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Proceeding Pro Se: Misguided Limitations on the Prison Mailbox Rule in *Cretacci v. Call*

Eleanor Ritter*

Abstract

Under the "prison mailbox rule," an inmate's notice of appeal in either a criminal or civil case is considered filed at the moment the notice is given to prison authorities to be mailed. But the prison mailbox rule originated as a common law rule—having developed in Fallen v. United States *and* Houston v. Lack*—and was not codified in the Federal Rules of Appellate Procedure until 1993. In light of its complex origins, circuit courts have split over to whom and to which types of filings the rule should apply. More specifically, courts have disagreed over whether the prison mailbox rule should only apply to prisoners entirely unrepresented by counsel—as suggested in* Houston*—or whether it should extend even to those who are represented in some capacity at the time of filing. This Note analyzes a recent case,* Cretacci v. Call*, in which the Sixth Circuit joined the majority of circuits and held that the prison mailbox rule applies only to fully unrepresented prisoners. This Note argues that the Sixth Circuit's opinion relies on an overly wooden view of "representation," a departure from the text of the Appellate Rules, and unsound distinctions based on the type of filing at issue. By placing misguided limitations on the prison mailbox rule,* Cretacci *erodes the ability of passively represented litigants to file claims and appeals.*

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I. INTRODUCTION

As the number of people incarcerated in the United States has continued to grow over the past fifty years,[1] so too has the number of lawsuits—and subsequent appeals—brought by inmates.[2] Despite the substantial increase in prisoner litigation, prisoners still face procedural obstacles that present difficulty for courts and commentators alike.[3] Although the Constitution guarantees prisoners the right to "meaningful access to the courts" as a matter of due process,[4] this right is limited both legally[5] and pragmatically, since a prisoner—by nature of being incarcerated—is not as easily able as an ordinary litigant to file documents and to pursue their claims or appeals.[6]

Given the obstacles inmates face in accessing the court system, "courts relax procedural hurdles in some circumstances to permit prisoners to file and prosecute claims" more easily.[7] For instance, the Federal Rules of Appellate Procedure, which enumerate various requirements for filing appeals within the court system, were drafted with "the goal of equal access to the appellate system for poor and incarcerated litigants" in mind.[8] And, since their creation

1. Catherine T. Struve, *The Federal Rules of Inmate Appeals*, 50 ARIZ. ST. L.J. 247, 248 (2018).

2. *Id.* (observing that, over the past half-century, "the number of federal appeals by self-represented, incarcerated litigants has increased dramatically"); *see also* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156–62 (2015) (analyzing the number of federal lawsuits filed by prisoners and concluding that "[a] steep increase in prisoner civil rights litigation combined in the 1970s with a steep increase in incarcerated population," although the filing rate fluctuated after the enactment of the PLRA in 1996).

3. *See, e.g.*, Struve, *supra* note 1, at 250–51 (noting that the procedural rights of prisoners have been "the subject of close attention both inside and outside the courts").

4. Nico Corti, *The Prison Mailbox Rule: Can Represented Incarcerated Litigants Benefit?*, 91 FORDHAM L. REV. 919, 925 (2022); *Substantive Rights Retained by Prisoners*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 929, 929 (2006).

5. *See Substantive Rights Retained by Prisoners*, *supra* note 4, at 929–30 n.2842 (citing cases in which courts declined to find violations of prisoners' right of access to the courts).

6. *See id.* at 930–31 (recognizing that "prisoners face practical difficulties in exercising their right of legal access" to the courts); *see also* Houston v. Lack, 487 U.S. 266, 270 (1988) (noting that "prisoners cannot take the steps other litigants can take to monitor" their court filings).

7. Corti, *supra* note 4, at 928 ("[P]rocedural requirements are [one] structural barrier for incarcerated litigants to properly file. In response, courts sometimes relax certain procedural hurdles to permit imprisoned persons to file and bring claims."); *Substantive Rights Retained by Prisoners*, *supra* note 4, at 931.

8. *See* Struve, *supra* note 1, at 250. As Struve points out, the Appellate Rules were adopted during the 1960s—"a time when the Supreme Court, the executive branch, and Congress all took measures to improve the treatment of poor defendants in the criminal justice system." *Id.* at 251. And this increased concern for indigent litigants underpinned many aspects of the Appellate Rules: for

during the 1960s, the Appellate Rules have "shaped the procedures for inmate appeals."[9] Still, while the original Appellate Rules addressed some aspects of inmate filings, such as habeas petitions and *in forma pauperis* appeals,[10] the Appellate Rules did not "articulate any special rules concerning the logistics of inmate filings" specifically.[11]

Nevertheless, commentators and courts alike have pointed to the Appellate Rules Committee Note to Rule 3 of the original Appellate Rules as an indication that the Committee intended for the rule to be construed liberally, especially in the context of prisoner litigation.[12] The Committee Note to Rule 3, in turn, relies on *Fallen v. United States*, a case in which the Supreme Court "held that an inmate's delivery of a notice of appeal to prison authorities sufficed as filing for purposes of a direct criminal appeal."[13] Although the Court in *Fallen* did not announce a new bright-line procedural rule, four Justices advocated for the formal adoption of such a rule—which would later occur through the adoption of Appellate Rule 4(c).[14]

The rationale behind the *Fallen* decision—coupled with the concept of the common law mailbox rule from the law of contracts, which dictates that an acceptance of an offer is effective upon its dispatch[15]—formed the basis of

instance, the Appellate Rules laid out detailed procedures for habeas and *in forma pauperis* appeals—two procedures that spurred "active debate" among judges at the time. *Id.* at 257, 259–60.

9. *Id.* at 250. Indeed, the adoption of the Appellate Rules was particularly significant for inmate litigation because neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure established detailed or determinate rules governing post-conviction review proceedings. *See id.* at 258 (observing that Rule 81 of the Federal Rules of Civil Procedure "limited the application of the Civil Rules" in post-conviction proceedings); *id.* at 260 (noting that, "[a]s for petitions to proceed in forma pauperis, the late-1960s national rules likewise had relatively little to say").

10. *See id.* at 268; *see also* FED. R. APP. P. 22 (1966) (last amended 2009) (prescribing the procedures governing habeas applications and appeals); FED. R. APP. P. 24 (1968) (last amended 2002) (prescribing the procedures governing applications to proceed *in forma pauperis*).

11. Struve, *supra* note 1, at 268.

12. *See, e.g.*, *id.* at 269 (internal citation omitted); Corti, *supra* note 4, at 932.

13. Struve, *supra* note 1, at 268 (quoting Fallen v. United States, 378 U.S. 139, 142 (1964)). In *Fallen*, the Court emphasized that the Appellate Rules were intended to be flexible, so an incarcerated litigant who "did all he could under the circumstances" to file a notice of criminal appeal would not be barred from bringing his appeal merely because some external factor precluded his appeal from being filed timely. *Id.* at 271 (quoting *Fallen*, 378 U.S. at 144 (1964)) ("Chief Justice Warren began by emphasizing 'that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances.'")); *see also* Mario Ramirez, *Untangling the Prison Mailbox Rules*, 89 U. CHI. L. REV. 1331, 1336–37 (2022) (explaining the role of *Fallen* in the development of the current prison mailbox rule). For further discussion of *Fallen*, see discussion *infra* Part II.

14. *See infra* Part II (discussing how the prison mailbox rule evolved between *Fallen* and Appellate Rule 4(c)).

15. Courtenay Canedy, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO.

what would later develop into the "prison mailbox rule," a rule that allows prisoners to "file" court documents in certain circumstances by delivering the documents to prison authorities, rather than mailing court documents to the courthouse themselves.[16] Still, because the holding in *Fallen* and the prison mailbox rule were not explicitly codified in the original Appellate Rules—indeed, they were not included in the Rules until 1993, and even then with shoddy guidance—courts have continued to debate the types of filings and the classes of prisoners to which the prison mailbox rule should extend.[17]

This Note analyzes the current circuit split over applying the prison mailbox rule and traces the development of the majority approach through court decisions and policy concerns. Part II discusses the historical background of the prison mailbox rule, looking at its evolution through case law, its codification in the Federal Rules of Appellate Procedure, and its application in different contexts. Next, Part III sets out the facts and procedural history of *Cretacci v. Call*,[18] a case in which the Sixth Circuit addressed the application of the prison mailbox rule (and the focus of this Note). Part IV then analyzes the majority opinion in *Cretacci* and evaluates it against the concurrence, arguing that the Sixth Circuit reached the incorrect decision in *Cretacci* by declining to extend the prison mailbox rule to represented prisoners in the context of filing civil complaints. As Part IV contends, the Sixth Circuit's approach to the prison mailbox rule not only relied on a too-rigid understanding of what it means to "proceed without counsel," but also departed unnecessarily from the text of the Appellate Rules. Finally, Part V situates the *Cretacci* decision within the context of the current circuit split and discusses the implications the decision has for inmate litigation, concluding that—as Judge Readler's concurrence in *Cretacci* correctly points out—the Federal Rules of Appellate Procedure are in need of attention and amendment.

MASON L. REV., 774, 774–75 (2009). According to Canedy, four rationales may have guided the common law mailbox rule and are relevant to the prison mailbox rule: (1) the rule "ensure[s] the certainty and stability of the offeree's obligations upon dispatch"; (2) it takes away the risk of non-delivery from the offeree sending the dispatch; (3) it makes the post office into a "common agent" of both parties; and (4) it protects the offeror, who relinquishes control over the dispatch upon sending it, from any forces outside of the offeror's control. *Id.* at 775–76.

16. *Id.* at 773.

17. Struve, *supra* note 1, at 272.

18. 988 F.3d 860 (6th Cir. 2021). As an initial note, the scope of this Note is limited to evaluating *Cretacci v. Call*. For more comprehensive accounts of the prison mailbox rule, see, e.g., Caitlyn B. Switzer, *The Scope of the Prison Mailbox Rule*, 17 LIBERTY U. L. REV. 433 (2023); Canedy, *supra* note 15; Corti, *supra* note 4.

II. ORIGINS AND DEVELOPMENT OF THE PRISON MAILBOX RULE

Generally, the prison mailbox rule instructs that a confined inmate's notice of appeal is deemed filed at the moment the inmate delivers the notice to prison authorities for mailing.[19] But the exact scope of the rule remains unclear—especially in light of the rule's dual development through both case law and the Federal Rules of Appellate Procedure. As such, this Part traces out the origins and development of the prison mailbox rule to situate current debates over the rule's application.

As explained above,[20] the prison mailbox rule developed out of *Fallen v. United States*, where the Supreme Court held that a prisoner's mailed notice of appeal was not time-barred—despite reaching the appellate court four days too late—since the prisoner "did all he could" to timely file the notice.[21] At the time *Fallen* was decided, the prison mailbox rule did not yet exist in the Federal Rules of Appellate Procedure; nevertheless, the Court read into the rules a flexibility for prisoners who made reasonable, diligent efforts to dispatch a notice of appeal.[22] Still, *Fallen* did not formally establish the prison mailbox rule—after all, the decision merely adopted a flexible reading of the Appellate Rules. But *Fallen* "set the groundwork" for the evolution of the modern prison mailbox rule, indicating a willingness on the part of the Court to account for the unique circumstances of incarcerated litigants.[23]

After *Fallen*, the Supreme Court adopted Appellate Rules 3 and 4, which set out the processes and deadlines for filing appeals.[24] Still, while the rules were promulgated in light of *Fallen*, neither rule gave textual sanction to the prison mailbox rule as they were originally enacted.[25] Instead, the original

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19. *See* Struve, *supra* note 1, at 268 (summarizing the prison mailbox rule).

20. *See supra* notes 12–15 and accompanying text.

21. 378 U.S. 139, 144 (1964). As explained *supra* Part I, the prison mailbox rule also stems from the common law "mailbox rule" from the law of contracts, which instructs that the acceptance of an offer is effective upon its dispatch. *See* Canedy, *supra* note 15, at 774–76 (explaining the common law "mailbox rule" in contracts and how its rationale has underpinned the prison mailbox rule, especially given that the mailbox rule aims to account for the lack of control that individuals have over mailed documents).

22. *See* 387 U.S. at 144 (declining "to read the Rules so rigidly as to bar a determination of [an] appeal on the merits" where an inmate "had done all that could reasonably be expected to get the letter to its destination within the required 10 days"); Ramirez, *supra* note 13, at 1336 (arguing that the Court in *Fallen* implicitly created a basic form of the prison mailbox rule).

23. Ramirez, *supra* note 13, at 1337.

24. *Id.*; *see also* FED. R. APP. P. 3, 4 (1967).

25. Ramirez, *supra* note 13, at 1337; Struve, *supra* note 1, at 272 (noting that, while the original Appellate Rules 3 and 4 pointed to *Fallen* as an underlying rationale for their enactment, neither rule

Appellate Rules 3 and 4 merely served to "dispense with literal compliance in cases in which [the filing provisions] cannot be fairly exacted."[26]

The Court re-confronted the application of the prison mailbox rule in *Houston v. Lack*, a 1988 case in which a 5–4 majority officially established the prison mailbox rule and held that *Fallen*'s reasoning extended to the context of civil appeals.[27] Writing for the majority, Justice Brennan interpreted Appellate Rules 3 and 4 in such a way as to justify an explicit prison mailbox rule, holding that an inmate's notice of appeal is considered filed at the time it is handed off to the prison guards, not at time of receipt by the clerk.[28] Of course, Justice Brennan's conclusion departed from the text of Appellate Rules 3 and 4—after all, neither rule expressly embraced the prison mailbox rule—and his analysis instead focused on underlying policy considerations.[29] Indeed, Justice Brennan reasoned that, unlike an ordinary "civil litigant who

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expressly incorporated the prison mailbox rule).

26. FED. R. APP. P. 3 advisory committee's note to the 1967 Rule.

27. Houston v. Lack, 487 U.S. 266, 270 (1988); Struve, *supra* note 1, at 272–73 (describing the context in which *Houston* arose). In *Houston*, a pro se prisoner attempted to appeal a denial of his writ of habeas corpus, but his notice of appeal was marked as filed thirty-one days after the entry of the judgment denying his habeas petition. *Houston*, 487 U.S. at 268. Because writs of habeas corpus are civil actions, they are governed by civil procedural rules, making the facts of the case different from *Fallen*. *See* Ramirez, *supra* note 13, at 1338 n.46 (explaining that writs of habeas corpus are "governed by federal procedural rules applicable to civil cases") (citing Browder v. Dir., Dep't of Corrs. of Ill., 434 U.S. 257, 269–70 (1978)). And, because *Fallen*'s holding only applied to *criminal* appeals, some commentators argued prior to *Houston* that the rule should be limited to the criminal context, and many of those commentators speculated that the Court would not extend *Fallen* to the civil context. Struve, *supra* note 1, at 272, 275–77; *see also* Ramirez, *supra* note 13, at 1338.

28. *Houston*, 487 U.S. at 276. Justice Brennan also referred to the *Fallen* decision, pointing out that the Court in *Fallen* considered the fact that timely filings of appeals are a jurisdictional requirement but nevertheless interpreted the Federal Rules of Criminal Procedure less strictly because the plaintiff "had done all that could reasonably be expected" to timely file his appeal. *Id.* at 270 (quoting *Fallen*, 387 U.S. at 144). Justice Brennan then applied the same lenient interpretation to the Federal Rules of Appellate Procedure at issue in *Houston*. *Id.*

29. *Id.* at 271. Writing in dissent, Justice Scalia sharply criticized Justice Brennan's departure from the text of the Appellate Rules. *See id.* at 277 (Scalia, J., dissenting) ("Today's decision obliterates the line between textual construction and textual enactment."). As Scalia saw things, procedural rules ought to be enforced only in accordance with their own terms; to read procedural rules so flexibly is to undermine the certainty and uniformity of the rules. *Id.* at 283–84 (Scalia, J., dissenting) (citing Thompson v. INS, 375 U.S. 384, 390 (1964) (Clark, J., dissenting)). Moreover, judges ought not to read exceptions into procedural rules, Scalia argued, because doing so amounts to impermissible judicial lawmaking and bypasses the amendment process. *Id.* (Scalia, J., dissenting). Scalia's criticism underscores the shaky grounds on which the prison mailbox rule originated—and his opinion unknowingly foreshadowed the current debate over the application of the prison mailbox rule. Indeed, the *Houston* majority's departure from the text of the Appellate Rules, as Scalia predicted, left the scope and application of the rules entirely unclear. This lack of clarity, in turn, leaves both courts and prisoners with little guidelines or notice as to how the rules are supposed to apply.

chooses to mail a notice of appeal" and thus "assumes the risk of untimely delivery and filing," a pro se prisoner has "no choice but to hand his notice over to prison authorities for forwarding to the court clerk"[30] and "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."[31]

Houston prompted the Appellate Rules Committee to amend the Appellate Rules. Specifically, the case prompted the adoption of Appellate Rule 4(c), which finally "gave textual sanction to the prison mailbox rule" five years after *Houston* was handed down.[32] Rule 4(c) now allows any "inmate confined in an institution" to file a notice of appeal in either a criminal or civil case by depositing the notice in the institution's internal mail system.[33] Moreover, in keeping with the prison mailbox rule, Rule 4(c) provides that such a filing is considered timely so long as it is deposited in the institution's mail system "on or before the last day" of the filing period.[34] As such, "the federal circuits have interpreted Rule 4(c) as codifying" *Houston* and the prison mailbox rule as applied to *pro se* prisoners.[35]

Still, *Houston* and Rule 4(c) only apply to appellate proceedings (or, perhaps even more specifically, to notices of appeal). In light of *Houston* and the amendment to Appellate Rule 4(c), however, courts have applied Justice Brennan's rationale in *Houston* to extend the prison mailbox rule to situations beyond the filing of civil appeals by *pro se* prisoners,[36] including *pro se* prisoners' filing of criminal appeals,[37] habeas corpus petitions,[38] and motions.[39] Some courts have even extended *Houston* to the filing of civil complaints and

30. *Id.* at 275.

31. *Id.* at 271.

32. Struve, *supra* note 1, at 268. In an accompanying Advisory Committee Note to Rule 4(c), the Committee expressly stated that the Rule reflected the *Houston* decision. Canedy, *supra* note 15, at 778 (citation omitted).

33. FED. R. APP. P. 4(c) (1993).

34. *Id.*

35. Canedy, *supra* note 15, at 778.

36. Struve, *supra* note 1, at 280 ("Though no similar provisions [such as Appellate Rule 4(c)] were adopted in the Civil or Criminal Rules [of Procedure], the courts have applied *Houston* to district-court filings not expressly covered by any national inmate-filing rules.").

37. *See* United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994); United States v. Craig, 368 F.3d 738, 738 (7th Cir. 2004).

38. *See* Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002); Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003).

39. *See* United States v. Rodriguez-Aguirre, 30 Fed. App'x 803, 805 (10th Cir. 2002).

other filings governed by the Federal Rules of Civil Procedure.[40]

Despite extending the types of *filings* to which the prison mailbox rule may apply, however, courts have continued to debate the types of *inmates* to which it applies—namely, whether the prison mailbox rule is limited to *pro se* inmate litigants or whether it also extends to those assisted by counsel.[41] Currently, only the Fourth and Seventh Circuit Courts of Appeals support extending the rule to represented prisoners.[42] In *United States v. Moore*, the Fourth Circuit extended the prison mailbox rule to represented prisoners based on a lenient interpretation of *Houston*, finding that as long as the prisoner mails the notice of appeal himself, "the same concerns that motivated the Supreme Court in [*Houston*] are still present."[43] Similarly, in *United States v. Craig*, the Seventh Circuit held that Appellate Rule 4(c), by its plain text, should be read to include both represented and *pro se* prisoners.[44]

On the other hand, the majority of circuits have argued that the prison mailbox rule does *not* apply to those represented by counsel in any capacity.[45] Those courts have held that, because represented prisoners can rely on their counsel to help file their court documents, those prisoners "are in a fundamentally different position from *pro se* prisoners" because "*pro se* prisoners lack control over the filing process and have to depend on the prison mail system as a means to file legal documents."[46]

III. FACTS OF *CRETACCI*

Against the backdrop of the circuit split, the Sixth Circuit addressed the applicability of the prison mailbox rule in 2021, when it decided *Cretacci v. Call*.[47] This Part briefly lays out the facts and procedural posture of *Cretacci*.

On September 29, 2016, Blake Cretacci attempted to file a complaint

40. *See, e.g.*, Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002) (deeming as timely a *pro se*, incarcerated litigant's filing of a civil complaint, which was delivered to prison officials before the expiration of the statute of limitations, but which was not timely received by the court clerk).

41. Canedy, *supra* note 15, at 779; *see also* Struve, *supra* note 1, at 301 (noting that there is "a procedural framework [for applying the prison mailbox rule] that explicitly operates on two tracks—one for represented litigants, and another for *pro se* (frequently incarcerated) litigants").

42. Canedy, *supra* note 15, at 779; *see* sources cited *supra* note 28.

43. United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994).

44. United States v. Craig, 368 F.3d 738, 738 (7th Cir. 2004).

45. *See* sources cited *supra* notes 29–30; Canedy, *supra* note 15, at 780.

46. *See* Canedy, *supra* note 15, at 780.

47. 988 F.3d 860 (6th Cir. 2021).

against Coffee County, Tennessee, and multiple Coffee County Jail Deputies, including Joe Call, among others.[48] Cretacci's complaints pertained to three separate incidents that occurred while Cretacci was a pretrial detainee at the Coffee County Jail.[49]

Cretacci alleged that during the three incidents—which occurred on September 29, 2015, October 11, 2015, and January 14, 2017—officers at the jail were deliberately indifferent to assaults on Cretacci by other inmates and that the officers failed to protect him from and prevent these assaults.[50] Cretacci also alleged that the officers used excessive force against Cretacci during these incidents because they shot Cretacci with pepperballs, and he alleged that the officials denied inmates toilet paper, showers, and running water in sinks and toilets at the jail.[51]

After these incidents, Cretacci decided to bring a lawsuit against the jail, securing attorney Andrew Justice to represent him.[52] Justice drafted a complaint, but on September 28, 2016—the evening before the statute of limitations was set to expire on Cretacci's claims arising from the first incident—Justice realized he was not admitted to practice law in the Eastern District of Tennessee, where the jail was located.[53] Although Justice looked into admission into the Eastern District *pro hac vice* and attempted to file the complaint in person, neither option succeeded.[54] Instead, Justice gave Cretacci the complaint in an addressed envelope, instructing Cretacci to deliver it to the correctional officers immediately so that he could take advantage of the prison mailbox rule, which—Justice thought—would make Cretacci's filing timely.[55]

Cretacci delivered the complaint to jail officials on the night of September 29, 2016, and the district court received it on October 3, 2016.[56] The

48. *Id.* at 864–65.

49. *Id.* at 863.

50. *Id.* at 863–64. Cretacci first brought three claims under 42 U.S.C. § 1983, related to the September 29, 2015, and October 11, 2015, incidents, and then later amended his complaint to include a fourth claim related to the January 14, 2017 incident. *Id.* at 865.

51. *Id.* at 863–64.

52. *Id.* at 864–65.

53. *Id.*

54. *Id.* Justice did not get admitted into the Eastern District of Tennessee because he "did not think he could complete the requirements in time," and he could not file the complaint in person because one courthouse did not allow in-person filings, and the other courthouse closed before he would have been able to arrive. *Id.*

55. *Id.* at 865.

56. *Id.*

defendants moved for summary judgment, arguing that the statute of limitations barred the two claims arising from the September 29, 2015 incident because Cretacci was represented by counsel when he filed his complaint, and so the prison mailbox rule did not apply.[57] The district court agreed with the defendants, granting summary judgment, and Cretacci subsequently appealed to the Sixth Circuit.[58]

IV. *CRETACCI*'S MISGUIDED APPROACH TO THE PRISON MAILBOX RULE AND "REPRESENTED" INMATE LITIGANTS

The Sixth Circuit ultimately concluded that Cretacci was represented by counsel for the purposes of the prison mailbox rule and held that the prison mailbox rule did not extend to represented prisoners.[59] This Part evaluates the court's rationale and addresses Judge Readler's concurrence, arguing that the court ultimately got it wrong. In treating Cretacci as "represented by counsel," the court relied too heavily on an overly wooden definition of "proceeding without assistance of counsel" and ignored Cretacci and his counsel's passive relationship at the time of filing.[60] Indeed, this Part argues that the court's analysis of the relationship between Cretacci is misplaced to begin with: by focusing on whether Cretacci was represented at the time of filing, the Sixth Circuit—like the circuits it followed—unnecessarily departed from the text of Rule 4(c).[61] But even if the text of Rule 4(c) could be read to apply only to entirely unrepresented inmates, the court's decision not to extend the prison mailbox rule to Cretacci's circumstances rests on a misguided distinction from the two cases that have extended the prison mailbox rule to represented prisoners in the context of civil appeals.[62]

57. *Id.* If, as the defendants contended, the prison mailbox rule did not apply, then the effective filing date of Cretacci's complaint was October 3, 2016, which was untimely because the statute of limitations for the claims arising from the September 29, 2015 incident expired on September 29, 2016. *Id.* at 868. The defendants also argued that there were no constitutional violations underlying the other two claims. *Id.* at 865.

58. *Id.*

59. *Id.* at 866–67.

60. *Id.* at 866; *see also* Canedy, supra note 15, at 787–89 (defining a "passively represented prisoner" as "a prisoner who, though technically represented by counsel, is acting . . . independent of that fact" and concluding that the prison mailbox rule should apply to passively represented prisoners).

61. *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) ("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.").

62. *Cretacci*, 988 F.3d at 867; *see also* Canedy, supra note 15, at 786 (internal quotation omitted)

A. *Judge McKeague's Opinion*

1. Was Cretacci 'represented by counsel'?

Writing for the majority, Judge McKeague began by addressing whether Cretacci was "represented by counsel" for the purposes of applying the prison mailbox rule.[63] Although Justice realized he was not admitted to practice in the forum district, and although Cretacci himself filed the complaint, the court nevertheless held that Cretacci was "not proceeding without the assistance of counsel" because Cretacci and Justice "had an explicit attorney-client relationship," and because Justice developed Cretacci's case, prepared legal documents, and attempted to file Cretacci's complaint for him.[64] Further, the fact that Cretacci filed the complaint himself did not make him a *pro se* litigant, in Judge McKeague's view, because Justice continued to represent Cretacci both at the district court and on appeal.[65]

2. Should the prison mailbox rule extend to incarcerated prisoners proceeding with the assistance of counsel?

After concluding that Cretacci was represented by counsel when filing his complaint, the court evaluated whether to extend the prison mailbox rule to represented inmate litigants, both in general and in the relevant context of the filing of civil complaints.[66] Judge McKeague decided no, relying on the majority approach across circuits to interpret the *Houston* decision as applying only to *pro se* prisoners because they in particular "have no means to file legal documents except through the prison mail system" and "cannot monitor the status of their mailings to ensure timely delivery."[67] Alluding to the rationale

(noting that "the federal circuits in favor of extending the prison mailbox rule to represented prisoners argue that . . . a represented prisoner is placed in substantially the same 'unique' situation as a prisoner proceeding *pro se*").

63. *Cretacci*, 988 F.3d at 866.

64. *Id.* To determine Cretacci and Justice's relationship, Judge McKeague relied on a Tennessee statute defining the "practice of law" as "the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court." *Id.* (citing Tenn. Code Ann. § 23-3-101(3); *Stillman v. LaMarque*, 319 F.3d 1199, 1200-01 (9th Cir. 2003)).

65. *Id.* at 866.

66. *Id.* at 867.

67. *Id.* (citing Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002); United States v. Camilo, 686 F. App'x 645, 646 (11th Cir. 2017)).

behind *Houston*, the court noted that represented prisoners, unlike *pro se* prisoners, "are not dependent on the prison mail system and can rely on their attorneys to file the necessary pleadings on time."[68]

The court then discussed the two circuits that *have* extended the prison mailbox rule to represented prisoners, pointing out that those two circuits did so "in the context of notices of appeal, not the filing of civil complaints, and relied on the text of Federal Rule of Appellate Procedure 4."[69] Judge McKeague disagreed with the reasoning of those two circuits, writing that "if a prisoner does not need to use the prison mail system, and instead relies on counsel to file a pleading on his or her behalf . . . the rationale of the prison mailbox rule does not apply."[70] Judge McKeague also distinguished Cretacci's situation from the facts of the cases facing the other two circuits because Cretacci's case involved the filing of a civil *complaint*, not an appeal, and thus was not governed by Appellate Rule 4(c).[71] As such, Judge McKeague concluded that the prison mailbox rule did not extend to represented prisoners in the context of the filing of civil complaints.[72]

After declining to apply the prison mailbox rule to Cretacci's claims, the court accordingly dismissed two of Cretacci's claims because they were not timely filed and were thus barred by the statute of limitations.[73] Finally, the court addressed Cretacci's other two claims (which were *not* untimely because they arose out of the January 14, 2017 incident), finding that Cretacci failed to provide evidence to demonstrate any of his claims and thus affirming the district court's grant of summary judgment to the appellees.[74]

Ultimately, Judge McKeague declined to extend the prison mailbox rule to represented prisoners based on a misguided interpretation of the rationale behind *Houston*, reasoning that represented prisoners "can rely on their attorneys to file the necessary pleadings on time."[75] This interpretation of

68. *Id.* (citing Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996) (per curiam); United States v. Rodriguez-Aguirre, 30 F. App'x 803, 805 (10th Cir. 2002)); *accord* Houston v. Lack, 487 U.S. 266, 270–71 (1988) ("Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received notice.").

69. *Cretacci*, 988 F.3d at 867 (citing United States v. Moore, 24 F.3d 624, 626 (4th Cir. 1994); United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 868.

74. *Id.* at 868–70.

75. *Id.* at 867.

Houston, however, contradicts Judge McKeague's finding that Cretacci was represented by counsel despite the fact that Cretacci's attorney could not file the complaint on Cretacci's behalf.[76] By Judge McKeague's own admission, Cretacci could not in fact rely on Justice to file Cretacci's complaint;[77] as such, because Cretacci himself had to file the complaint while incarcerated, he fit within the reasoning of *Houston*—that he had "no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise."[78] By treating incarcerated litigants as "represented" whenever they have a formal attorney-client relationship, Judge McKeague's reasoning creates a gap in which incarcerated litigants who have secured an attorney, but for whom the attorney is either passively or ineffectively providing representation, are unable to take advantage of the prison mailbox rule.

Moreover, while Judge McKeague distinguished between the contexts of filing complaints and filing appeals, the distinction between the two is unavailing. In making this distinction, Judge McKeague referred to the Fourth and Seventh Circuit decisions in *Moore* and *Craig*, respectively, which both related to the filing of appeals.[79] The court in *Moore*, however, indicated that its decision to extend the prison mailbox rule to represented prisoners was not limited by the *type* of filing or action, writing that "[t]he mechanism for obtaining [a prisoner's] freedom . . . makes no difference" in whether it is fair to apply the prison mailbox rule.[80] Indeed, statutes of limitations for filing complaints are *not* a jurisdictional bar,[81] unlike deadlines for filing appeals;[82] as

76. *Id.* at 866.

77. *Id.* at 864. Although Cretacci and Justice had an attorney-client relationship, the relationship did not ultimately permit Justice to file the complaint for Cretacci, since Justice was, after all, not admitted to practice law in the forum. *Id.*

78. *Id.* at 863 (citing Houston v. Lack, 487 U.S. 266, 271 (1988)) (internal alterations omitted).

79. *Cretacci*, 988 F.3d at 867 (citing United States v. Moore, 24 F.3d 624, 626 (4th Cir. 1994); United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004)).

80. *Moore*, 24 F.3d at 625.

81. *See, e.g.*, United States v. Rodriguez-Aguirre, 30 F. App'x 803, 805 (10th Cir. 2002) (noting that a statute's one-year statute of limitations period for filing claims "is not a jurisdictional bar and is subject to equitable tolling"); Cousin v. Lensing, 310 F.3d 843, 848 (5th Cir. 2002) (stating that "any statute of limitations" may be equitably tolled).

82. *See, e.g.*, *Houston*, 487 U.S. at 279–80 (Scalia, J., dissenting) (citation omitted) (emphasizing that deadlines for filing notices of appeal "bear[] upon the very jurisdiction of the courts" and pointing out that courts have no equitable power to "enlarge the time for filing a notice of appeal"); Canedy, *supra* note 15, at 781–82 (internal quotation omitted) (citation omitted) (discussing the principle that "the timeliness of an appeal is mandatory and jurisdictional"); Struve, *supra* note 1, at 265 (citations omitted) (noting that the Appellate Rules and the Supreme Court have emphasized that deadlines for appeals are jurisdictional).

such, deadlines for filing complaints, including those such as Cretacci's, ought to be treated more leniently than deadlines for filing appeals.[83] Because the timeliness of complaints is more relaxed than the timeliness of appeals, McKeague's distinction appears backwards—if a distinction should be made at all.[84]

B. Judge Readler's Concurrence

Judge Readler wrote a concurrence to underscore his view "that any rewriting of our federal filing requirements to create exceptions for incarcerated individuals should come from Congress or [the Committee], rather than individual judges."[85] Judge Readler criticized federal courts, including both the Supreme Court in *Houston v. Lack* as well as the Sixth Circuit itself, for "tinkering with the otherwise clear filing requirements in the respective Federal Rules of Civil and Appellate Procedure."[86] Judge-made changes to the rules of procedure, Judge Readler argued, create a problematic "patchwork system of federal rules" that subjects federal prisoners across states to varying and uncertain requirements for filing complaints and appeals.[87]

On this score, Judge Readler gets it right. Nothing in the text of Rule 4(c) indicates that its application is limited to only "unrepresented" prisoners. Indeed, Rule 4(c) does not even mention *pro se* litigants or representation of counsel. The only limitations present in Rule 4(c) are that it applies only to "inmates confined in an institution" and that it requires inmates to use the internal mailing system of their institution, if one exists.[88] And the language of Rule 4(c) is plain and unambiguous—no court has contended otherwise.[89]

83. *See, e.g.*, *Houston*, 487 U.S. at 279–80 (Scalia, J., dissenting) (stating that the need for uniformity is "even more apparent" for deadlines for filing appeals than it is for "ordinary statutory deadlines"); Canedy, *supra* note 15, at 787 (citing Lewis v. Richmond City Police Dep't, 947 F.2d 733, 735–36 (4th Cir. 1991) (per curiam)) (finding that the prison mailbox rule should be extended to cover complaints filed pursuant to 42 U.S.C. § 1983).

84. In fact, the Sixth Circuit has previously suggested that *Houston*'s rationale applies equally in the context of filing complaints. *See* Richard v. Ray, 290 F.3d 810, 813 (6th Cir. 2002) ("All of the justifications for applying the mailbox rule in *Houston v. Lack* are present in the [context of filing complaints].").

85. Cretacci v. Call, 988 F.3d 860, 870 (6th Cir. 2021) (Readler, J., concurring).

86. *Id.* (Readler, J., concurring).

87. *Id.* at 871 (Readler, J., concurring).

88. FED. R. APP. P. 4(c) (1993).

89. *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) ("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.").

To impose an additional requirement that an incarcerated litigant also be unrepresented in order to be covered by Rule 4(c), then, is to depart from the text of the rule without justification.

Despite his disagreement with the atextual interpretations of Rule 4(c), Judge Readler noted that he joined the majority opinion because he also disagreed with the prison mailbox rule on the whole.[90] At the same time, Judge Readler emphasized that he is "not blind to the challenges inmates face in pursuing legal remedies."[91] Guided by Justice Scalia's dissent in *Houston*, Judge Readler advocated for "[a]ccomodating those challenges when possible," pointing out that "a litigant who cannot personally ensure a timely filing with the court should benefit from a filing rule that accounts for her unique circumstance."[92] While maintaining that such rules should come from Congress or the Committee, Judge Readler also noted that these institutions would most likely be "up to the task" of determining the need for and substance of any potential amendments to procedural rules.[93] Congress or the Standing Committee could adopt a similar amendment to the federal rules governing the filing of civil complaints, Judge Readler argued, which would provide "uniform direction on whether to extend the 'mailbox rule'" in that context.[94]

Departing from the majority's reasoning—which relied on an

90. *Cretacci*, 988 F.3d at 870–71 (Readler, J., concurring). As Judge Readler's concurrence points out, a departure from the text of the original Appellate Rules also guided the Court in *Houston*, since *Houston* stretched to read into the then-existing Appellate Rules an implicit authorization for the prison mailbox rule. In his concurrence, Judge Readler aptly criticized this questionable development of the prison mailbox rule. *Id.* at 871 (Readler, J., concurring). *Houston*'s rationale is dubious indeed. *See* discussion *supra* note 29. But, since the prison mailbox rule was codified in the amended Appellate Rules, this Note accepts the rule as written in Rule 4(c).

91. *Cretacci*, 988 F.3d at 871 (Readler, J., concurring) (citing Houston v. Lack, 487 U.S. 266, 277 (1988) (Scalia, J., dissenting)).

92. *Id.* (Readler, J., concurring). Both Justice Scalia and Judge Readler acknowledged the inequities and hardships that many prisoners face, and they both urged amendments to the Appellate Rules: amending the Appellate Rules to accommodate the needs of incarcerated litigants, they both argued, "makes a good deal of sense." *Id.* (Readler, J., concurring) (citing *Houston*, 487 U.S. at 277 (Scalia, J., dissenting)). But they also both rightly pointed out that courts who abandon the text of the Appellate Rules in their application of the prison mailbox rule effectively leave incarcerated litigants worse off, since those litigants lack notice as to what procedural requirements they must satisfy. *Cretacci*, 988 F.3d at 871 (Readler, J., concurring) (citing *Houston*, 487 U.S. at 277 (Scalia, J., dissenting)). And that makes good sense: atextual interpretations of the Appellate Rules lead to non-uniform results between states, and such interpretations have the perverse effect of penalizing litigants who follow the Appellate Rules by the letter.

93. *Id.* at 872 (Readler, J., concurring) (pointing to Appellate Rule 4 as an example of the Standing Committee's willingness and ability to extend the prison mailbox rule to different contexts).

94. *Id.* (Readler, J., concurring).

interpretation of the *Houston* rationale to hold the prison mailbox rule should not extend to represented prisoners—Judge Readler argued that if the Standing Committee did decide to extend the prison mailbox rule to the filing of civil complaints, "it should consider doing so irrespective of whether that inmate is represented."[95] Only applying the rule to *pro se* prisoners creates discordance across states, "leav[ing] judges with the unenviable task of determining whether an inmate was 'represented' at the time of filing"—a difficult determination for judges to make, in Judge Readler's view.[96]

In his concurrence, Judge Readler correctly criticizes the arbitrary nature of judge-made rules governing the timeliness of inmates' court filings—rules which necessarily create "policy judgments regarding the equities of prisoner litigation."[97] Judge Readler also aptly points out that limiting the prison mailbox rule to *pro se* prisoners allows judges to make capricious determinations about a prisoner's representative status, which is often more complicated than it may seem and which may unfairly preclude prisoners like Cretacci from litigating their claims.[98] Most importantly, Judge Readler's concurrence also highlights the need for amendments to the federal rules governing an inmate's filing of a civil complaint.[99] Amendments to the various rules of procedure could help avoid the need for judicial line-drawing (and lawmaking), and clarity in the rules would allow prisoners to better understand the requirements they must meet when filing court documents.

V. CONCLUSION

In light of *Cretacci*, the Sixth Circuit joins the majority approach within the circuit split by declining to extend the prison mailbox rule to represented prisoners.[100] In joining the majority approach to the prison mailbox rule, the Sixth Circuit's decision in *Cretacci* erodes the ability of certain prisoners to file timely complaints and appeals, both in the civil and criminal contexts, thereby denying prisoners of their constitutional right to meaningful access to the courts.

Moreover, Judge McKeague's opinion unfairly assumes that represented

95. *Id.* (Readler, J., concurring).
96. *Id.* (Readler, J., concurring).
97. *Id.* at 871 (Readler, J., concurring).
98. *Id.* at 872 (Readler, J., concurring).
99. *Id.* at 873 (Readler, J., concurring).
100. *Id.* at 867.

prisoners have access to their counsel, know of their counsel, and "can, in fact, communicate with [their counsel]"[101]—an assumption which does not always prove true.[102] Such an assumption is precisely what Judge Readler criticizes in his concurrence, noting that a system of judge-made rules for applying the prison mailbox rule leaves judges with "the unenviable task of determining whether an inmate was 'represented' at the time of filing."[103] Indeed, Judge McKeague's assumption overlooks the existence of "passively represented" prisoners who may not be able to avail themselves of the benefits of their counsel in the way non-incarcerated litigants can.[104]

To avoid such assumptions and to ensure that all prisoners, including those who are "passively represented," have equitable access to the court system as a means of protecting due process,[105] some commentators have suggested that courts applying the prison mailbox rule focus not on whether the prisoner litigant was represented in some general sense, but rather on whether the prisoner litigant was *actively* represented by counsel at the *time of the mailing*.[106] Of course, such a flexible approach leaves a dangerous amount of room for judges to make even more arbitrary decisions about a prisoner's representation status,[107] and perhaps the best option is for Congress or the appropriate body to amend each of the various rules of procedure.[108] Until then, however, the fate of prisoner litigants is in the hands of the courts, and courts ought to ensure fundamental fairness by extending the prison mailbox rule to any prisoner, regardless of whether they are represented at the time of filing.

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101. Canedy, *supra* note 15, at 785.

102. *Id.* Indeed, there are many ways in which a litigant who has secured an attorney nevertheless remains effectively unrepresented: for instance, an inmate could be abandoned by their counsel, or an inmate could seek to move against their counsel in court. *See* Switzer, *supra* note 18, at 458–59 (describing several situations in which an inmate might need to "rely on the prison mail system to mail a filing for themselves," despite technically being represented by counsel).

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

104. Canedy, *supra* note 15, at 787.

105. *Id.* at 790.

106. *Id.* (emphasis added).

107. *See Cretacci*, 988 F.3d at 872 (Readler, J., concurring); Houston v. Lack, 487 U.S. 266, 279–80 (Scalia, J., dissenting) (cautioning against "allowing courts to give different meanings from case to case").

108. *See Cretacci*, 988 F.3d at 873 (Readler, J., concurring) ("Better [the Committee to amend the rules], as I see it, than us.").