MEMORANDUM

From: Mario Ramirez
To: Conley Hurst
Date: July 25, 2021
Re: Topic Proposal #1: Does the "prison mailbox rule" apply only to pro se inmates?

I. ISSUE

Does the "prison mailbox rule" apply only to pro se inmates?

II. DISCUSSION

A. Prison Mailbox Rule

Federal Rule of Appellate Procedure 4 governs the timing for filing notices of appeals in federal courts.[1] In civil cases, notice must be filed with the district clerk within 30 days after the judgment is entered.[2] In criminal cases, notice must be filed with the district court within 14 days after entry of the decision being appealed or the filing of the government's notice of appeal.[3]

As originally promulgated, Rule 4 did not have a separate provision for pro se prison inmates, who rely on their prisons' mailing system to send notices of appeal. However, in 1988, the Supreme Court held in Houston v. Lack[4] that a pro se prisoner's notice of appeal is considered filed when the prisoner delivers it to the prison authorities to be forwarded to the court clerk.[5] The Court noted that "the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay" and that a notice should thus be considered filed when the prisoner loses control over the notice, rather than when it reaches the court.[6] This is often referred to as the "prison mailbox rule." Although Houston dealt with an appeal of a habeas corpus claim, courts have since significantly expanded its rule by applying it to pro se prisoners filing, inter alia, criminal appeals, civil complaints, and administrative filings.[7]

B. Rule 4(c) and Represented Appellants

In 1993, the Federal Rules of Appellate Procedure were amended to add Rule 4(c);[8] the advisory committee wrote that Rule 4(c) "reflects" the decision in Houston.[9] The relevant portion of Rule 4(c) states that:

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1 FED. R. APP. P. 4.
2 FED. R. APP. P. 4(a)(1)(A).
3 FED. R. APP. P. 4(b)(1)(A).
4 487 U.S. 266 (1988).
5 Id. at 276.
6 Id. at 271.
7 See Cretacci v. Call, 988 F.3d 860, 866 (6th Cir. 2021) (collecting cases).
8 United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).
9 FED. R. APP. P. 4(c) advisory committee's note.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing.[10]

Rule 4(c) thus explicitly adopted the expansion of the Houston rule to criminal appellants. However, Rule 4(c) has created a circuit split over whether the rule applies only to appeals of pro se inmates, as in Houston, or whether it also applies to inmates represented by counsel. The Fifth,[11] Eighth,[12] Tenth,[13] and Eleventh[14] Circuits have held that the rule applies only when an inmate is not represented by counsel and so needs to rely on the prison's mail system to file a notice of appeal. These Circuits have emphasized the policy considerations at play in Houston and the absence of those considerations in the context of represented inmates.[15]

In contrast, the Seventh Circuit held that Rule 4(c) overrode Houston in the appellate context and that the rule, by its plain text, applies to inmates confined in institutions regardless of whether they have legal representation.[16] Writing for the court, Judge Easterbrook stated that "[t]oday 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."[17] Though it focused more on policy rationales, the Fourth Circuit reached the same conclusion in United States v. Moore,[18] noting that Rule 4(c) "does not distinguish between represented prisoners and those acting pro se."[19]

The Sixth Circuit faced the circuit split this year in Cretacci v. Call.[20] Cretacci arose from a civil complaint filed by a represented inmate on the last day allowed by the statute of limitations.[21] The district court held that because it received the plaintiff's complaint after the statute of limitations period had expired, his claim was barred.[22] Although the Third Circuit had extended the prison mailbox rule to the filing of civil complaints,[23] the appellate court affirmed, holding that because Cretacci had legal representation, the rule did not apply to him.[24] However, the court did not disagree with the circuits that had expanded the rule to represented prisoners; it distinguished Cretacci from those cases on the ground that the relevant missed deadline here was the filing of a complaint rather than of a notice of appeal, and that this case was therefore not governed by Rule 4(c).[25] Thus, although the Sixth Circuit declined to extend the prison mailbox rule to this particular

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[10] FED. R. APP. P. 4(c)(1).
[11] Cousin v. Lensing, 310 F.3d 843 (5th Cir. 2002).
[12] Burgs v. Johnson County, 79 F.3d 701 (8th Cir. 1996).
[13] United States v. Rodriguez-Aguirre, 30 F. App'x 803 (10th Cir. 2002).
[14] United States v. Camilo, 86 F. App'x 645 (11th Cir. 2017).
[15] Cousin, 310 F.3d at 848 ("[T]he justifications for leniency with respect to pro se prisoner litigants do not support extension of the 'mailbox rule' to prisoners represented by counsel.").
[16] Craig, 368 F.3d at 740.
[17] Id.
[18] 24 F.3d 624 (4th Cir. 1994).
[19] Id. at 626 n. 3.
[20] 988 F.3d 860 (6th Cir. 2021).
[21] Id. at 863–65.
[22] Id. at 865.
[23] See Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002) (per curiam).
[24] Cretacci, 988 F.3d at 867.
[25] Id.

plaintiff, 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 Rule 4(c), and left open the possibility of extending the rule to represented prisoners filing appeals under the latter.

III. PROPOSAL IDEAS

A. Separate Prison Mailbox Rules

A Commentator could argue that Rule 4(c) superseded Houston, but only for inmates filing notices of appeals. As stated by the Seventh Circuit, Rule 4(c) makes no distinction between represented and unrepresented inmates filing appeals.[26] Thus, a Commentator could conclude that the addition of Rule 4(c) split the prison mailbox rule into two distinct doctrines, as the Sixth Circuit arguably suggested. For appellate filing deadlines, a Commentator could argue that the statutory prison mailbox rule arising from Rule 4(c) should apply to all inmates. In other contexts where courts have applied the Houston holding, such as the filing of civil complaints and administrative documents, the judge-made prison mailbox rule originating in Houston would continue to be animated by the policy concerns at play in Houston and thus not extend to represented inmates.

To bolster this argument, a Commentator could look to other examples of potential codifications of judge-made law. If the Supreme Court typically finds meaning in the differences between the codified law and the judicial opinions it sprung from, a Commentator could argue that courts should take note of the lack of any reference to pro se inmates in Rule 4(c). Furthermore, the suggestion that Rule 4(c) governs inmate appeals and that Houston governs all other filing deadlines would be strengthened if a Commentator can show examples of courts holding that codification created a new branch of the law separate from its related judge-made doctrine.

One example a Commentator could analyze is the interplay between Teague v. Lane[27] and 28 U.S.C. § 2254(d),[28] as modified by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[29] Both Teague and the subsequently passed § 2254(d) limit the ability of federal habeas corpus petitioners to use newly created federal protections.[30] Shortly after § 2254(d) was passed, the Court held that "there is no reason to believe that Congress intended to require federal courts" to analyze a case under both Teague and § 2254(d).[31] The Court thus stated that "[i]t is perfectly clear that AEDPA codifies Teague" in the context of newly established protections.[32] Just two years later, however, the Court reversed course and held that "the AEDPA and Teague inquiries are distinct."[33] The Court has since stated that "AEDPA did not codify Teague" and that it "see[s] no reason why Teague should alter AEDPA's plain meaning."[34]

A Commentator could use § 2254(d) and Teague, along with other examples of judge-made and codified laws running in parallel to each other, to argue that Rule 4(c) and Houston should coexist. As with Teague and § 2254(d), there is no reason Houston should alter the plain meaning of

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[26] Craig, 368 F.3d at 740.
[27] 489 U.S. 288 (1989).
[28] 28 U.S.C. § 2254(d).
[29] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified in scattered sections of the U.S. Code).
[30] See Teague, 489 U.S.; see also 28 U.S.C. § 2254(d).
[31] Williams v. Taylor, 529 U.S. 362, 379 (2000).
[32] Id. at 380.
[33] Horn v. Banks, 536 U.S. 266, 272 (2002).
[34] Greene v. Fisher, 565 U.S. 34, 39 (2011).

Rule 4(c), which by its terms applies to all inmates.[35] Thus, a Commentator could argue that Rule 4(c) should apply to all inmates filing appeals, while the Houston rule would apply to pro se prisoners in any situation not covered by Rule 4(c), so long as the policy motivations that led to Houston are present. This would resolve the circuit split by furthering the policies behind Houston when possible while still giving effect to the plain text of Rule 4(c).

B. History of Rule 4(c)

Focusing only on Rule 4(c) and notices of appeals, a Commentator could engage in statutory interpretation and use the history of Rule 4(c) to show that the Supreme Court and Congress intended that the rule apply to all inmates. The Judicial Conference's appellate advisory committee drafts the Federal Rules of Appellate Procedure, the Supreme Court approves them, and Congress has seven months to reject or modify them.[36] Given the repeated focus of the Houston Court in specifying the challenges facing pro se prisoners specifically[37] and the fact that Rule 4(c) was approved by the Court only five years later, a Commentator could argue that the omission of any reference to legal representation (or lack thereof) in Rule 4(c) must have been intentional.

This argument is strengthened by the fact that Rule 4(c) contains other specific limitations not found in Houston, such as requiring inmates to attach evidence of the date of filing to their notices of appeals.[38] Since the drafters of Rule 4(c) did more than simply copy the text of Houston, a Commentator could easily argue that any deviations from that text are meaningful and must be given effect. A Commentator could even use the advisory committee's note on Rule 4(c) in favor of this argument; had the advisory committee intended Rule 4(c) to have the same limitations as Houston, it could have said the rule was intended to codify its holding, rather than merely "reflect" it.[39]

C. Judicial Efficiency and Normative Analysis

A Commentator could also engage in normative analysis and argue that interpreting Rule 4(c) to cover all inmates would save judicial resources without sacrificing fairness. In civil cases, 91% of prisoners' petitions are filed pro se.[40] Restricting Rule 4(c) to cover only those petitions is an attempt to protect fairness in the other 9% of petitions, but because it always allows a prisoner's opponent to argue that the prisoner was represented by counsel, it opens the door to evidentiary disputes in every single petition by a prisoner. Furthermore, a Commentator could argue that the fairness interest at stake is minimal, since the rule only gives represented prisoners the ability to file their appeals themselves until the same day their attorneys are able to do so.

IV. EXISTING COMMENTARY

There is surprisingly little commentary on this circuit split. The only scholarly piece I could find dealing with Rule 4(c)'s applicability to represented prisoners is a 2009 Comment written by

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[35] FED. R. APP. P. 4(c)(1).
[36] Admin. Off. of the U.S. Courts, How the Rulemaking Process Works, UNITED STATES COURTS, https://perma.cc/WS5Y-KSGF
[37] Houston, 487 U.S. 266.
[38] FED. R. APP. P. 4(c)(1)(A).
[39] FED. R. APP. P. 4(c) advisory committee's note.
[40] Admin. Off. of the U.S. Courts, Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019, UNITED STATES COURTS, https://perma.cc/2N29-KTNW.

Courtenay Canedy for the George Mason Law Review.[41] Canedy's argument analyzes the policy rationales behind the common law mailbox rule for contracts and how those rationales led to Houston.[42] Canedy then argues, in line with the Fourth Circuit's decision in Moore, that those rationales also apply to "passively represented" prisoners (i.e. prisoners who nominally have counsel but are functionally acting pro se) and that the rule should thus extend to those prisoners.[43]

Canedy's piece would not preempt a Comment on this topic. Her Comment was written before the Sixth and Eleventh Circuit joined the split in Cretacci and Camilo, respectively. Cretacci has added particularly meaningful texture to the split by indicating that the general Houston prison mailbox rule and Rule 4(c) exist separately and in tandem.[44] Perhaps for that reason, Canedy's Comment does not delve deeply into a potential interplay between the two rules; although she briefly acknowledges that Rule 4(c) overrode Houston, she treats them as one and the same and does not suggest that the Houston rule might live on outside the context of notices of appeal.[45] Therefore, a Comment arguing that Rule 4(c) is distinct from Houston, rather than merely overriding it, would differ significantly from Canedy's piece and arrive at a different conclusion.

Even if a Commentator only addressed notices of appeals and not other applications of the Houston rule, a Commentator could argue that Canedy's proposed solution to the circuit split would be at best an inefficient use of judicial resources and at worst raise untenable evidentiary issues. Canedy proposes to resolve the circuit split through a compromise, where all inmates who file notices of appeals themselves receive the benefit of Rule 4(c) unless there is evidence that "the prisoner had counsel at his disposal," at which point a court "must then consider whether the prisoner knew he had counsel available to him."[46]

A Commentator could raise the fact that maintaining any kind of distinction between represented and unrepresented prisoners "leaves judges with the unenviable task of determining whether an inmate was 'represented' at the time of filing"',[47] and opens up the door to manipulation of the rule and would thus require extended judicial inquiries.[48] A Commentator could also argue that, based on the fact that Rule 4(c)'s text applies to all prisoners[49] and that 91% of prisoner petitions are pro se,[50] there is no need to bog courts down with complicated questions about whether a prisoner was acting pro se at the time of filing, as Canedy's suggestion would require.

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41 Courtenay Canedy, The Prison Mailbox Rule and Passively Represented Prisoners, 16 GEO. MASON L. REV. 773 (2009).

42 Canedy, supra note 41, at 774–76, 782–85.

43 Id. at 785–89.

44 See Cretacci, 988 F.3d at 867.

45 Canedy, supra note 41, at 793 ("Judge Easterbrook is right when he says that rule 4(c)(1) . . . plainly applies to both represented and pro se prisoners alike. No longer does the prison mailbox rule depend on the Supreme Court's decision in Houston v. Lack).

46 Id. at 792.

47 Cretacci, 988 F.3d at 872 (Readler, J., concurring).

48 Id. at 872–73 ("[T]he seemingly obvious solution for an inmate . . . would be to fire her counsel immediately before she turns her complaint over to a prison official. After all, that ostensibly would leave the inmate unrepresented, and thus free to avail herself of the prison mailbox rule."

49 FED. R. APP. P. 4(c)(1).

50 Admin. Off. of the U.S. Courts, supra note 40.

V. BIBLIOGRAPHY

A. Cases
   1. Supreme Court Cases
      a. Greene v. Fisher, 565 U.S. 34 (2011).
      b. Horn v. Banks, 536 U.S. 266 (2002).
      c. Houston v. Lack, 487 U.S. 266 (1988).
      d. Teague v. Lane, 489 U.S. 288 (1989).
      e. Williams v. Taylor, 529 U.S. 362 (2000).
   2. Circuit Cases
      a. Burgs v. Johnson County, 79 F.3d 701 (8th Cir. 1996).
      b. Cretacci v. Call, 988 F.3d 860 (6th Cir. 2021).
      c. Cousin v. Lensing, 310 F.3d 843 (5th Cir. 2002).
      d. Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002).
      e. United States v. Camilo, 686 F. App'x 645 (11th Cir. 2017).
      f. United States v. Craig, 368 F.3d 738 (7th Cir. 2004).
      g. United States v. Fiorelli, 337 F.3d 282 (3d Cir. 2003) (extending the Houston rule to delays caused by prisons in sending final civil judgments to inmates).
      h. United States v. Moore, 24 F.3d 624 (4th Cir. 1994).
      i. United States v. Rodriguez-Aguirre, 30 F. App'x 803 (10th Cir. 2002).

B. Statutes and Rules
   1. FED. R. APP. P. 4.
   2. 28 U.S.C. § 2254(d).
   3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

C. Journal Articles
   1. Courtenay Canedy, The Prison Mailbox Rule and Passively Represented Prisoners, 16 GEO. MASON L. REV. 773 (2009).
   4. Kendall Turner, A New Approach to the Teague Doctrine, 66 STAN. L. REV. 1159 (2014) (explaining the intersection between Teague and 28 U.S.C. § 2254(d)).

D. Miscellaneous
   1. 16A Federal Rules of Appellate Procedure § 3950.12 (2021) (5th ed.) (supplement to CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure (1969–1985)).
   2. Admin. Off. of the U.S. Courts, How the Rulemaking Process Works, UNITED STATES COURTS, https://perma.cc/WS5Y-KSGF
   3. Admin. Off. of the U.S. Courts, Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019, UNITED STATES COURTS, https://perma.cc/2N29-KTNW

VI. RESEARCH PATH

I selected this topic idea through the Topic Suggestion process. Lina Dayem and Reagan Kapp's TS memos both called attention to the circuit split. I used HeinOnline and Westlaw searches to search for preemption risks other than Canedy's article, which was discussed by both TS authors. Kapp's memo raised the possibility that Rule 4(c) might work in tandem with, rather than simply supersede, Houston. I decided to focus mainly on researching and proposing this avenue after reading the Sixth Circuit's recent take on the circuit split, which implied the same idea.