in the mailing of the notice of appeal.

We are not unsympathetic to the plight of pro se litigants, in pro se incarcerated litigants. As such, we know the Court is

not unsympathetic to the plight of those litigants. And as such, the Court has, in fact, granted several dispensations to pro se litigants concerning the form of their pleadings, certain formalities in the pleadings are waived in the litigants, but here we deal with the case where jurisidictional significance is involved.

There must come a point in time, we submit to you, a definite point in time where litigation must end if an appeal is not perfected before the deadline for doing so expires.

Q General Smith, I suppose that interest would be met by taking your point of second argument that you always treat the notice that is a couple of days late under these circumstances as a motion to extend time. You would have an extra 30 days, but you would have a deadline you could work with.

MR. SMITH: Well, I think there's a problem with the argument. There is a couple of problems with the argument.

Q Right, there are problems with it, but at least it would solve that particular concern.

MR. SMITH: Oh, if that is, yes. I mean, it would serve that particular concern if it was treated as a motion.

Q Plus the thing gets there one day after the extended deadline. I mean, you are --

MR. SMITH: That's right.

Q -- just postponing the evil day, aren't you?

MR. SMITH: That's right. If it is beyond the

time --

Q Even if you give him another 30 days, it is going to come one day after the extended 30 days.

MR. SMITH: Yes, and if it comes one day beyond the extended 30 days, this argument will not wash.

Q Well, sure, you couldn't make the rule whatever it is, 4(a)(1)(5), for a five rule in that circumstance. That's all. The argument just wouldn't apply.

MR. SMITH: That's right, it wouldn't.

Q If you buy her argument, you would have an outside number of 30 days. The fact that you are there on the 61st day, there is just no argument to make.

MR. SMITH: There is no argument to make in that kind of case.

I think the problems that are inherent in a rule -- in a rule that construes late filed notice of appeal within the extension period as being a motion for an extention are, first, it runs contrary to the plain language of the rule, which requires that a motion be filed.

I think another point to be made on that, and this does not necessarily make the conclusion that we reach correct, but I think it is very instructive, and that is that the Ninth Circuit Court of Appeals that have considered this argument have rejected this argument, including the Fourth Circuit, which has rejected this argument sitting on bank.

I think those two factors taken together certainly indicate that in amending Rule 4(a)(5) to provide that in all instances a motion must be filed in order to obtain an extension, and that informal grants of extension of time would not be favored, miligate against counsel's argument that a Rule 4(a)(5) extension can be granted when there is a late filed notice of appeal within the extension period.

I think it is noteworthy here too that the extension period for criminal appeals in 4(b) may be extended with or without notice, and with or without a motion. So that stands in stark contrast to the requirement for civil litigants that a motion must be filed.

So I think those are the problems with construing a rule--a late filed notice of appeal, as a motion for an extension of time.

Certainly we are interested in finality. We are particularly interested in finality of judgments in habeas corpus cases. The Court has recognized that federal habeas corpus cases significantly intrude into the operations of the state criminal courts. The Court has recognized that this often causes significant friction between the state governments and the federal governments.

And so we think it particularly efficatious to have a rule that allows the states to be free of habeas corpus litigation at a definite point in time.

It should be noted that there may be a way out of the box that a petitioner who is -- excuse me, an appellant who is a day late, or is some way late, somehow prevented from taking his appeal in a timely fashion. That is a Rule 60 motion under Rule 60 of the rules of appellant procedure• -- excuse me, of civil procedure.

In this particular case no such motion was filed despite the fact that such a motion may have been timely for over four months of a period in time when the appellant was counseled, was not a pro se litigant. However, he chose not to engage in --

Q What would yousay if the rule was it must be -- show a postmark of a certain date, that it was mailed on the certain date? Would that satisfy you?

MR. SMITH: No, Your Honor, it would not.

Q You'd have no objection to that, would you?

MR. SMITH: Yes, Your Honor, I do have an objection to that.

Q What would be the objection?

MR. SMITH: That it flies in the clear language of the rules concerning filing.

Q I said to change the rule.

MR. SMITH: Oh, by the rules amendment process we have absolutely no objection to that, Your Honor.

Q It would be all right for the statute.

Q If the rules said these papers shall be deemed filed if they are put in the United States mails.

MR. SMITH: If the rules said that, yes, Your Honor, because I think the definition of what is filing is a matter that would probably be left to promulgation of the court rule.

Q I suppose it might be -- do you think that this court is -- is it within its competence to construe the word file in an individual case like this?

MR. SMITH: Well, it certainly is, but I submit to youwhen the rule could not be plainer to say that file means delivery to the Clerk, that it would be an extraordinary torturous interpretation of that language.

Q Mr. Smith, in this case the District Court issued a certificate of probable cause, I guess, and the Court of Appeals sent out a briefing schedule?

MR. SMITH: That's correct, Your Honor.

Q And what was the timing of those two actions? Was that within the 60 day period that the motion to extend could have been filed?

MR. SMITH: Yes. The certificate of probable cause was issued on February 18th.

Q And you think that doesn't fit within the Thompson unique circumstances that the Petitioner might have thought by virtue of those two things reasonably that the appeal had been received on time, the notice of appeal?

MR. SMITH: Well, I think that the issuance of a certificate of probable cause, the bare issue on a certificate of probable

cause, stands in stark contrast to the statements of the District Court, and actions of the District Court in the Thompson and Wolfsohn cases, where counsel was virtually assured that the appeal period had been extended or told, affirmatively assured. I think Petitioner may or may not. We do not know the accuracy- - I cannot know what he thought. But he may or may not have made a faulty assumption that his appeal was timely progressing. But it strikes me as odd that his faulty assumption can confer jurisdiction on the Court of Appeals.

Q Well, the Court of Appeals had issued a briefing schedule, I thought.

MR. SMITH: Yes, they issued a briefing schedule. I believe that was some time in March, a briefing schedule was issued.

Q Within the 60 day period?

MR. SMITH: I think that's correct, Your Honor. I believe the briefing schedule was issued.

Q And if the papers had been given four days before the expiration of the 30 day filing period to the warden, and then you got all those things, I just wonder if that couldn't qualify?

MR. SMITH: Under?

Q Under Thompson as unique circumstance.

MR. SMITH: Well, we submit to you concerning Thompson and Wolfsohn that those cases may be of limited continuing validity, with all due respect. This Court has since those cases were decided decided a number of cases that seem to indicate that late

filed notices -- late filed motions, post judgment motions which would toll the time for the filing of a notice of appeal that were considered in Thompson and Wolfsohn, this Court has resoundingly said rejected the argument in Browder, the notion in Browder, that those could serve under any circumstances to toll the time for the filing of the notice of appeal. So those cases may be of limited continuing validity.

Q But it does seem that when one is dealing with notices of appeal from pro se Petitioners in prison, that it would be the most desirable practice if the District Court on receipt of it would indicate to the Petitioner that it was not timely filed, or if some action were taken other than one that could be thought to lull them into a sense of security about it.

I just wonder if we are dealing fairly with people in these circumstances.

MR. SMITH: We have no quarrel if this Court wishes to adopt a rule that puts the Clerks of the various federal District Courts on notice that they should create a pro se desk, and through that pro se desk, pro se filings, especially jurisdictional ones, should be screened for timeliness, and that litigants be notified of that fact.

It is significant, however, that the Court has not done that. This Court has not done that. The Sixth Circuit Court of Appeals has not done that, although they have suggested that such a course of action would be advisable.

We submit to you that it is a proper function for the Court to undertake to create such a rule, and it may be advisable, but it should be done through the rulemaking process and not by judicial fiat in individual court decisions.

I think there are issues concerning the administrative burden that this may be placing on the various District Courts, whether or not there is a need for that in every federal District Court. Many federal districts are busier than other federal districts.

And I think that is a matter that would be best to come through the rule promulgation process where it is open for comment, and such as this.

Q It would also save us from dealing with the million variations to determine just what has to be done to comply.

MR. SMITH: That's correct, it would.

Q If you say rule and not judicial, do you mean the federal rules or court rules?

MR. SMITH: The federal rules.

Q Because the court rules would be judicial fiat.

MR. SMITH: Yes. I mean, the federal rules should be amended.

Q Well, couldn't it be done by the circuit rules?

MR. SMITH: Yes, it could be done. The individual circuits could also modify their rules. They have not done so. It is ironic that having noted that that would be an advisable course

of action in several cases, to my knowledge they have not acted in respect to the course of action that Justice Marshall suggested.

Q Have you heard of it?

MR. SMITH: In closing, we would like to say to the Court that it is clear under innumerable decisions of this Court that federal rule of appellate procedure 4(a)'s time limits are jurisdictional, and in the interest of finality, of litigation, should not be considered waiverable.

In those exceptional cases where equitable concerns may override interests in finality, federal rule of civil procedure 60 may provide the escape hatch. Three members of this Court have recognized that Rule 60 may provide such an escape hatch. At least two federal circuits have recognized that it may provide an escape hatch.

Any other rules --

Q What case was it, Mr. Smith, in which three members of the Court recognized that 60(b) might be an escape hatch in a situation like this?

MR. SMITH: I believe it was in the case of Browder v. The Director of the Illinois Department of Correction in a concurring opinion, I believe, offered by Justice Blackmun, and with two Justices concurring, recognize that under slightly altered circumstances Rule 60(b) could be used to vacate an old judgment and reenter it to start afresh the judgment -- the time for the

appeal running.

Q But that wasn't the action of the Court.

MR. SMITH: No, that wasn't the action of the Court. No, in fact, the action of the Court was dismissal of the appeal for untimeliness, and it is noteworthy here that the Petitioner has never availed himself of the Rule 60 process, made no attempt to avail himself of the Rule 60 process, relying instead on the hope that the Court would adopt equitable exceptions to a jurisdictional and mandatory time period.

Q At least he's unlettered, General Smith. You are not expecting him to know about the 60 day, are you?

MR. SMITH: Well, Your Honor, again it is a point that the way you treat pro se litigants is almost a point without rational departure.

Q You are right.

MR. SMITH: It's -- you have to -- it seems to me if you are to have an orderly system of justice at some point in time, charge people with knowledge of how that -- some knowledge, some rudimentary knowledge of how that system operates, and I don't think the Court has ever held in its leniency to pro se defendants that they are excused from complying with jurisdictional requirements, that all bets are off, you just come to court one day and tell what your case is. I don't think anyone has -- any court has ever excused them to that degree.

We submit to you that any other rules that the Court might

develop concerning whether or not individuals in the Petitioner's situation should come through the rulemaking process, not through judicial decision.

In the words of -- to paraphrase Mr. Justice Clark in his dissenting opinion, in Thompson v. The Internal Revenue Service, rules of appellate procedure are a necessary part of an orderly system of justice, but the courts must be willing to enforce those rules according to their terms if they are to have any efficacy. The Court should not engage in ad hoc dispensations in particular facts, and in particular cases, because that would undermine the certainty of the rules, and only ultimately cause confusion amongst the Bench and Bar.

We submit to you that if you adopt the equitable exceptions pressed upon you by Petitioner today, that will, in fact, undermine the certainty of these rules, which in my mind cannot be plainer, and it will, in fact, add to the confusion of the Bench and Bar as under what circumstances the plain meaning of rules.

Q You're admitting they are confused now when you say it will add to the confusion.

MR. SMITH: Well, in some cases the rules are confused, yes, Your Honor, but not in all cases. But it will add, I think, unnecessarily to further confusion amongst the Bench and Bar for another ad hoc exception for pro se appellants.

Q It won't affect the Bar because we are talking about

pro se cases.

MR. SMITH: I'm sorry, Your Honor?

Q Would it affect the Bar when we're just confining it to pro se cases? It will confuse the Bench, I agree.

MR. SMITH: Well, Ms. White today inherited a pro se case, and is having to live with the result.

Q We will not confuse Ms. White.

Q There may well be a lawyer on the other side in the civil case.

MR. SMITH: There may well be.

Q So it would be confusing to that lawyer as to whether the appeal is alive or dead.

MR. SMITH: Very much. In fact, I submit to you that with these line of cases in effect, and if Ms. White and Petitioner have their way, we would certainly be confused as to whenever we might efficaciously move to dismiss an appeal for failure to file a timely notice of appeal.

If there are no other questions, we would submit the case on the argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. White. Ms. Smith, you have two minutes remaining.

ORAL ARGUMENT OF PENNY J. WHITE, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MS. WHITE: Counsel faults Petitioner and his appointed counsel for not filing a Rule 60 motion in a situation when the

Sixth Circuit in its order joint appendix 29 had assumed jurisdiction over the issue of jurisdiction. Counsel would have had counsel for the Petitioner go to another form while the Sixth Circuit had before it the issue of jurisdiction in order to file Rule 60?

Counsel has misspoken to this Court when he says that the Nine Circuits who have considered the -- treating a late filed notice as a motion of appeal have ruled against it.

Six circuits, Your Honors, six circuits, have said we either have a rule, or a form that we send to late pro se inmates, or we should be doing that. In one circuit, the Second Circuit, in the case of Fearon, 1985, totally went againast the majority of the circuits, and declared a late file notice of appeal to the motion.

I would suggest that the state's argument that Thompson is no longer valid law flies in the face of this Court's decisions, which he cites Lack, Browder, and Griggs. In Browder, the case which he suggests overrules Thompson, this Court cited Thompson for its continued validity in the proposition that Rule 52 and 59 motions are permissible in habeas cases.

In neither Griggs nor Lack were any of those three cases, Thompson, Wolfsohn, or Harris Truck Lines, mentioned. So to imply, as the State has, that those cases have no validity, when this Court has cited them with approval, and not explicitly overruled them, I would suggest is an improper implication.

I respectfully disagree with the opinion that finality will never occur if Mr. Houston is given his day in court. If we want to see a lack of finality, then tell pro se inmates to file a Rule 60 motion. This Court in Ackerman v. United States has said that a Rule 60 motion is not a substitute for an appeal.

What we had in this case was something filed within the additiona 30 days which this Court has seen fit to extend the appeal time beyond that 30 days to 60 days. We had something filed within that time; we had a pro se inmate load --

CHIEF JUSTICE REHNQUIST: Thank you, Ms. White. Your time has expired. The case is submitted.

[Whereupon, at 2:47 p.m., the oral arguments was concluded.]

REPORTER'S CERTIFICATE

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CASE TITLE: Prentiss Houston v. Larry Lack, Warden

HEARING DATE: April 27, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 5-3-88

Margaret Daly

Official Reporter

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