Untangling the Prison Mailbox Rules

Mario Ramirez†

Unlike typical litigants, pro se prisoners are unable to deliver filings to court or to have an attorney do so on their behalf. Such prisoners are forced to rely on their prisons' mailing systems to file documents, which often results in those documents reaching the court after the applicable deadlines. Accordingly, the Supreme Court created a "prison mailbox rule" in Houston v. Lack*, under which some filings by prisoners are considered filed when they are given to prison officials for mailing, rather than when they reach the court.*

Defining the exact reach of that prison mailbox rule has created considerable discord among lower courts, especially in light of the Court's subsequent holding in Fex v. Michigan *and its adoption of formal procedural rules governing the timing of prisoners' court filings. This Comment tackles three different issues left unresolved by the Supreme Court. Focusing particularly on the Court's instructions about when courts should apply a prison mailbox rule, this Comment provides a solution to each of those three issues and then combines those answers into a simple, easy-to-apply framework. The proposed framework provides a step-by-step process for determining whether a prison mailbox rule applies to a particular type of filing by a particular litigant, bringing some much-needed clarity and uniformity to the debate surrounding* Houston.

† B.A. 2020, University of Florida; J.D. Candidate 2023, The University of Chicago Law School. I would like to thank my fellow *Law Review* editors for their thoughtful feedback.

INTRODUCTION

In 1982, Prentiss Houston was indicted for murder in a Tennessee state court.[1] Under a plea bargain, Houston was convicted of second-degree murder.[2] He eventually filed a pro se habeas corpus petition alleging that his plea was involuntary and that he had received ineffective assistance of counsel.[3] The federal district court dismissed his petition,[4] leaving Houston with 30 days to appeal the dismissal under Federal Rule of Appellate Procedure 4(a)(1).[5] Houston drafted a notice of appeal, but, because he was incarcerated, he could not personally deliver it to the court.[6] He also did not have a lawyer to deliver it on his behalf.[7] Therefore, twenty-seven days after his petition was dismissed, Houston deposited the notice of appeal with prison authorities to have it mailed to the district court.[8] It was stamped as "filed" by the court on the thirty-first day; accordingly, the court of appeals dismissed Houston's appeal as untimely.[9]

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1 Houston v. Lack, 625 F. Supp. 786, 787 (W.D. Tenn. 1986).
2 *Id.* at 788.
3 *Id.* at 787.
4 *Id.* at 794.
5 *See* FED. R. APP. P. 4.
6 *See* Houston v. Lack, 487 U.S. 266, 268 (1988) [hereinafter *Houston*].
7 *See id.*
8 *Id.*
9 *Id.* at 268–69.

The Supreme Court overturned the appellate court's dismissal. In *Houston v. Lack*,[10] the Court held that because prison inmates without attorneys are dependent on their prisons' mailing systems to file documents, their notices of appeal will be considered filed when they are given to the prison authorities to be mailed, rather than when they are received by the courts.[11] It thus established a "prison mailbox rule," named after the similar concept in contract law governing the acceptance of an offer.[12]

The *Houston* Court did not make it clear whether its prison mailbox rule applies to documents other than notices of appeal filed by unrepresented prisoners. Further guidance from the Supreme Court was mixed. Just five years later, the Court again faced an unrepresented inmate who sought the protection of a prison mailbox rule in *Fex v. Michigan*.[13] The Court refused to extend *Houston* to the deadline at issue in *Fex*,[14] creating uncertainty about the continued vitality of *Houston*'s prison mailbox rule. At the same time, however, the Court began promulgating formal rules of procedure that resemble the rule announced in *Houston* but only govern specific filing deadlines.[15] This Comment refers to the combination of these three actions by the Court—*Houston*, *Fex*, and the Court's formal procedural rules—as "the Court's instructions." Taken together, they are the only binding pronouncements the Court has made about the application of a prison mailbox rule.

The ambiguity of the Court's instructions has given rise to three different issues in lower courts. First, although *Fex* seems to preclude application of *Houston* to certain deadlines, the circuits disagree about how to determine which deadlines the *Fex* limitation applies to.[16] Second, when *Fex* does not bar application of *Houston*, the circuits are often asked to apply a prison mailbox rule to a broad range of filings by unrepresented prisoners, not just to notices of appeal like the one in *Houston*.[17] Third, and most

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[10] 487 U.S. 266 (1988).

[11] *Id.* at 276.

[12] The common law mailbox rule instructs courts to consider the mailed acceptance of an offer as effective when it is dispatched to the offeror. *See, e.g.*, Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1057 (2019).

[13] 507 U.S. 43 (1993); *see infra* Part I.B.

[14] The differences between the deadlines at issue in *Houston* and *Fex* are discussed in Part III.A.

[15] *See infra* Part I.C.

[16] *See infra* Part III.A.

[17] *See infra* Part III.B.

controversially, a significant split has developed among the circuits about whether a prison mailbox rule ever applies to prisoners who have legal representation.[18]

Resolving whether a prison mailbox rule applies to a particular inmate's document is critically important. In any given case, the lack of such a rule can be outcome determinative. For example, if a prison inmate loses her civil rights claim against a prison guard, the protection of a prison mailbox rule can mean the difference between a complete procedural bar and a successful appeal.[19] The absence of a prison mailbox rule also incentivizes prisoners to mail their filings early to avoid a procedural bar, resulting in functionally shorter deadlines. Because a prison mailbox rule resolves these issues, litigants invoke the rule frequently; the Westlaw headnote on *Houston*'s prison mailbox rule shows over ten thousand federal cases involving its applicability.[20]

Resolving these uncertainties is important not just for individual cases but for the federal procedural system as a whole. In 1934, Congress passed the Rules Enabling Act,[21] which empowers the Supreme Court to create rules of procedure that bind lower courts. Congress did so out of a desire to create "a single system of procedure applicable to all [federal] cases."[22] The Court has repeatedly acknowledged the importance of uniform procedural rules.[23] Variation among lower courts' procedural rules

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[18] *See infra* Part IV.

[19] *See* Bowles v. Russell, 551 U.S. 205, 210 (2007) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals." (quoting 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3901, at 6 (2d ed. 1992))).

[20] WESTLAW, http://westlaw.com (Mar. 2022) (citing references to *Houston*, 487 U.S. 266, headnote 197k819, federal courts). This Comment deals only with *federal* prison mailbox rules, but many states have adopted their own prison mailbox rules modeled on *Houston*. *See generally* Barbara J. Van Arsdale, *Application of "Prisoner Mailbox Rule" by State Courts under State Statutory and Common Law*, *in* 29 AMERICAN LAW REPORTS 6TH 237.

[21] Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C § 2071–2077).

[22] Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 673 (1975); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040–42 (1982) (describing dissatisfaction with the lack of uniform judicial procedures under the predecessor statute of the Rules Enabling Act).

[23] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." (quoting Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764

contravenes a crucial purpose of judicial rulemaking by creating unequal treatment across jurisdictions. Additionally, lower courts are obligated to follow deadlines imposed on them by Congress and by the Supreme Court's procedural rulemaking.[24] Accordingly, to ensure that lower courts do not improperly extend binding deadlines, any proposed application of a prison mailbox rule must be faithful to the Court's instructions. This requires a determination of what those instructions actually mean.

This Comment proceeds in five parts. Part I lays out the Supreme Court's creation of the original prison mailbox rule in *Houston*. It also discusses the Court's subsequent instructions regarding prison mailbox rules, delivered partially through case law and partially through procedural rulemaking. Part II briefly introduces three issues lower courts face in deciding whether to apply a prison mailbox rule to a particular filing: the limits created by *Fex*, the application of a prison mailbox rule to filings other than notices of appeal, and the application of a prison mailbox rule to filings by represented prisoners. It then describes the qualities that any solution to those issues must have.

Guided by these qualities and building on the Court's instructions, Parts III and IV present the three issues in more depth and then suggest resolutions to each. Part III first argues that *Fex* should be interpreted as a narrow limitation on *Houston* that bars application of a prison mailbox rule only when the relevant deadline is clearly defined as depending on *receipt* of a document. It then argues that, for filings by pro se prisoners, *Fex* is the *only* limitation on *Houston*, such that circuits should continue to apply *Houston* to a broad range of filings by unrepresented prisoners. Part IV addresses the more controversial question of whether a prison mailbox rule ever applies to represented prisoners. It argues that although courts should apply *Houston*'s prison mailbox rule only to unrepresented prisoners, they should apply the formal prison mailbox rules created through the Supreme Court's procedural rulemaking to certain types of filings by all prisoners, regardless of legal representation. Finally, Part V combines the solutions to each of these three issues into a simple and easy-to-follow framework for determining whether a prison mailbox rule applies to a particular filing by a particular prisoner.

(5th Cir. 1963))); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) ("[P]reservation of operational consistency and predictability . . . requires, we think, a uniform rule.").

[24] *See infra* Part II.

I. THE COURT'S INSTRUCTIONS

This Part sets out the Court's instructions about when to apply a prison mailbox rule. Part I.A discusses the leadup to, and eventual adoption of, the original prison mailbox rule in *Houston*. Part I.B presents the Supreme Court's subsequent narrowing of *Houston* through *Fex*. Part I.C lays out the Court's creation of formal procedural rules adopting a modified version of *Houston*'s prison mailbox rule. Together, these three sections present all of the Supreme Court's binding pronouncements about prison mailbox rules, which guide this Comment's resolution to the uncertainties left by the Court's instructions.

A. The Origin of the Prison Mailbox Rule

The Supreme Court took the first step toward creating a prison mailbox rule in *Fallen v. United States*.[25] The petitioner, Floyd Fallen, was convicted of violating postal laws.[26] His attorney chose not to represent him during his appellate process, and Fallen was not given an opportunity to secure a new attorney.[27] Under then-applicable rules, he had ten days after the entry of judgment to file an appeal.[28] Because Fallen was paraplegic and suffering from a bout of flu, it took him eight days to mail his notice of appeal; combined with infrequent mail pickup, this resulted in his notice reaching the appellate court four days after the deadline.[29] The appellate court accordingly dismissed his appeal, and the Supreme Court granted certiorari.[30]

In a short opinion seemingly limited to the facts at issue, the Court remanded, holding that Fallen's claim was not procedurally barred.[31] The Court noted that Fallen had taken every reasonable step he could to meet the deadline and thus "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits."[32]

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[25] 378 U.S. 139 (1964). For a thorough look at the history of the prison mailbox rule, see Catherine T. Struve, *The Federal Rules of Inmate Appeals*, 50 ARIZ. ST. L.J. 247, 268–89 (2018).

[26] *Fallen*, 378 U.S. at 140.

[27] *Id.* at 140, 142–43.

[28] *Id.* at 142.

[29] *See id.* at 140 n.2, 143.

[30] *Id.* at 141.

[31] *Fallen*, 378 U.S. at 144.

[32] *Id.* at 144.

The Court did not announce a rule in *Fallen*. However, a four-Justice concurrence called for the creation of a bright-line rule that "a defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the ten-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court."[33] The majority and concurrence in *Fallen* set the groundwork for flexibility in filing deadlines as applied to prison inmates.

The Rules Enabling Act grants the Supreme Court the power to promulgate rules of procedure for lower federal courts, which take effect with the assent of Congress.[34] Typically, procedural rules are proposed to the Court by an advisory committee assigned to a particular category of federal rules. If the Court agrees with a committee's proposal, it then officially promulgates it as a rule, which can take effect as soon as seven months later unless Congress acts to stop it.[35]

In the wake of *Fallen*, the Supreme Court promulgated two new federal rules of appellate procedure.[36] One was Federal Rule of Appellate Procedure 3, which set forth the process for appealing a district court's decision.[37] The notes from the Advisory Committee on Appellate Rules stated that the rule was meant to "restate, in modified form, provisions now found in the civil and criminal rules" and that "decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules."[38] The Committee expressly noted that *Fallen* was one such decision.[39]

The second rule was Federal Rule of Appellate Procedure 4.[40] Appellate Rule 4 governs deadlines for filing appeals.[41] It states that in civil cases, a notice of appeal must be filed with the district clerk no more than thirty days after the judgment is entered.[42] In criminal cases, Appellate Rule 4(b) generally requires notice to be

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[33] *Id.* at 144 (Stewart, J., concurring).

[34] 28 U.S.C § 2071.

[35] *See* 28 U.S.C. § 2074. For a more in-depth look at the process of procedural rule-making, see Admin. Off. of the U.S. Cts., *How the Rulemaking Process Works*, U.S. CTS., https://perma.cc/27YA-AJJ2.

[36] *See* Struve, *supra* note 25, at 271–72.

[37] FED. R. APP. P. 3.

[38] FED. R. APP. P. 3 advisory committee's note; *see also* Struve, *supra* note 25, at 272.

[39] FED. R. APP. P. 3 advisory committee's note.

[40] FED. R. APP. P. 4.

[41] *See id.*

[42] FED. R. APP. P. 4(a)(1)(A).

filed with the district court no more than fourteen days after entry of the decision being appealed or the filing of the government's notice of appeal.[43]

Despite the Committee's apparent approval of *Fallen*, Appellate Rule 4's text did not incorporate *Fallen*'s holding; as originally enacted, the rule did not have a separate provision for unrepresented prisoners. On a purely textualist reading of Appellate Rule 4, prisoners' appeals would thus be considered filed only once they reached the court and would be barred if that filing date were after the applicable deadline. Thus, although lower courts continued to apply *Fallen*,[44] it seemed possible that the Court would renounce that holding after the promulgation of Appellate Rule 4.[45]

Houston v. Lack shut the door on this possibility. As described in the Introduction, *Houston* involved a pro se prisoner who filed a writ of habeas corpus in federal court.[46] The district court dismissed the petition, and the prisoner, still acting without counsel, mailed a notice of appeal twenty-seven days later.[47] Under Appellate Rule 4(a), the deadline for the notice to reach the district court was thirty days after entry of judgment; it was stamped as filed by the appellate court thirty-one days after the entry.[48] The court of appeals originally scheduled the case for briefing but then dismissed the appeal after it discovered that the filing deadline had passed.[49]

Although *Houston* was a civil case and *Fallen* dealt with an appeal from a criminal judgment, the *Houston* Court "conclude[d] that the analysis of the concurring opinion in *Fallen* applie[d]."[50] It stated that "[t]he situation of prisoners seeking to appeal without the aid of counsel is unique," noting that pro se inmates have no control over their notices of appeal after they give them to prison officials to be mailed.[51] The Court expressed concern that a literal interpretation of the rule would leave an unrepresented

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43 FED. R. APP. P. 4(b)(1)(A).

44 *See, e.g.*, Wright v. Deyton, 757 F.2d 1253, 1255 (8th Cir. 1985).

45 *See* Struve, *supra* note 25, at 272, 276–77.

46 *Houston*, 487 U.S. at 268. A writ of habeas corpus allows a prisoner to challenge the legality of their detention. It is a civil action in federal court against the government agent holding that prisoner, so it is governed by federal procedural rules applicable to civil cases. *See* Browder v. Dir., Dept. of Corrs. of Ill., 434 U.S. 257, 269–70 (1978).

47 *Houston*, 487 U.S. at 268.

48 *Id.* at 268–69.

49 *Id.* at 269.

50 *Id.* at 270.

51 *Id.* at 270–71.

prisoner with "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."[52]

Sympathizing with the plight of pro se prisoners, the Court chose to expressly adopt the bright-line rule urged by the *Fallen* concurrence. It held that, for purposes of Appellate Rule 4(a)'s requirement that a notice of appeal "be filed with the district clerk within 30 days,"[53] a prison inmate's notice of appeal would be considered filed with the clerk "on the date the *pro se* prisoner delivers the notice to prison authorities for mailing," rather than on the day it reaches the clerk.[54]

In reaching its conclusion, the Court noted that mailbox rules are often undesirable because they create administrative disputes over when documents are mailed.[55] It stated that in cases like *Houston*, in contrast, "reference to prison mail logs will generally be a straightforward inquiry" and that the prison mailbox rule is therefore an easily administrable "bright-line rule, not an uncertain one."[56] It contrasted these benefits with the problems created by the absence of a prison mailbox rule, such as the difficulty of determining whether the court stamped a filing as received on the actual day of receipt.[57]

B. *Fex v. Michigan*

The Supreme Court's next—and, thus far, final—case on prisoners' filing deadlines was *Fex v. Michigan*. Decided only five years after *Houston*, *Fex* dealt with a very similar issue. The petitioner was a prisoner incarcerated in Indiana.[58] While detained, he was charged with unrelated offenses in Michigan.[59] Michigan sought a detainer, "which is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency."[60] Being under

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[52] *Houston*, 487 U.S. at 271.

[53] FED. R. APP. P. 4(a)(1)(A).

[54] *Houston*, 487 U.S. at 275.

[55] *Id.* ("[T]he rejection of the mailbox rule in other contexts has been based in part on concerns that it would increase disputes and uncertainty over when a filing occurred." (citing United States v. Lombardo, 241 U.S. 73, 78 (1916))).

[56] *Id.* For an analysis of the *Houston* Court's rationale and its parallels to the common law mailbox rule, see Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773, 782–85 (2009).

[57] *Houston*, 487 U.S. at 275–76.

[58] *Fex*, 507 U.S. at 46.

[59] *Id.*

[60] *Id.* at 44.

detainer "entails certain disabilities, such as disqualification from certain rehabilitative programs."[61]

The prisoner, William Fex, requested a trial for the Michigan charges. Under the Interstate Agreement on Detainers (IAD),[62] Fex's trial had to commence "within one hundred and eighty days after he *shall have caused to be delivered* to the prosecuting officer" a written request for a disposition.[63] Fex's trial began 177 days after the prosecuting officer received he request but 196 days after Fex mailed it.[64] Accordingly, Fex moved to dismiss the charges, arguing that the 180-day time limit on the start of the trial had elapsed.[65]

The Court's seven-Justice majority refused to apply a prison mailbox rule, under which the Court would have begun counting toward the time limit on the date that Fex mailed his request.[66] After analyzing the IAD's deadline, the Court held that the 180-day period "does not commence until the prisoner's request . . . has actually been delivered."[67] Notably, although the dissent argued that the policy rationale of *Houston* applied in this case as well,[68] the *Fex* majority did not even mention *Houston*. Therefore, even though the Court did not overturn *Houston*,[69] it did not explicitly set forth guidelines for when courts should instead apply *Fex*, under which a litigant does not receive the protection of a prison mailbox rule.

C. Adoption of Formal Rules

In *Houston*, the four-Justice dissent agreed with the majority that the outcome of the case was sensible as a matter of policy.[70]

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61 *Id.* at 50 (citing United States v. Mauro, 436 U.S. 340, 359 (1978)).

62 18 U.S.C. app. 2 § 2.

63 *Fex*, 507 U.S. at 45 n.1 (quoting 18 U.S.C. app. 2 § 2) (emphasis added).

64 *Id.* at 46.

65 *Id.*

66 *See id.* at 47–52.

67 *Id.* at 52. The *Fex* Court's reasoning is discussed in further depth in Part II.B.

68 *See Fex*, 507 U.S. at 58–59 (Blackmun, J., dissenting) ("I must emphasize the somewhat obvious fact that a prisoner has no power of supervision over prison officials. . . . For that reason, this Court held in [*Houston*] that a *pro se* prisoner's notice of appeal is 'filed' at the moment it is conveyed to prison authorities.").

69 *Cf.* Hohn v. United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

70 *Houston*, 487 U.S. at 284 (Scalia, J., dissenting) ("The filing rule the Court supports today seems to me a good one.").

However, the dissenters argued that the Court's holding was incompatible with the text of Appellate Rule 4, which clearly referred to filing a notice with the district court, not with a prison's mailing system.[71] They stated that the Court had the power to adopt a prison mailbox rule by amending Appellate Rule 4 and that "short-circuit[ing] the orderly process of rule amendment" by interpreting Appellate Rule 4 to create a prison mailbox rule "not only evades the statutory requirement that changes be placed before Congress so that it may reject them by legislation before they become effective . . . but destroys the most important characteristic of filing requirements, which is the certainty of their application."[72] The dissenters argued that the Court, rather than stretch the language of Appellate Rule 4, should instead change the text of the actual rule to include a separate provision for inmates.[73]

And change the text it did. The Supreme Court began by amending its own filing deadlines a year and a half after *Houston*, adding a version of the prison mailbox rule to Supreme Court Rule 29.2.[74] The new portion of the rule stated, in relevant part, that "[i]f submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing."[75]

The prison mailbox rule found in Supreme Court Rule 29.2 differs from the rule laid out in *Houston* in three notable ways. First, the rationale underlying *Houston* focused on the struggles facing pro se inmates;[76] in contrast, Supreme Court Rule 29.2 makes no mention of whether an inmate has legal representation. Second, the new rule expressly applies to *any* document filed with the Court, while the *Houston* Court was equivocal about whether its holding applied to filings other than notices of appeal.[77] Third,

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[71] *Id.* at 282–83.

[72] *Id.* at 284 (citation omitted).

[73] *Id.* The dissent did not explicitly call for this provision to apply only to pro se inmates, but that is the most natural reading given its interpretation of the majority's rule as specifically applying to pro se appellants. *See id.* at 281.

[74] SUP. CT. R. 29.2; *see also* Struve, *supra* note 25, at 277.

[75] SUP. CT. R. 29.2.

[76] Note, however, that the *Houston* Court did not explicitly limit its holding to pro se prisoners, giving rise to one of the circuit splits discussed in this Comment. *See infra* Part IV.

[77] *See infra* Part III.B.

Supreme Court Rule 29.2 refers generally to inmates confined in institutions, rather than specifically to prisoners.[78]

After enacting Supreme Court Rule 29.2, the Court began formally adding prison mailbox rules to the rules of practice and procedure that govern lower courts. The first of these was added in a new section of Appellate Rule 4. In a 1993 amendment, the Supreme Court promulgated Appellate Rule 4(c), which states that "[i]f 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's internal mail system on or before the last day for filing."[79] The Advisory Committee's notes on the 1993 amendment reiterate the holding in *Houston* and state that the amendment "reflects that decision."[80]

The Committee's notes on Appellate Rule 4(c) also state that "[t]he language of the [1993] amendment is similar to that in Supreme Court Rule 29.2."[81] This is evident from a comparison of Appellate Rule 4(c) and Supreme Court Rule 29.2. Both apply to inmates confined in institutions broadly, and neither explicitly requires inmates to be proceeding pro se.[82] In fact, the notes from a meeting of the Advisory Committee in April 1991 state that a "prior draft limited its application to persons 'not represented by an attorney'" but that "[t]he new draft does not contain that limitation because the Supreme Court's rule does not."[83] At the same time it adopted Appellate Rule 4(c), the Supreme Court also promulgated Appellate Rule 25(a)(2)(A)(iii), which applies an

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[78] This difference seems to have been aimed at including persons confined to mental (as opposed to only penal) institutions within the rule's coverage. *See* App. Rs. Advisory Comm., Minutes 17–18 (Oct. 23, 1990); App. Rs. Advisory Comm., Minutes 26 (Apr. 17, 1991).

[79] FED. R. APP. P. 4(c)(1).

[80] FED. R. APP. P. 4 advisory committee's note. The Court has previously looked to commentary from advisory committees to clarify uncertainties in federal rules of practice and procedure. *See, e.g.*, United States v. Vonn, 535 U.S. 55, 64 n.6 (2002) ("[T]he Advisory Committee Notes provide a reliable source of insight into the meaning of a rule."). For an argument in favor of referring to advisory committee notes, see generally Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995). Although Scallen's article focuses on the Federal Rules of Evidence, her argument also applies to the other federal rules of practice and procedure. *See id.* at 1284 n.7.

[81] FED. R. APP. P. 4 advisory committee's note; *cf.* App. Rs. Advisory Comm., Minutes 4 (Apr. 23–24, 2015) (stating that proposed changes to the wording of the prison mailbox rules in Appellate Rules 4 and 25 "would bring the Appellate Rules into closer parallel with Supreme Court Rule 29.2").

[82] *Compare* FED. R. APP. P. 4(c)(1)(A) *with* SUP. CT. R. 29.2.

[83] App. Rs. Advisory Comm., Minutes 26 (Apr. 17, 1991); *see also* Struve, *supra* note 25, at 279.

identical version of Rule 4(c) to all filings in appellate courts.[84] The committee's notes on this amendment state that it "accompanies new subdivision (c) of Rule 4 and extends the holding in *Houston v. Lack* . . . to all papers filed in the courts of appeals by persons confined in institutions."[85]

After promulgating Appellate Rule 25, the Court continued to add the language of Appellate Rule 4(c) to rules governing documents other than notices of appeal. In 2004, the Court amended the rules governing habeas corpus procedures. The new rules, § 2254 Rule 3(d)[86] and § 2255 Rule 3(d),[87] have essentially the same text as Appellate Rule 4. Ten years later, the Court promulgated Federal Rules of Bankruptcy Procedure 8002(c)[88] and 8011(a)(2)(iii),[89] which are virtually identical to their counterpart sections in Appellate Rules 4 and 25.[90]

This Comment refers to these quasi-statutory rules of practice and procedure as "formal prison mailbox rules" to distinguish them from *Houston*'s common law prison mailbox rule. While these formal prison mailbox rules now apply to many court filings, they are not ubiquitous. The Court has not amended the rules for many types of filings, such as civil complaints[91] and motions for new trials[92] under the Federal Rules of Civil Procedure. Courts cannot, of course, apply the formal prison mailbox rules to filings

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84 FED. R. APP. P. 25.

85 FED. R. APP. P. 25 advisory committee's note.

86 FED. R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 3, *reprinted in* 28 U.S.C. app. § 2254.

87 FED. R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 3, *reprinted in* 28 U.S.C. app. § 2255.

88 FED. R. BANKR. P. 8002(c).

89 FED. R. BANKR. P. 8011(a)(2)(A)(iii).

90 App. Rs. Standing Comm., Minutes 20–21 (June 12–13, 2017) ("Bankruptcy Rules 8002(c) (time to file a notice of appeal) and 8011(a)(2)(C) (filing, signing, and service) contain inmate-filing provisions virtually identical to the parallel provisions of Appellate Rule 4(c) and rule currently numbered Appellate Rule 25(a)(2)(C) [and now numbered Appellate Rule 25(a)(2)(A)(iii)].").

91 *See* Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002); *see also* FED. R. CIV. P. 3.

92 *See* Edwards v. United States, 266 F.3d 756, 757–58 (7th Cir. 2001); *see also* FED. R. CIV. P. 59(b).

that are not governed by those rules.[93] Accordingly, the only relevant prison mailbox rule for those filings is *Houston*.[94] Passage of the formal prison mailbox rules did not override *Houston*'s application to those filings, and the case remains good law.[95] Those two distinct types of prison mailbox rules—*Houston* and the formal prison mailbox rules—along with *Fex*, constitute the Court's instructions on the application of a prison mailbox rule.

II. GUIDING CONSIDERATIONS

The previous Part set forth the Court's instructions about when to apply a prison mailbox rule. These instructions are not entirely clear, however, and they have created three issues for lower courts. First, the circuits disagree over what limitation *Fex* places on *Houston*. Second, courts are often asked to apply *Houston*'s prison mailbox rule to nonappellate filings by unrepresented prisoners. Third, a significant circuit split has developed over whether a prison mailbox rule ever applies to filings by represented prisoners. This Comment proposes solutions to all three of those issues in Parts III and IV.

First, however, this Part outlines the qualities that an adequate solution to these issues must have: it must lead lower courts to procedural uniformity and allow them to apply a prison mailbox rule only when the Court instructs them to do so.

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[93] For example, it would be absurd for a lower court to apply Appellate Rule 4(c), governing inmates' notices of appeal, to the filing of a motion for a new trial, which has its own deadline under Civil Procedure Rule 59. *See* FED. R. CIV. P. 59(b); *cf.* Gross v. FBL Financial Services, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

[94] *Houston* applies to these types of filings by unrepresented prisoners, as shown in Part III.B.

[95] A somewhat analogous example can be seen in the right to attack a witness's credibility under the Federal Rules of Evidence (FRE), which govern the admissibility of evidence in federal trials. Before adoption of the FRE, the Court had held that trial courts must allow parties to impeach a witness's credibility by showing the witness's bias. *See* Alford v. United States, 282 U.S. 687, 691–93 (1931). The later-enacted FRE contain no clause continuing to allow impeachment by bias. *See, e.g.*, FED. R. EVID. 608, 610. Nonetheless, the Court held that "it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption." United States v. Abel, 469 U.S. 45, 51 (1984). The Court bolstered this conclusion in part by looking to the FRE's Advisory Committee Notes. *Id.* at 51–52. Similarly, though the formal prison mailbox rules make no mention of *Houston*, that silence is not a reason to think that *Houston* is no longer good law. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 ("[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity."); *Hohn*, 524 U.S. at 252–53.

Under the Constitution, Congress determines which cases lower courts may hear.[96] As set out in the Introduction, Congress delegated some of this power to the Supreme Court in the Rules Enabling Act, allowing the Court to create federal rules of practice and procedure.[97] Congress delegated this power out of a desire for uniform procedures governing all federal courts;[98] accordingly, any approach to applying the prison mailbox rules must be easy to apply uniformly across courts. This counsels against any approach that gives courts discretion, which might exacerbate (rather than resolve) uneven application of a prison mailbox rule.

One possible uniform solution would be to encourage widespread application of a prison mailbox rule. This would serve the obvious policy instinct of protecting a vulnerable class of people that is at a significant disadvantage when litigating. This instinct might encourage widespread application of a prison mailbox rule. However, the Court has expressly disavowed a permissive approach to deadlines based on policy considerations.[99] The deadlines imposed on lower courts by Congress and the Supreme Court are intended to limit the cases that those courts can hear, and lower courts must carefully adhere to these deadlines.[100]

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[96] *See* U.S. CONST., art. III, § 1; Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of . . . withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper.'"(quoting Cary v. Curtis, 44 U.S. 236, 245 (1845))); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act,* 68 GEO. WASH. L. REV. 395, 410–11 (2002).

[97] *See* Burlington N. R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("Congress' rulemaking authority [ ] originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act." (citing Hanna v. Plumer, 380 U.S. 460, 471–74 (1965))).

[98] *See supra* note 23 and accompanying text; *see also Burlington*, 480 U.S. at 5 n.3 ("In the Rules Enabling Act, Congress authorized this Court to prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 19 FED. PRAC. AND PROC. § 4509 (3d ed.) (describing the "overriding purpose" of the Rules Enabling Act as "to provide a uniform and rational system of practice and procedure for the federal courts").

[99] *See* United States v. Robinson, 361 U.S. 220, 229 (1960) ("[P]owerful policy arguments may be made for and against greater flexibility with respect to the time for the taking of an appeal. . . . But that policy question . . . must be resolved through the rulemaking process and not by judicial decision."). Of course, *Houston* and *Fallen* are examples of the Supreme Court taking just such a flexible, policy-based approach. One of the benefits of being the Supreme Court (much to the *Houston* dissenters' frustration) is that it gets to disregard its own mandates; lower courts have no such prerogative. *Cf.* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

[100] *Cf. Robinson*, 361 U.S. at 288–89 ("Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.").

Some such deadlines are jurisdictional[101] and so go to the heart of the courts' power to hear the underlying cases under Article III.[102] Other deadlines, including those imposed by the federal rules of practice and procedure, are "claim-processing rules"[103] that do not alter the courts' jurisdiction.[104] In distinguishing between jurisdictional and claim-processing rules, the Court has stated that jurisdictional rules, unlike claim-processing rules, can never be waived and can be addressed sua sponte by the Court.[105] The Court has also made it clear, however, that "calling a rule nonjurisdictional does not mean that it is not mandatory."[106] The Court has commanded lower courts to follow the clear limits of deadlines imposed on them and cautioned that even claim-processing rules are "unalterable" if properly raised by the opposing party.[107]

When a lower court applies a prison mailbox rule to extend an otherwise-elapsed deadline, it refuses to apply the language of that binding deadline. Accordingly, lower courts should not apply a prison mailbox rule unless they have been instructed to do so by Congress or the Supreme Court. Any proposed solution must, above all, be faithful to the Court's instructions. Parts III and IV therefore undertake the critically important task of discerning the contours of those instructions.

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[101] *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 214 (2007) ("[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement.").

[102] *See Ex parte* McCardle, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *see also* U.S. CONST., art. III, § 1.

[103] Kontrick v. Ryan, 540 U.S. 443, 453 (2004). For an analysis of the distinction the *Kontrick* Court made, see generally E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart, 40 CREIGHTON L. REV. 181 (2007).

[104] *See Kontrick*, 540 U.S. at 453 ("'[I]t is axiomatic' that such rules 'do not create or withdraw federal jurisdiction.'" (quoting Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978))). This is obvious from various rules expressly stating as much. *See, e.g.*, FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts.").

[105] *See, e.g.*, Fort Bend Cty., Texas v. Davis, 139 S. Ct. 1843, 1849 (2019).

[106] Gonzales v. Thaler, 565 U.S. 134, 146 (2012); *see also* Eberhart v. United States, 546 U.S. 12, 18 (2005) ("[W]hen the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory.").

[107] *See* Manrique v. United States, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart*, 546 U.S. at 17 (2005); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019) ("Courts may not disregard a properly raised procedural rule's plain import any more than they may a statute's.").

III. FILINGS BY UNREPRESENTED PRISONERS

Because any framework governing a prison mailbox rule must accord with the Court's instructions—*Houston*, *Fex*, and the Court's procedural rules—this Comment next determines the precise parameters of those instructions. It discusses the three issues lower courts have faced in determining whether a prison mailbox rule applies in a particular case and then resolves those issues by turning to the Court's pronouncements on them. This Part addresses the two easier issues, which both deal with filings by unrepresented prisoners. Part III.A analyzes the limitation the Court imposed on prison mailbox rules in *Fex*. Part III.B assesses whether *Houston* applies to filing deadlines other than notices of appeal under Appellate Rule 4(c). This Comment then addresses the most controversial question—whether a prison mailbox rule ever applies to prisoners who have legal representation—at length in Part IV.

A. The *Fex* Limitation

This Section first presents the circuit split that has developed around determining when *Fex* bars the application of *Houston* to a particular deadline.[108] It contrasts the interpretation adopted by most circuits, under which *Fex* bars application of a prison mailbox rule only when the language of a deadline clearly forecloses the application of a prison mailbox rule, with the Seventh Circuit's "balance of the harms" approach. It then argues for adopting the majority interpretation.

1. *Fex* in the circuits.

As described above, the *Fex* Court refused to apply a prison mailbox rule to a filing by an unrepresented inmate.[109] Furthermore, it did so without mention of *Houston*.[110] This left lower courts uncertain about when *Houston*'s prison mailbox rule applies and when its application is foreclosed by *Fex*. Although no

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[108] This assumes that *Houston* applies to a broad range of filings by unrepresented prisoners, not just to notices of appeal, and that *Fex* therefore works to block a default rule in favor of applying *Houston*. That assumption is explained (and supported) in Part III.B.

[109] *See supra* Part I.B.

[110] *See generally Fex*, 507 U.S. 43. The prisoner's attorney was not aware of *Houston* during oral arguments and did not cite it in his brief. One Justice referred the attorney to *Houston*, noting that "[i]t helps you, by the way. It doesn't hurt you." Transcript of Oral Argument, *Fex*, 507 U.S. 43, 1992 WL 687897, at *12–13.

court has understood *Fex* to overturn *Houston*,[111] the circuits have adopted two distinct interpretations of when *Fex* bars application of a prison mailbox rule.

Most circuits that have considered this issue have held that *Fex* bars application of *Houston* only when a deadline is specifically defined in reference to the date on which a filing is *received*. The applicable deadline in *Fex* was 180 days after the prisoner "shall have caused to be delivered to the prosecuting officer" the request for a trial.[112] In contrast, the deadline at issue in *Houston* merely required that a notice of appeal "be filed with the district clerk within 30 days after entry of the judgment."[113] The Second,[114] Third,[115] Fifth,[116] and Ninth[117] Circuits have all held that the wording of each deadline was the key difference between *Fex* and *Houston*, in that the latter was open to interpretation[118] while the former clearly required delivery of a document. Accordingly, those four circuits have essentially adopted a clear statement rule, holding that *Fex* bars application of a prison mailbox rule only when "statutory or regulatory schemes [ ] clearly required actual receipt by a specific date."[119]

The Seventh Circuit recently broke from this interpretation. It reconciled *Fex* and *Houston* by focusing on the worst-case scenarios with and without a prison mailbox rule in each case.[120] In *Houston*, the absence of a prison mailbox rule would have entirely

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[111] *See infra* Part III (discussing circuit courts' continued application of *Houston* to many types of filings); *see also* Censke v. United States, 947 F.3d 488, 492 (7th Cir. 2020) ("[T]he Court has explained that it does not overrule itself silently . . . . [W]e are hesitant to read *Fex* (which notably does not mention *Houston*) to cast doubt on the general principle that prisoners may, in the interests of justice, require different filing rules.").

[112] 18 U.S.C. app. 2 § 2.

[113] FED. R. APP. P. 4.

[114] *See* Tapia-Ortiz v. Doe, 171 F.3d 150, 152 n.1 (2d Cir. 1999) ("*Houston* does not apply, of course, when there is a specific statutory regime to the contrary.").

[115] *See* Longenette v. Krusing, 322 F.3d 758, 762 (3d Cir. 2003) ("The line between *Houston* and *Fex* is a narrow one. The distinguishing factor appears to be the specificity of the 'service' language in the statute at issue.").

[116] *See* Smith v. Conner, 250 F.3d 277, 278 (5th Cir. 2001) ("The Supreme Court has since emphasized that when the language of the governing rule clearly defines the requirements for filing, the text of the rule should be enforced as written." (citing *Fex*, 507 U.S. at 52)).

[117] *See* Nigro v. Sullivan, 40 F.3d 990, 995 (9th Cir. 1994) ("We cannot in the name of sympathy rewrite a clear procedural rule, however.").

[118] *See id.* at 994 ("[B]oth *Houston* and [a Ninth Circuit case] addressed an undefined term, 'file' or 'serve.' These terms, left undefined, are susceptible to the construction given them in [those cases].").

[119] *Longenette*, 322 F.3d at 764.

[120] *See Censke*, 947 F.3d at 492–93.

foreclosed the prisoner from filing his notice of appeal. Applying a prison mailbox rule in *Houston* allowed the prisoner to appeal at the relatively low cost of extending the time during which the state had to be ready to respond. In *Fex*, the absence of a prison mailbox rule forced the prisoner to wait longer for his trial, during which time he was disqualified from certain inmate programs; applying such a rule would have entirely foreclosed the state from pursuing its criminal charge.[121] Accordingly, the Seventh Circuit reconciled the application of a prison mailbox rule in *Houston* with the lack of such a rule in *Fex* by emphasizing that both outcomes minimized the harm created by mailing delays. Under this "balance-of-the-harms" interpretation of *Fex*, a prison mailbox rule applies only when the worst possible consequence of a potential mailing delay is better with that rule than without it.[122]

2. Courts should focus on the language of the deadline.

At the outset, it is worth noting that resolution of this circuit split will make no difference in a great deal of prison mailbox rule cases. Many deadlines, including all the ones discussed in subsequent parts of this Comment, are defined in reference to filing[123] and will cause less harm when a prison mailbox rule applies than when one does not, as in *Houston*.[124] When faced with these types of deadlines, courts will reach the same outcome under either interpretation: *Fex* does not apply. Nonetheless, the difference sometimes matters, so any complete framework for determining whether a prison mailbox rule applies must address the *Fex* limitation.

Resolution of the circuit split should, of course, turn mainly on the proper reading of *Fex*. There is some support for the Seventh Circuit's interpretation of *Fex*. The *Fex* Court did note

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[121] *Fex*, 507 U.S. 43 at 50 ("If, through negligence of the warden, a prisoner's [ ] request is delivered to the prosecutor more than 180 days after it was transmitted to the warden, the prosecution will be precluded before the prosecutor even knows it has been requested.").

[122] *See Censke*, 947 F.3d at 493.

[123] *See, e.g.*, FED. R. CIV. P. 50(b) ("No later than 28 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law."); 28 U.S.C. § 2401 ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

[124] This is because, for many types of filings (like the one in *Houston*), the absence of a prison mailbox rule would translate to a complete procedural bar, while the application of a prison mailbox rule would merely cause the other party to wait a few extra days for a document.

that the worst-case scenario under a prison mailbox rule would be "significantly worse" than without such a rule.[125]

However, the better reading of *Fex* is that it turned on the specificity of the language in the applicable deadline, as most circuits have held. Most of the Court's opinion closely scrutinizes the text of the statutory deadline at issue.[126] Noting that the "present case turns upon the meaning of the phrase . . . 'within one hundred and eighty days after he shall have caused to be delivered,'" the Court stated that it was self-evident that "no one can have 'caused something to be delivered' unless delivery in fact occurs."[127] The Court then undertook a grammatical analysis of the deadline and stated that "[i]t makes more sense to think that, as respondent contends, delivery is the key concept."[128]

Indeed, the *Fex* Court offered its worst-case scenario rationale as just "[a]nother commonsense indication pointing to the same conclusion"[129] that it had already reached through interpreting the deadline's text. It then rejected the prisoner's policy arguments in favor of reading a prison mailbox rule into the deadline by reiterating that "the textual requirement 'shall have caused to be delivered' is simply not susceptible of such a reading."[130]

A complete reading of the Court's opinion in *Fex* thus clearly gives more support to the circuits that focus on the specific language governing a deadline. Under this approach, courts should not apply *Fex* to any deadlines that are defined merely by reference to filing, serving, presenting, or similarly ambiguous terms. However, in situations when a deadline is specifically defined in relation to delivery or receipt, whether in the text of the deadline itself[131] or in regulations interpreting the deadline,[132] courts should hold that *Fex* bars application of a prison mailbox rule.

An illustrative example of how this approach works comes from the Second Circuit's analysis in *Tapia-Ortiz v. Doe*.[133] In

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[125] *Fex*, 507 U.S. at 50.

[126] *See id.* at 47–49, 52.

[127] *Id.* at 47.

[128] *Id.* at 49.

[129] *Id.*

[130] *Fex*, 507 U.S. at 52.

[131] *See, e.g.*, *id.* at 47.

[132] *See, e.g.*, *Smith*, 250 F.3d at 279; *Nigro*, 40 F.3d at 994–95; *see also* 28 C.F.R. § 14.2(a) ("For purposes of the provisions of 28 U.S.C. § 2401(b) . . . a claim shall be deemed to have been presented when a Federal agency receives from a claimant [the relevant document].").

[133] 171 F.3d 150 (2d Cir. 1999).

Tapia-Ortiz, an unrepresented prisoner filed a complaint against the United States under the Federal Tort Claims Act (FTCA).[134] The relevant deadline bars tort actions against the United States if they are not "presented in writing to the appropriate Federal agency within two years after [the] claim accrues."[135] Tapia-Ortiz's claim reached the court one day after that deadline.[136] The court cited *Fex* as holding that *Houston* does not apply "when there is a specific statutory regime to the contrary" but correctly found that the term "presented in writing" did not specifically refer to delivery and that the language of the statute therefore was not contrary to the application of *Houston*.[137] The Second Circuit thus joined the majority interpretation urged by this Comment.

Although it applied this Comment's preferred test, the Second Circuit resolved *Tapia-Ortiz* incorrectly. The court was right that the wording of the statute's deadline did not bar application of *Houston*. However, it overlooked a regulation interpreting the deadline. The regulation states that for purposes of that statute, "a claim shall be presented as required by [the statute] as of the date it is received by the appropriate agency."[138] Under the majority interpretation, this is precisely the kind of language that invokes the *Fex* limitation, barring application of a prison mailbox rule. Accordingly, the court should not have applied *Houston* to Tapia-Ortiz's claim.

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[134] Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified at 28 U.S.C. §§ 2671–2680). The FTCA allows private parties to sue the United States for certain torts committed by federal government employees. *Id.* Tapia-Ortiz filed a lawsuit against agents of the Drug Enforcement Administration, alleging that they used excessive force against him. *See Tapia-Ortiz*, 171 F.3d at 151.

[135] 28 U.S.C. § 2401.

[136] *Tapia-Ortiz*, 171 F.3d at 152.

[137] *See id.* at 152 n.1.

[138] *See* 28 C.F.R. 14.2(b). Note that the Seventh Circuit, faced with the same issue, interpreted this as an intentional move by the Second Circuit. It saw the Second Circuit as adopting a third position, where only the language of a statute (and not of a regulation) could invoke *Fex*. *See Censke*, 947 F.3d at 492. The better interpretation of *Tapia-Ortiz* is that the Second Circuit was not aware of the regulation. The Second Circuit's interpretation of *Fex* was confined to a brief footnote, and the court did not cite the regulation or make any arguments against allowing a regulation to invoke *Fex*. *See Tapia-Ortiz*, 171 F.3d at 152 n.1; *see also* Royster v. United States, 2010 WL 936764 (W.D. Pa. Mar. 11, 2010) ("With all due respect, it appears that our sister Circuit overlooked the specific language of 28 C.F.R. § 14.2(b)."), *vacated on other grounds*, Royster v. United States, 475 F. App'x 417 (3d Cir. 2012).

B. *Houston* and Unrepresented Prisoners

In determining when *Fex* bars application of *Houston* to other filing deadlines, the previous Section assumed that *Houston* is not limited to notices of appeal under Appellate Rule 4(c). This Section explains that assumption, showing that lower courts have expanded *Houston* to a very broad set of filings by pro se prisoners. Having determined that *Fex* should only bar application of a prison mailbox rule to deadlines that are clearly defined in reference to delivery, this Comment now argues that courts should apply *Houston* to all other types of filings by unrepresented prisoners. The key word here is "unrepresented"; the application of a prison mailbox rule to prisoners that have legal representation is a much more contentious issue.[139]

As noted in the Introduction, the *Houston* Court did not make the breadth of its newly adopted prison mailbox rule clear. At minimum, the rule applies to pro se prisoners' notices of appeal in civil cases, as in *Houston* itself, and their notices of appeal in criminal cases, as in *Fallen*. It is unclear from *Houston*, though, whether its rule also applies to other deadlines, such as the filing date of civil complaints. However, the *Houston* Court's rationale for the rule—that pro se prisoners are unable to control the delivery of their documents—is not limited to notices of appeal. Thus, when the *Fex* limitation does not apply, lower courts have been very willing to apply *Houston* to a broad range of filings by unrepresented prisoners.

For example, the Sixth Circuit, when faced with an unrepresented prisoner's civil complaint, stated that "[a]ll of the justifications for applying the mailbox rule in *Houston v. Lack* are present in the instant case."[140] It held that a prisoner's complaint that was given to prison officials before—but reached the district court after—the statute of limitations expired was nonetheless filed on time.[141] The Sixth Circuit thus joined several other circuits that apply the prison mailbox rule to civil complaints, noting that "many of the circuits extending the filing rules of *Houston v. Lack* to civil complaints have taken note that *Houston* gives no indication, in either text or analytical framework, that it should be limited to the habeas context."[142] Similarly, circuits have invoked

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[139] *See infra* Part IV.

[140] Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002) (per curiam).

[141] *Id.* at 813.

[142] *Id.*; *see also* Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993); Cooper v. Brookshire, 70 F.3d 377, 381 (5th Cir. 1995); Lewis v. Richmond City Police Dept., 947 F.2d 733, 736

Houston to allow unrepresented prisoners to avoid procedural bars in a wide variety of contexts, such as habeas corpus petitions in district courts,[143] responses to discovery orders,[144] appeals of bankruptcy orders,[145] and administrative filings.[146]

Although the application of *Houston* to different types of filings has not been uniform across the circuits, circuit courts almost[147] invariably apply *Houston* to unrepresented prisoners' filings when given the opportunity.[148] Unlike the other two issues addressed in this Comment, no circuit split has developed on this question. There is simply no reason, either conceptual or within the Court's opinion, to interpret *Houston* as giving greater protection to unrepresented prisoners filing notices of appeal than to those filing any other document. Accordingly, courts should continue applying *Houston* to all such filings.

IV. PRISONERS WITH LEGAL REPRESENTATION

The prior Part dealt with issues facing the application of a prison mailbox rule to filings by unrepresented prisoners. This Part deals with a much more contentious topic: whether to apply such a rule to prisoners who have legal representation. Because that question takes the prison mailbox rule far afield from the context of *Houston* and has generated a large circuit split, it merits considerably more discussion than the other two issues addressed in this Comment.

Part IV.A discusses the split that has developed over whether a prison mailbox rule applies to all prisoners or only to prisoners who do not have legal representation. Often, a prisoner has an

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(4th Cir. 1991). *But see* Jackson v. Nicoletti, 875 F. Supp. 1107, 1111–14 (E.D. Pa. 1994) (declining to extend *Houston* to civil complaints).

143 *See* Jones v. Bertrand, 171 F.3d 499, 504 (7th Cir. 1999).

144 *See* Faile v. Upjohn Co., 988 F.2d 985, 988–89 (9th Cir. 1993).

145 *See In re* Flanagan, 999 F.2d 753, 759 (3d Cir. 1993).

146 *See Tapia-Ortiz*, 171 F.3d at 152.

147 The "almost" qualifier here refers to *Guirguis v. INS.*, 993 F.2d 508 (5th Cir. 1993). In *Guirguis*, a panel of the Fifth Circuit refused to apply *Houston* to a petition for appellate review of an administrative agency's immigration adjudication. *Id.* at 510. This appears to be the only instance where a circuit court has refused to extend *Houston* to a filing by an unrepresented prisoner. Moreover, the Fifth Circuit later overturned *Guirguis* in light of the addition of a formal prison mailbox rule governing all appellate filings. *See Smith*, 250 F.3d at 279 n.11.

148 *See, e.g.*, Sulik v. Taney County, Mo., 316 F.3d 813, 815 (8th Cir. 2003) ("Although we have not yet extended the prison mailbox rule to § 1983 complaints filed by pro se prisoners, it appears that all other courts to consider the issue have held *Houston* applies."), *rev'd on other grounds*, Sulik v. Taney County, Mo., 393 F.3d 765 (8th Cir. 2005).

attorney but nonetheless mails a filing through her prison's mailing system rather than having her attorney file it personally.[149] Part IV.B presents potential solutions that would not adequately resolve the circuit split. Guided by the flaws of those approaches, Part IV.C then advances this Comment's proposed solution: applying *Houston* only to pro se prisoners but applying the formal prison mailbox rules to certain types of filings by represented prisoners.

A. Represented Prisoners in the Circuits

This Section describes the circuit split that has developed over whether some version of a prison mailbox rule applies to inmates that have legal representation. Four circuits have held that a prison mailbox rule can never apply to represented inmates, while two have held that one can. None of these courts has made any distinction between types of filings; all have assumed that a prison mailbox rule either applies to all filings by represented inmates or to none of them.

The Sixth Circuit recently suggested a third approach. The circuit interpreted two of the Court's instructions—*Houston* and formal prison mailbox rules like Appellate Rule 4(c)—as creating different types of prison mailbox rules. It applied *Houston* only to pro se prisoners but suggested that when a formal rule applies to a filing at issue, that formal rule would apply to all prisoners regardless of legal representation.

1. Circuits applying a prison mailbox rule only to pro se prisoners.

The Fifth,[150] Eighth,[151] Tenth,[152] and Eleventh[153] Circuits have held that a prison mailbox rule applies only when a prisoner

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[149] When the prisoner's lawyer files the document, the prison's mailing system plays no role and the prison mailbox rule is therefore irrelevant.

[150] *See* Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002).

[151] *See* Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996).

[152] *See* United States v. Rodriguez-Aguirre, 30 F. App'x 803, 805 (10th Cir. 2002). This case and *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002), arose in the habeas context. Both were decided before the federal rules governing § 2254 and § 2255 motions were amended to include explicit prison mailbox rules, *see supra* notes 86–90 and accompanying text, but neither has been overturned since then. All other cases discussed in this Part deal with appeals, which are governed under Appellate Rule 4, and all were decided after that rule's amendment.

[153] *See* United States v. Camilo, 686 F. App'x 645, 646 (11th Cir. 2017).

is not represented by counsel, regardless of what type of document the prisoner is filing. These circuits have emphasized the policy considerations at play in *Houston* and their absence in the context of represented prisoners.

For example, in *Burgs v. Johnson County*,[154] a state prisoner filed a civil rights suit against the county and its jail officials. The district court granted summary judgment to the defendants, and the petitioner's appeal of that judgment reached the court three days after the filing deadline.[155] Although the petitioner had an attorney, he stated that he had not received notice of the district court's judgment until a day before the appeal deadline was set to elapse, and he included a request for appointment of appellate counsel with his notice of appeal.[156] Despite granting the petitioner's request for new counsel, the Eighth Circuit dismissed the appeal for lack of jurisdiction, holding that he was represented by counsel at the time of filing and was "thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal."[157]

The reasoning in *Burgs* is emblematic of this approach. For example, the Fifth Circuit noted that a "prisoner litigant who is represented by counsel is not incapable of controlling the filing of pleadings" because "he has an agent through whom he can control the conduct of his action."[158] Of course, even represented prisoners are at a disadvantage when filing as compared to other litigants.[159] Nonetheless, these circuits have determined that the *Houston* Court focused on the specific disadvantage of pro se prisoners' reliance on their prisons' mailing systems. Accordingly, they have held that its rule simply was not intended to—and thus does not—apply to represented prisoners, who at least nominally have access to alternative means of filing.[160]

A represented prisoner who is denied coverage of the prison mailbox rule in these circuits might be able to file an ineffective

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154 79 F.3d 701 (8th Cir. 1996).

155 *Id.* at 701.

156 *Id.*

157 *Id.* at 702.

158 *Cousin*, 310 F.3d at 847.

159 Prisoners can face barriers in communicating with counsel. *See* United States v. Moore, 24 F.3d 624, 626 (4th Cir. 1994). Additionally, a prisoner may receive notice of a judgment late, which would reduce the time available for that prisoner to prepare a notice of appeal. *See Burgs*, 79 F.3d at 701.

160 *See, e.g.*, *Camilo*, 686 F. App'x at 646 ("The mailbox rule was not intended to help prisoners with counsel, so it does not apply here.").

assistance of counsel claim. Such claims allow criminal defendants to overturn convictions that resulted from their attorneys' errors.[161] A prisoner could argue that his attorney's failure to file a document on time forced the prisoner to mail the document himself, that the subsequent delay led to the prisoner's conviction, and that the attorney's representation was thus so deficient as to require reversal of the conviction.[162]

However, this strategy will typically be an inadequate way of compensating for the lack of a prison mailbox rule. First, ineffective assistance of counsel claims are only available to criminal defendants; this excludes many prisoners seeking the coverage of a prison mailbox rule, including the habeas claimants[163] in many of the cases that this Section discusses.[164] Even for prisoners seeking relief from a conviction, ineffective assistance of counsel claims require a showing of constitutionally deficient representation by the claimant's attorney.[165] Thus, if a prisoner's use of his prison's mailing system was the result of anything other than attorney error,[166] an ineffective assistance of counsel claim will be of little help.

2. Circuits applying a prison mailbox rule to all prisoners.

Originally, the Seventh Circuit sided with the circuits discussed above, holding that *Houston* applies only to pro se prisoners because, when it comes to filing documents, "[r]epresented prisoners are in no different position than litigants who are at liberty."[167] However, the Seventh Circuit changed course after the

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[161] *See* Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

[162] *See, e.g.*, Brief for Appellant at 12–17, *Moore*, 24 F.3d 624 (No. 92-5042), 1993 WL 13122727 at *12–17.

[163] *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state postconviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." (citations omitted) (first citing Pennsylvania v. Finley, 481 U.S. 551 (1987); and then citing Murray v. Giarratano, 492 U.S. 1 (1989))).

[164] *See generally, e.g.*, *Cousin*, 310 F.3d 843; *see also generally* United States v. Rodriguez-Aguirre, 30 F. App'x 803 (10th Cir. 2002).

[165] *See Strickland*, 466 U.S. at 687.

[166] *See, e.g.*, United States v. Craig, 368 F.3d 738, 739 (7th Cir. 2004)("[The prisoner] had changed his mind [about whether to appeal] while in prison and then prepared and mailed a notice on his own because he thought that his lawyer would no longer represent him."); Cretacci v. Call, 988 F.3d 860, 864 (6th Cir. 2021) ("[The prisoner's attorney] attempted to file the complaint several times, and only when those attempts proved unsuccessful, advised [the prisoner] to file it with prison officials in an effort to trigger the prison mailbox rule.").

[167] United States v. Kimberlin, 898 F.2d 1262, 1265 (7th Cir. 1990).

adoption of Rule 4(c). In *United States v. Craig*,[168] the court stated that its previous case "addressed the status of the mailbox rule when it was a matter of common law, having been invented in *Houston v. Lack*."[169] It held that Appellate Rule 4(c) overrode *Houston* and that the rule, by its plain text, applies to all inmates confined in institutions regardless of whether they have legal representation.[170] Writing for the court, Judge Frank Easterbrook stated that:

> Today the mailbox rule depends on Rule 4(c). . . . Rule 4(c) applies to "an inmate confined in an institution." Craig meets that description. A court ought not pencil "unrepresented" or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd. Craig therefore is entitled to use the mailbox rule.[171]

Craig dealt with an inmate's notice of appeal, so application of Appellate Rule 4(c) made sense. However, nowhere did the Seventh Circuit state that its holding was limited only to notices of appeal. Its assertion that "[t]oday the mailbox rule depends on [Appellate] Rule 4(c)" indicates that it believes Appellate Rule 4(c) overruled *Houston* and created an entirely new prison mailbox rule that applies to all filings by represented inmates.[172]

The Fourth Circuit reached a similar conclusion shortly after adoption of Appellate Rule 4(c), though with somewhat different reasoning.[173] It focused mostly on two facts: that "[t]he Supreme Court did not expressly limit *Houston*'s application to cases involving unrepresented prisoners, and . . . that even represented prisoners might be prevented from timely communicating with counsel."[174] Although it noted that Appellate Rule 4(c) "does not distinguish between represented prisoners and those acting *pro se*," the court still framed its holding as "an interpretation of *Houston*."[175] Thus, the Seventh and Fourth Circuits now apply a prison mailbox rule to all filings by both represented and unrepresented inmates. The former holds that Appellate Rule 4(c) overruled *Houston*, while the latter sees Appellate Rule 4(c) as a

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[168] 368 F.3d 738 (7th Cir. 2004).
[169] *Id.* at 740.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Moore*, 24 F.3d at 626.
[174] *Id.*
[175] *Id.* at 626 n.3.

simple codification of *Houston* that sheds some light on the case's applicability.

3. A new perspective: the Sixth Circuit joins the fray.

The Sixth Circuit faced the circuit split last year in *Cretacci v. Call*.[176] *Cretacci* arose from a civil complaint sent through a prison's mailing system by a represented inmate on the last day allowed by the statute of limitations.[177] The district court held that because it received the plaintiff's complaint after the statute of limitations period had expired, his claim was barred.[178] The Sixth Circuit had previously extended *Houston* to the filing of civil complaints.[179] Nonetheless, the appellate court affirmed, holding that because the plaintiff had legal representation, he was not entitled to a prison mailbox rule.[180]

At face value, this might make it seem like the Sixth Circuit sided with the four circuits that have maintained a restrictive version of the prison mailbox rule. However, the *Cretacci* court did not explicitly disagree with the Fourth and Seventh Circuit cases extending the prison mailbox rule to unrepresented prisoners. It distinguished *Cretacci* from those cases on the ground that the relevant missed deadline was for the filing of a complaint rather than a notice of appeal and thus that the case was not governed by Appellate Rule 4(c).[181] Therefore, although the Sixth Circuit declined to extend the prison mailbox rule to Blake Cretacci, it was the first to suggest that, for represented prisoners, the protection of a prison mailbox rule may depend on what type of document the prisoner is filing. It indicated that there is a difference between the rule as created in *Houston* and the rule as it specifically relates to appeal deadlines under Appellate Rule 4(c).

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[176] 988 F.3d 860 (6th Cir. 2021), *cert denied*, 142 S. Ct. 400 (2021).

[177] *Id.* at 864–65. *Cretacci* provides a colorful example of why a prisoner might choose to file through the prison despite having legal representation. The plaintiff's attorney attempted to electronically file a document on the plaintiff's behalf the day before the statute of limitations expired. The attorney then learned that he was not admitted to practice in the relevant district and was therefore required to file in person. The next day, the attorney drove to the nearest courthouse in the district but discovered that that courthouse does not have a staffed clerk's office and so does not accept in-person filings. Realizing he would not reach the nearest staffed courthouse before it closed, the attorney gave the complaint to his client to file through the prison's mailing system instead, hoping to gain the benefit of a prison mailbox rule. *See id.*

[178] *Id.* at 865.

[179] *See* Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002) (per curiam).

[180] *Cretacci*, 988 F.3d at 867.

[181] *Id.*

Cretacci left open the possibility of extending the rule to represented prisoners filing appeals under the latter rule. By doing so, it was the first case to treat *Houston* and a formal prison mailbox rule as different regimes, albeit only in passing. In the following two Sections, this Comment explains why this is the correct approach.

B. *Houston* Applies Only to Unrepresented Prisoners

The Supreme Court had an opportunity to resolve this circuit split last year. The prisoner in *Cretacci* filed a petition for certiorari, but the Court denied it in October 2021, declining to resolve a dispute that now involves no fewer than seven circuits.[182] Unless the Court decides to resolve this issue, any judicial solution to the split would have to be undertaken by the circuits themselves.[183] This would require the circuits to interpret the Court's instructions, particularly *Houston* and the formal prison mailbox rules. This Section explores the former.

Given that *Houston* applies to a broad range of filings,[184] extending its reach to all prisoners would make a vast set of prisoner filings subject to a prison mailbox rule. Normatively, this may be a desirable outcome. However, the Fifth, Eighth, Tenth, and Eleventh Circuits correctly note that *Houston* was clearly animated by a concern over the plight of pro se prisoners specifically, not of prisoners in general.

The *Houston* Court based its holding on the fact that "[t]he situation of prisoners seeking to appeal without the aid of counsel is unique."[185] The Court stated that prisoners with legal representation can have their attorneys file an appeal on their behalf, but that pro se prisoners do not have that luxury; by definition, "they [do not] have lawyers who can take [ ] precautions for them."[186] The Court also noted that "the *pro se* prisoner has no choice but

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[182] *See Cretacci*, 142 S. Ct. at 400. Note that although the Supreme Court declined to address the prison mailbox rule through this case, it has not been forgotten by the various rulemaking committees. For example, the Appellate Advisory Committee considered possible changes to Appellate Rule 4(c) in 2020. *See* App. Rs. Advisory Comm., Minutes 10 (Oct. 20, 2020).

[183] For an argument that it is better for the circuit courts to resolve their own disputes rather than for them to rely on the Supreme Court, see Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1454–63 (2020).

[184] *See supra* Part III.B.

[185] *Houston*, 487 U.S. at 270.

[186] *Id.* at 271.

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."[187] The Court did not intend to apply *Houston* only to notices of appeal, but it clearly intended to apply *Houston* only to unrepresented prisoners.

Nonetheless, this Section discusses—and then dismisses—two potential steps that the circuits could take: (1) extending *Houston* to prisoners who are only formally (as opposed to functionally) represented by an attorney and (2) extending *Houston* to all prison inmates, even those with effective legal representation. In dismissing these options, this Section will reference the criteria presented in Part II: the need for clear and nondiscretionary standards and for faithfulness to the Court's instructions.[188]

1. Extending *Houston* to passively represented prisoners.

The *Houston* Court's rationale was that pro se prisoners face unique burdens when filing documents and should therefore be given special protection. This Comment has argued that, because that reasoning applies to all filings, circuits have been right to apply *Houston*'s rule to documents other than notices of appeals.[189]

Using similar logic, Courtenay Canedy argued that *Houston*'s rationale applies to prisoners who technically have legal representation but whose attorneys are ineffective.[190] Focusing mostly on the policy considerations in *Houston*, Canedy's Comment argued in favor of extending *Houston* to what she called "passively represented prisoners," or prisoners who technically have legal representation but functionally act pro se when filing.[191] Under her proposal, only a prisoner who is actively represented by an attorney would have "forfeited the benefit of the prison mailbox rule."[192]

Canedy is correct that *Houston*'s rationale applies to passively represented prisoners just as much as it does to filings by pro se prisoners outside the habeas context. However, the questions posed to courts by these two extensions of *Houston* are very

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[187] *Id.*

[188] *See supra* Part II. The phrase "the Court's instructions" refers to *Houston*, *Fex*, and the formal prison mailbox rules.

[189] *See supra* Part III.B.

[190] *See generally* Canedy, *supra* note 56.

[191] *Id.* at 786–93.

[192] *Id.* at 792.

different. In any given case, it is straightforward and obvious which type of filing is at issue. On the other hand, the question of whether a prisoner's representation was passive requires a more complex inquiry that involves judicial discretion. Treating passive representation as equivalent to a complete lack of representation would require courts to decide whether a particular prisoner's representation was passive; avoiding such fact-specific inquiries was part of the *Houston* Court's rationale for adopting a prison mailbox rule in the first place.[193]

Canedy acknowledged this inquiry's challenges but said that the cost it would impose on judicial economy would be slight.[194] That may well be true, but cost is not the problem. The real issue is that there are no clear criteria that provide an answer. Is a prisoner represented if her attorney is not admitted to practice in the relevant state? If her attorney is temporarily unavailable? If she is aided, but not formally represented, by a family member with a law degree?[195] Making this determination would "often [be] no easy task."[196] There is no limit to the potential situations a court may encounter in deciding whether a prisoner's representation was active or passive. Many of these situations would not involve deficient representation, so the existing test for ineffective assistance of counsel would often be inapposite and provide little guidance.[197]

While easy cases would no doubt exist, lower courts would necessarily have to make policy determinations to answer the harder questions. This would allow those courts to widen or narrow the cases they can hear based on the judges' individual policy preferences. Furthermore, if courts disagreed about whether particular types of litigants were passively represented, the prison mailbox rule's application would continue to vary from court to court. This would defeat the purpose of having federal rules of procedure in the first place: establishing uniform rules across the country.[198]

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[193] *See Houston*, 487 U.S. at 275 ("[T]he rejection of the mailbox rule in other contexts has been based in part on concerns that it would increase disputes and uncertainty. . . . These administrative concerns lead to the opposite conclusion here.").

[194] Canedy, *supra* note 56, at 792–93.

[195] These examples are partially based on Judge Chad Readler's insightful concurring opinion in *Cretacci*. *See* 988 F.3d at 872 (Readler, J., concurring).

[196] *Id.* (Readler, J., concurring).

[197] *See supra* notes 161–66 and accompanying text.

[198] *See supra* Part II.

Simply put, uncertain standards, as opposed to bright-line rules, have no place in the realm of deadlines.[199] Extending the prison mailbox rule to passively represented prisoners would not resolve the circuit split; it would just shift the disagreement to determining what does and does not qualify as passive representation. It would engage the lower courts in a discretionary inquiry, allowing them to alter their competence without the constraint of a bright-line rule and inviting further discord in the application of *Houston*.

2. Extending *Houston* to all prisoners.

One potential solution that avoids any discretionary inquiry is to apply *Houston* very broadly. In theory, courts that want to be lenient to inmates could extend *Houston* to all filings by all inmates, even those with legal representation. The Fourth Circuit has arguably headed in this direction by stating, on policy grounds rather than rule interpretation, that "[t]here is simply no good reason to" limit *Houston* to unrepresented prisoners.[200] There is some intuitive appeal to extending Houston to all filings by prisoners; this approach would be simple to apply and would benefit a group that has very little power.

However, as discussed in Part II, the Supreme Court has consistently overturned extensions of deadlines based on policy concerns.[201] In *United States v. Robinson*,[202] the Court acknowledged that "powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal."[203] It nonetheless held that "that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision."[204] The Court has since emphatically repeated

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[199] *Cf. Houston*, 487 U.S. at 275 (establishing the prison mailbox rule in part because "making filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one").

[200] United States v. Moore, 24 F.3d 624, 626 (4th Cir. 1994). *But see Cretacci*, 988 F.3d at 871 (Readler, J., concurring) ("As a matter of interpreting precedent, simply because the Supreme Court cracks open a door in one context does not mean we should kick the door wide open at the next possible opportunity.").

[201] *See supra* notes 99–107 and accompanying text.

[202] 361 U.S. 220 (1960).

[203] *Id.* at 229.

[204] *Id.*; *cf.* United States v. Gilman, 347 U.S. 507, 511–13 (1954) ("The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.").

that procedural rules are "mandate[s]" that cannot be disregarded "in order to obtain 'optimal' policy results."[205]

The Court clearly did not intend to apply *Houston* to represented prisoners. It has since shown no willingness to extend *Houston* to represented prisoners through case law; it had an opportunity to do so in late 2021 but declined to grant certiorari.[206] Any application of a prison mailbox rule must be consistent with the Court's instructions so as not to run afoul of both jurisdictional and mandatory claim-processing rules.[207] If a lower court were to apply *Houston* to, for example, the filing of a motion for a new trial by a represented prisoner, it would do so without the Court's imprimatur; that court would be defying the twenty-eight-day deadline created for such motions by the Supreme Court[208] by applying a prison mailbox rule of its own creation.

Simply put, Congress and the Court have the power to impose deadlines;[209] lower courts do not, and so they cannot fashion a new type of prison mailbox rule of their own by applying *Houston* to cases that the Court clearly did not mean to apply it to. This is especially true when the Court has shown that it is able to create formal prison mailbox rules that protect even represented prisoners but has done so only for certain types of filings.

A court might argue that if the Supreme Court disagrees with the application of *Houston* to represented prisoners, it can grant certiorari and say as much. That is, however, not the relationship between the Court and the inferior courts. It is the "Court's prerogative alone to overrule one of its precedents";[210] lower courts cannot just ignore the clear rationale behind *Houston* and wait to be corrected.

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[205] Carlisle v. United States, 517 U.S. 416, 430 (1996).

[206] *See Cretacci*, 142 S. Ct. 400.

[207] *See supra* Part II; *see also, e.g.*, Nova Scotia v. United States, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.").

[208] *See* FED. R. CIV. P. 50(b).

[209] The Supreme Court has rulemaking power under the Rules Enabling Act. The Court has repeatedly stated that the proper avenue for its procedural rulemaking is through the exercise of this congressionally delegated power, rather than through the Court's normal judicial role. *See, e.g.*, United States v. Isthmian Steamship Co., 359 U.S. 314, 323 ("We think that if the law is to change it should be by rulemaking or legislation and not by decision."); *Carlisle*, 517 U.S. at 430 ("[W]e are not at liberty to ignore the mandate of Rule 29."); *see also supra* note 99. This is at odds with *Houston*, which circumvented the rulemaking process, but *Houston* remains binding on lower courts.

[210] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

C. The Formal Prison Mailbox Rules Apply to All Prisoners

Having dismissed the application of *Houston* to represented prisoners, this Comment now argues that they are not entirely out of luck. The Court's instructions about the prison mailbox rule are not limited to *Houston*—the Court also passed several formal prison mailbox rules after *Houston*.[211] Appellate Rule 4(c) and its offshoots created a formal version of the prison mailbox rule separate from *Houston*. The contours of *Houston* continue to be important when no formal prison mailbox rule applies, but the formal prison mailbox rules come into play when one governs the filing at issue in a case.

Just as one side of the split is correct that *Houston* was motivated by the plight of pro se prisoners, the Seventh Circuit is also correct that Appellate Rule 4(c) and its progeny clearly apply to all prisoners regardless of legal representation, as evidenced by the plain text and legislative history of those rules. The Advisory Committee wrote that Rule 4(c) "reflects" the decision in *Houston*;[212] however, Appellate Rule 4(c) contains no express limitation based on prisoners' representation status. Like Supreme Court Rule 29.2, Appellate Rule 4(c) does not explicitly specify that it applies only to unrepresented prisoners. The rule's plain text applies to any prisoner confined to an institution.[213] In fact, "though a prior Appellate Rules Committee draft would have limited the prison mailbox rule to pro se inmates, the new draft dropped that limitation in deference to the broader approach taken by the Supreme Court's rule."[214]

Thus, Appellate Rule 4(c) was drafted to apply to all prisoners, as were Supreme Court Rule 29.2 and the other procedural rules copied verbatim from Appellate Rule 4(c).[215] Unlike a court that unduly extends *Houston* to, for example, the filing of a civil complaint, a court that applies these formal prison mailbox rules to represented prisoners is not defying the Court's instructions; it

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[211] *See supra* notes 85–90 and accompanying text.

[212] FED. R. APP. P. 4(c) advisory committee's note.

[213] FED. R. APP. P. 4(c); *see also* Canedy, *supra* note 56, at 793 ("Judge Easterbrook is right [in *Craig*] that rule 4(c)(1)'s text and title . . . plainly appl[y] to both represented and pro se prisoners alike.").

[214] Struve, *supra* note 25, at 279 (citing App. Rs. Advisory Comm., Minutes 26 (Apr. 17, 1991)).

[215] *See supra* note 90 and accompanying text.

is *enforcing* them. When a represented prisoner files any document with an appellate court,[216] the Supreme Court,[217] or a bankruptcy court,[218] or files a petition for habeas corpus in a trial court,[219] that court is not just allowed to apply a prison mailbox rule—it is required to.

V. PROPOSED FRAMEWORK

This Part combines the solutions proposed to each of the three issues raised in Parts III and IV. Part V.A presents a framework for determining whether a prison mailbox rule applies to a particular filing. It places each of the solutions proposed in the preceding parts into a simple three-step inquiry. Part V.B argues that this framework creates no potential for abuse.

A. The Framework

When faced with a prisoner seeking the protection of a prison mailbox rule for an otherwise-late filing, a court should ask three questions, which roughly line up with the three issues presented in Parts III and IV of this Comment.

First, the court should determine whether the filing at issue is governed by a formal prison mailbox rule. This should be a simple and nondiscretionary inquiry. If the prisoner is attempting to file any document in an appellate or bankruptcy court or filing a habeas corpus petition, the inquiry stops there; a formal prison mailbox rule applies and the prisoner is entitled to its protection regardless of legal representation or lack thereof.[220]

If any other type of filing is at issue, such as the filing of a civil complaint or administrative document, the court should then determine whether the prisoner is represented by counsel, even if that representation is arguably passive.[221] If the prisoner has an attorney, he is unfortunately out of luck. Courts should only apply

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[216] FED. R. APP. P. 4(c); FED. R. APP. P. 25(a)(2)(A)(iii).

[217] SUP. CT. R. 29.2.

[218] FED. R. BANKR. P. 8002(c); FED. R. BANKR. P. 8011(a)(2)(iii).

[219] FED. R. GOVERNING § 2254 CASES IN THE U.S. DIST. CTS. 3, *reprinted in* 28 U.S.C. app. § 2254; FED. R. GOVERNING § 2255 CASES IN THE U.S. DIST. CTS. 3, *reprinted in* 28 U.S.C. app. § 2255.

[220] *Fex* never applies to a formal prison mailbox rule; by definition, all such rules define filings by inmates as occurring at the time that the inmate dispatches the document, not at the time that the court receives that document.

[221] *See supra* Part III.B.

formal prison mailbox rules—not *Houston*—to represented prisoners, and each such rule applies only to its particular type of filing. A circuit court should not be in the business of applying, for example, a federal rule of appellate procedure to the initial filing of a civil complaint.

If the filing is not governed by a formal prison mailbox rule but the prisoner is unrepresented, the prisoner may be entitled to the protection of *Houston*. The final inquiry for the court is whether *Fex* bars application of *Houston* to the deadline at issue. As argued above, invocation of *Fex* should depend on the specific language in the deadline.[222] If the deadline itself is defined in relation to delivery or receipt, or if a regulation interpreting that deadline defines filing as occurring at the time of delivery or receipt,[223] courts should enforce that language and forgo *Houston*. If the deadline is defined vaguely, using terms like "filing," "serving," or "presenting," the court should not apply the *Fex* limitation and should give the prisoner the benefit of *Houston*'s prison mailbox rule.

In *Houston*, the Supreme Court instructed lower courts to generally afford pro se prisoners the protection of a prison mailbox rule. In *Fex*, it instructed lower courts not to apply *Houston* when the text of the deadline bars a prison mailbox rule. In its formal amendments to the federal rules of practice and procedure, it instructed lower courts to apply a prison mailbox rule to certain types of filings by all inmates confined in institutions, even those with legal representation. This Comment's proposed framework is consistent with each of those instructions, so it does not allow courts to ignore binding deadlines without the Supreme Court's imprimatur. It also features simple, nondiscretionary questions, introducing much-needed uniformity to application of the prison mailbox rules.

B. The Framework's Effect on Incentives

This Comment's proposed framework calls for applying the formal prison mailbox rules to certain filings by represented prisoners. In some circuits, this would lead to an expansion of the prison mailbox rule. This is consistent with the Court's intent in

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[222] *See supra* Part III.A.

[223] Recall the discussion of the Federal Tort Claims Act, *supra* in notes 133–38 and accompanying text.

promulgating the formal prison mailbox rules.[224] Nevertheless, providing special treatment to a new set of litigants may raise the concern that litigants could game the system to gain deadline extensions even where none are warranted.

However, the ability to take advantage of the prison mailbox rule is extremely limited, if not eliminated, by the fact that the rule does not significantly extend the time available to *draft* documents. It merely changes the filing date from the day a document reaches the court to the day it is deposited in a prison's mailing system. A prisoner's attorney who needs a few extra days to finish drafting a document will not gain anything by having the inmate file the document instead; it must be deposited in the mailing system by the same day the attorney would otherwise need to file it with the court herself.[225] Therefore, expanding the coverage of prison mailbox rules would create, at most, negligible potential for abuse.

CONCLUSION

Courts have struggled with the appropriate reach of the prison mailbox rule since its inception in *Houston v. Lack*. The Court's restriction (through *Fex*) and expansion (through procedural rulemaking) of prison mailbox rules has led to discordant application of such rules among the circuits. Federal procedural rules are meant to be uniform across the country; accordingly, this Comment has attempted to delineate the appropriate reach of the prison mailbox rules.

Any solution undertaken by lower courts must, of course, be consistent with all of the Court's binding instructions for applying a prison mailbox rule. Therefore, this Comment first attempted to discern what limitations *Fex* imposed on *Houston*, then argued that for filings by unrepresented prisoners, *Fex* is essentially the *only* limitation on *Houston*.

It then turned to the interplay between *Houston* and the formal prison mailbox rules. To the extent that certain circuits have applied *Houston*'s prison mailbox rule to notices of appeal by represented inmates, they have reached the right outcome—but

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[224] *See supra* Part IV.C.

[225] In other words, a prisoner who finishes drafting a document on the last day allowed by a deadline could, if represented by an attorney, give the document to that attorney and have her file it (either electronically or in person) that same day. This makes the benefit of choosing to proceed pro se—and thus being eligible for *Houston*—marginal at best, especially compared to the significant disadvantages facing pro se litigants.

for the wrong reasons. This Comment has argued that the correct approach is to recognize that there are in fact two distinct types of prison mailbox rules: one created by *Houston* and one created by procedural rulemaking. This Comment has argued that *Houston* does not apply to represented prisoners but that the formal prison mailbox rules, which govern specific filings, apply to all inmates.

Under this Comment's proposed framework, courts should apply a prison mailbox rule to certain types of filings by all prisoners, whether represented or not, when a federal rule of practice and procedure calls for it. For all other filings, courts should determine whether the text of the applicable deadline precludes application of a prison mailbox rule. If it does not, courts should apply a prison mailbox rule so long as the filer is an unrepresented prisoner. This is an easily administrable rule that is consistent with the Court's instructions, as expressed through *Houston*, *Fex*, and the formal rules it has promulgated. Application of this framework would give the prison mailbox rules much-needed uniformity and solve two circuit splits without intervention from the Supreme Court.