No. 2021-22

In The

Supreme Court of the United States

MAX POSCA, in His Official Capacity as Warden and Administrator of Garum Correctional Facility

Petitioner,

v.

LUCAS ESCOFFIER

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 2106

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a prisoner, represented by counsel, is permitted to benefit from the prison mailbox rule when the prisoner submits his own Notice of Appeal on the advice of counsel.
2. Whether a correctional facility's blanket ban denying GAS and individual assessments to demonstrate necessity for such surgery violate a transgender prisoner's Eighth Amendment rights against cruel and unusual punishment.

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STATEMENT OF JURISDICTION

Petitioner filed a timely petition for writ of certiorari, which this Court granted. R. at 19.[1] Therefore, this Court has jurisdiction. 28 U.S.C. § 1254(1) (2018).

STANDARD OF REVIEW

This Court exercises *de novo* review over an appeal of a summary judgment. *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 465 n.10 (1992). When reviewing a grant of summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

Whether a prisoner's Eight Amendment rights have been violated presents a question of law over which this Court exercises *de novo* review. *Pierce v. Underwood*, 487 U.S. 552 (1988).

[1] "R." refers to Record on Appeal.

STATEMENT OF THE CASE AND FACTS

In December of 2019, Lucas Escoffier ("Respondent") was arrested, charged, and indicted with criminal tax fraud and other underlying charges. R. at 2. Ten days before Respondent's arrest for criminal tax fraud, Respondent's doctor had confirmed the necessity of gender affirmation surgery ("GAS") to treat Respondent's gender dysphoria ("GD"). R. at 1. Respondent is a transgender man who was assigned female at birth and suffers from symptoms of GD, such as suicidal ideation, that social transitioning and hormone therapy had ameliorated but not completely treated. R. at 1. Ultimately, on March 1, 2020, Respondent plead guilty to criminal tax fraud in the third degree as part of a plea bargain agreement for a reduced sentence of five years. R. at 2. Respondent began to serve his sentence in Garum Correction Facility ("GCF"), a State of Silphium correctional facility. R. at 2.

Shortly after Respondent began serving his sentence, a viral disease known as Miasmic Syndrome ravaged humanity. R. at 2. Miasmic Syndrome became a global pandemic in a matter of months, infecting hundreds of millions and killing several million people worldwide. R. at 2. Miasmic Syndrome is both highly contagious and fatal in at least one percent of all cases. R. at 2. Governments around the world instituted strict regulations to combat the spread of the disease, including the requirement of social distancing measures and quarantines. R. at 2.

Miasmic Syndrome hit prisons particularly hard, due to prisons' dense populations and high turnover rates of prisons. R. at 3. GCF, one of the largest prison facilities in the country, was no exception. R. at 3. To protect the health and safety of both GCF prisoners and staff, GCF cancelled in-person visits, job training,

communal visits, and other activities that did not allow for social distancing. R. at 3. GCF allowed court appearances and essential attorney-client activities to be conducted through video conference software and had five computers to provide these services. R. at 3. Additionally, access to GCF's communal phones was available only by appointment. R. at 4. As a result of these efforts to save the lives of GCF prisoners and staff, prisoners' videoconference appointments had to be booked in advance and it was difficult for prisoners to access phones to call their attorneys or family members. R. at 4.

The Miasmic Syndrome pandemic also required GCF to limit prisoners' access to GCF medical facilities. R. at 4. Despite this, GCF allowed Respondent to continue hormone therapy for Respondent's GD. R. at 4. Respondent began to suffer symptoms of his GD after incarceration, most notably suicidal ideation. R. at 4. Respondent filed requests to meet with GCF psychiatrist Dr. Arthur Chewtes and discuss his available options to treat the symptoms of GD. R. at 4. Dr. Chewtes informed Respondent that GCF's medical policy, created by a committee of medical professionals, prohibited GAS as an option to treat GD. R. at 4–5. When designing GCF medical policy regarding the treatment of GD, the committee carefully considered the World Professional Association for Transgender Health ("WPATH") Standards of Care. R. at 14. Although the standards do recognize GAS is an effective treatment for GD, the standards recognize other treatments are effective as well. R. at 14. Dr. Cordata, one of the doctors on the committee, opined that GAS was never medically necessary for treatment of GD because other options exist to

treat GD. R. at 14. Ultimately, after two and a half hours of discussion over the course of two days, the committee unanimously voted to preclude GAS from its policy. R. at 14. Respondent filed several administrative grievances challenging Dr. Chewte's denial of the requested GAS; each grievance received an investigation and subsequent administrative review. R. at 5. Ultimately, each grievance was denied in accordance with GCF medical policy. R. at 5.

In response, Respondent reached out to Forme Cury, a law firm specializing in civil litigation, to seek assistance for bringing a civil rights lawsuit against GCF . R. at 5. Forme Cury is a medium-size law firm consisting of twenty-five staff attorneys and forty staff members, including legal assistants, paralegals, and docketing staff. R. at 5. Forme Cury took Respondent's case on a pro bono basis, assigning the case to Sami Pegge, a senior associate and informal prison litigation expert who handled almost all the firm's incarcerated clients. R. at 5.

On October 5, 2020, Ms. Pegge filed a 42 U.S.C. § 1983 suit in the District Court of Silphium on behalf of Respondent against GCF warden Max Posca ("Petitioner"), alleging that GCF's prohibition of GAS and subsequent denial of Respondent's request for GAS violated Respondent's Eight Amendment rights. R. at 5. On October 25, 2020, Petitioner filed a response to Respondent's complaint, moving to dismiss the complaint because the prison's policy did not specifically target Respondent and similarly prohibitive policies had been held constitutional. R. at 6. The district court found all necessary facts available through materials submitted with the parties' briefing and converted the motion to dismiss to one for

summary judgment. R. at 6. The district court then found no genuine material issue of fact and ruled in favor of Petitioner, finding the GCF policy did not violate Respondent's constitutional rights, and dismissed the action on February 1, 2021. R. at 6.

Respondent spoke to his attorney, Ms. Pegge, shortly after the decision and confirmed Forme Cury would continue to represent him. R. at 6. Ms. Pegge told Respondent she would be in touch with Respondent sometime in early March. R. at 6. However, Ms. Pegge contracted a severe case of Miasmic Syndrome infection requiring immediate hospitalization. R. at 6. Ms. Pegge spent two weeks recovering in the hospital and, during this time, did not speak to Respondent about his case. R. at 6. Nor did Ms. Pegge's legal assistant properly transition her cases to another of the firm, despite Ms. Pegge leaving a note to her legal assistant to transfer all her inmate matters to another associate. R. at 6.

During Ms. Pegge's recovery, Respondent struggled to get in contact with his attorney or any other Forme Cury attorney. R. at 7. Due to the health and safety regulations GCF put in place to prevent the spread of Misasmic Syndrome, prisoner access to phones and computers were limited. R. at 7. After multiple attempts to contact Ms. Pegge via telephone, Respondent sent an email on March 1, 2021, to the firm's general inbox. R. at 7. On March 2, 2021, another associate at Forme Cury, Hami Sharafi, called and spoke to Respondent. R. at 7. Mr. Sharafi advised Respondent that Ms. Pegge was unavailable and that Mr. Sharafi could not advise Respondent further with his case because Mr. Sharafi was unfamiliar with it. R. at

7. Mr. Sharafi also advised Respondent that Respondent would have to submit his Notice to Appeal to the prison mailbox on his own. R. at 7. After receiving Mr. Sharafi's advice, Respondent submitted the Notice Appeal to the prison mailbox on the same day. R. at 7.

However, due to delays caused by the Miasmic Syndrome pandemic, GCF mailed the Notice to Appeal to the district court on March 7, 2021. R. at 7. The district court received the Notice to Appeal on March 10, 2021. R. at 7. On August 1, 2021, the Fourteenth Circuit Court of Appeals reversed the decision of the district court below, finding that Petitioner's Notice of Appeal is timely under the prison mailbox rule and that Respondent's medical policy violated Respondent's constitutional rights. R. at 8. On August 14, 2021, Petitioner petitioned this Court for a writ of certiorari on August 15, 2021. R. at 9. This Court granted certiorari on September 22, 2021. R. at 9.

SUMMARY OF THE ARGUMENT

Petitioner challenges the decision of the Fourteenth Circuit Court of Appeal that Respondent's Notice of Appeal was timely because the prison mailbox rule has not been extended to prisoners represented by counsel. In the present case, at the time Respondent submitted his Notice of Appeal to prison officials on March 2, 2021, Respondent was represented by Forme Curry. After the summary judgment stage of the litigation, Ms. Pegge confirmed with Respondent that Forme Curry would continue to represent Respondent's claim on appeal. Additionally, on March 2, 2021, Mr. Sharafi advised Respondent to file his Notice of Appeal using the prison mailbox rule. As a prisoner represented by counsel Respondent should not be permitted to benefit from the prison mailbox rule. The prison mailbox rule only extends to pro se prisoners. Therefore, for Respondent's Notice of Appeal to be considered timely, the Notice of Appeal must be filed with the district clerk within thirty days after entry of judgment. Here, the district court received the notice of appeal thirty-eight days after entry of judgement. Accordingly, Respondent failed to comply with Federal Rule of Appellate Procedure 4.

This Court has always held that the Eighth Amendment does not require prisons to provide perfect or ideal medical care; the Eighth Amendment only requires that medical care be medically sufficient. Under the Eighth Amendment, medical care that is medically sufficient cannot be considered cruel and unusual. Here, Garum Correctional Facility's medical policy provided sufficient medical care for GD, care recommended and approved by a committee of experienced medical professionals. Although the policy does not align perfectly with the WPATH

standards, the WPATH standards are only one side of a contested medical debate on what constitutes medically necessary treatment for people suffering from GD. Though the committee's views on what the ideal treatment for a prisoner suffering from GD differ from the opinion of Respondent, this does not make them medically insufficient. Therefore, the Fourteenth Circuit Court incorrectly reversed the summary judgment in favor of Petitioner.

To succeed in his Eighth Amendment challenge to Petitioner's medical policy, Respondent must demonstrate that the policy constituted deliberate indifference to Respondent's serious medical need, and this Respondent cannot do. A committee of experienced medical professionals crafted Petitioner's medical policy, weighing the limited resources available to Garum Correctional Facility. This policy provided what the doctors unanimously voted was the medically necessary care for prisoners suffering from GD. When drafting Petitioner's medical policy, the medical experts considered considered the use of GAS in-line with WPATH standards. However, they ultimately decided GAS was not medically necessary to treat GD and therefore prohibited the use of GAS at Garum Correctional Facility. The committee still ensured Respondent and other transgender prisoners received access to other effective GD treatments, such as hormonal treatments, mental counseling, and social transitioning. In sum, a panel of experienced medical experts who believed gender affirmation surgery was not medically necessary to treat gender dysphoria created Petitioner's policy.

This Court has never considered the Eighth Amendment an open invitation for courts to second guess the medical policy of medical professionals. This Court should reject Respondent's invitation to do so here, and should instead find that Petitioner's medical policy constitutional because it does not deny access to necessary medical care and provides access to alternative effective treatments. For the foregoing reasons, Petitioner respectfully requests that this Court reverse the lower court's ruling on *de novo* review.

ARGUMENT

I. RESPONDENT WAS REPRESENTED BY COUNSEL AT THE TIME HE SUBMITTED HIS NOTICE OF APPEAL AND IS NOT PERMITTED TO BENEFIT FROM THE PRISON MAILBOX RULE THEREFORE HIS FILING IS UNTIMELY PER FEDERAL RULE OF APPELLATE PROCEDURE 4.

Black's Law Dictionary defines counsel as "[o]ne or more lawyers who, having the authority to do so, give advice about legal matters." *Counsel*, Black's Law Dictionary (11th ed. 2019). A prisoner's counsel serves as "an agent through whom he can control the conduct of his action, including the filing of pleadings." *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002). The prison mailbox rule exists to address the plight of pro se prisoners seeking to appeal without the aid of counsel. *Houston v. Lack*, 487 U.S. 266, 270 (1988). "Notices of appeal from pro se prisoners are considered filed when the prisoner delivers the notice to prison authorities for mailing." *Cretacci v. Call*, 988 F.3d 860, 865 (6th Cir. 2021) (citing *Houston*, 487 U.S. at 270). The rule enumerated in *Houston* has since been codified in Rule 4(c) of the Federal Rules of Appellate Procedure. The Circuit Courts of Appeal are split on whether prisoners represented by counsel are permitted to benefit from the prison mailbox rule.

A. Respondent was represented by counsel at the district court and the appellate court levels.

Counsel has the authority to provide advice on legal matters to clients. *Counsel*, Black's Law Dictionary (11th ed. 2019). A prisoner's counsel has been described as "an agent through whom he can control the conduct of his action, including the filing of pleadings." *Cousin*, 310 F.3d at 847. A prisoner is not proceeding without

the assistance of counsel when an attorney advises their client to file with prison officials to "trigger the prison mailbox rule."*Cretacci*, 988 F.3d at 866.

In *Cousin*, a prisoner convicted of murder filed a 28 U.S.C. § 2254 petition for writ of habeas corpus with a motion to proceed *in forma pauperis*. 310 F.3d at 846. The motion was denied, record was sent to the prisoner's counsel, and the petition would not be deemed filed until the filing fee was paid. *Id.* The five-dollar filing fee was not paid until almost two years later. *Id.* The district court found the petition to be time-barred; however, the district court certified two questions on appeal. *Id.* The first question was whether the habeas corpus petition could be evaluated under the prison mailbox rule applicable to filings by pro se prisoners. *Id.* The Fifth Circuit found that the rationale of the prison mailbox rule applied to pro se prisoner litigants was not applicable to prisoners represented by counsel. *Id.* at 847. A pro se prisoner litigant lacked the ability to exercise control over filings and was dependent on prison officials, whereas the prisoner's counsel served as "an agent through whom he can control the conduct of his action, including the filing of pleadings." *Id.* Since the prisoner was represented by counsel, the prisoner did not lack the ability to control his filings and was not dependent on prison officials for filing. *Id.* The Fifth Circuit affirmed the dismissal of the prisoner's petition as untimely. *Id.* at 849.

Most recently, in *Cretacci*, a prisoner sued the jail where he was housed pursuant to 42 U.S.C. § 1983. 988 F.3d at 863. Counsel for the prisoner realized the evening before the statute of limitations expired that he was not admitted to

practice law in the district and therefore could not file the prisoner's complaint. *Id.* at 864. The next day, after a few futile attempts to file the complaint, counsel went to the jail where the prisoner was housed and told the prisoner to deliver the stamped and addressed envelope to correctional officers immediately to take advantage of the prison mailbox rule. *Id.* at 864–65. The district court did not receive the complaint until four days past the statute of limitation expiration. *Id.* at 865. Subsequently, the district court dismissed the prisoner's claims, finding that two of his four claims were barred by the statute of limitations and the remaining two claims did not have underlying constitutional violations. *Id.*

The prisoner appealed to the Sixth Circuit. *Id.* In addressing the claims barred by the statute of limitations, the Sixth Circuit analyzed whether the prisoner was proceeding without the assistance of counsel. *Id.* at 866. The court determined that the prisoner was not without the assistance of counsel, as counsel and prisoner had "an explicit attorney-client relationship in which [counsel] agreed to represent [prisoner] in his lawsuit against the jail." *Id.* Further, the attorney-client relationship did not end after the prisoner mailed his own complaint, as counsel continued to represent the prisoner at both the district court and appellate court level. *Id.* In agreeing with the majority of circuits, the court reasoned that *Houston* was focused on pro se prisoners who have no other means to file legal documents. *Id.* at 867. The court affirmed the district court and concluded that "in the context of filing civil complaints in federal court, the prison mailbox rule applies only to prisoners who are not represented by counsel." *Id.*

In the present case, Ms. Pegge served as counsel to Respondent. *Counsel*, Black's Law Dictionary (11th ed. 2019); R. at 5. Approximately twenty-five attorneys and forty working staff members were employed by Forme Curry. R. at 5. Ms. Pegge and Forme Curry were the agents by which Respondent took action in his legal proceedings. *See Cousin* 310 F.3d at 847 (holding prisoner's counsel serves as "an agent through whom he can control the conduct of his action, including the filing of pleadings."); R. at 5–6. Ms. Pegge filed the initial suit against Petitioner and the subsequent briefs required at the district court level. R. at 5. Once the district court dismissed the case Respondent was able to speak with Ms. Pegge where she confirmed that Forme Curry would continue to represent him. R. at 6. Shortly after, Ms. Pegge contracted Miasmic Syndrome and instructed her legal assistant to transition her matters, including Respondent's appeal, to other attorneys. R. at 6–7. The failure of Ms. Pegge's legal assistant to properly transition Ms. Pegge's work including did not effectively render Respondent without counsel. R. at 6–7.

On March 2, 2021, Respondent spoke with Mr. Sharafi of Forme Curry to discuss his appeal. R. at 7. Mr. Sharafi told Respondent he was not familiar with his case but advised Respondent as his counsel to submit his Notice of Appel to the prison mailbox immediately. R. at 7. The instructions made by Mr. Sharafi were no different than counsel's instruction in *Cretacci.* 988 F.3d at 864–65. Counsel in *Crettaci* realized that he would not be able to timely file the prisoner's notice of appeal and advised the prisoner to utilize the prison mailbox rule. *Id.* The court in *Crettaci* found the prisoner to still be represented by counsel because the prisoner

submitted his own notice of appeal on the instruction of his counsel to "trigger" the prison mailbox rule. 988 F.3d at 866.

The present case is strikingly similar to *Crettaci.* In the present case, when Respondent spoke with Mr. Sharafi on March 2, 2021, Mr. Sharafi told Respondent he was not familiar with the case and Respondent would need to file his own Notice of Appeal immediately. R. at 7. Mr. Sharafi, like counsel in *Crettaci*, advised Respondent on how to file his Notice of Appeal in an attempt to "trigger" the prison mailbox rule. 988 F.3d at 866; R. at 7. Counsel in *Crettaci* went on to represent the prisoner throughout his appeal after being admitted to practice in the district. 988 F. 3d 866. Here, Mr. Sharafi did not mention that he would be unable to represent Respondent in the future, but only that he could not file the Notice of Appeal. R. at 7. Accordingly, at the time Respondent submitted his Notice of Appeal he was represented by counsel at Forme Curry.

B. This Court in Houston v. Lack and five Circuit Courts of Appeal have not extended the prison mailbox rule to prisoners with counsel.

Pro se prisoners are in a unique position to file notice of appeal. 487 U.S. at 270. Pro se prisoners are "[u]nskilled in law, unaided by counsel, and unable to leave the prison." *Id.* at 270–71. The plight of the pro se prisoner is not the same as a prisoner with counsel. *Id.* at 270. A prisoner's counsel serves as "an agent through whom he can control the conduct of his action, including the filing of pleadings." *Cousin*, 310 F.3d at 847, and counsel should be aware of the potential delays and take precautions to timely file. *United States v. Rodriguez-Aguirre*, 30 Fed. Appx. 803, 805 (10th Cir. 2002)

In *Houston v. Lack*, the Supreme Court of the United States answered whether a pro se prisoners' notices are considered filed at the moment of delivery to prison officials under Federal Rule of Appellate Procedure 4(a)(1). 487 U.S. at 268. The prisoner in *Houston* filed a 28 U.S.C. § 2254 for a writ of habeas corpus. *Id.* The district court dismissed the petition and subsequently the prisoner appealed. *Id.* The prisoner drafted a notice of appeal and submitted it to prison officials three days before the filing deadline. *Id.* The district court received the notice of appeal one day after the filing deadline. *Id.* at 269. The Sixth Circuit dismissed the appeal as untimely. *Id.* In addressing the issue on appeal, this Court concluded that the pro se prisoners' notice was filed at the moment of delivery to the prison official, overturning the appellate court. *Id.* at 270. In its analysis the Court highlighted the "unique" situation of a pro se prisoner. *Id.* Pro se prisoners are "[u]nskilled in law, unaided by counsel, and unable to leave the prison." *Id.* at 270–71. A pro se prisoner cannot monitor their appeals like other litigants with counsel and are entirely reliant on prison officials. *Id.* at 270.

In the present case, Respondent was represented by counsel and accordingly should not be permitted to benefit from the prison mailbox rule. *See United States v. Camilo*, 686 Fed. Appx. 645, 646 (11th Cir. 2017) (holding the prison mailbox is not applicable as the rule has "never been extended to parties represented by counsel."); R. at 6. Respondent was not in the unique position described by this Court in *Houston*. 487 U.S. at 270; Cousin, 310 F.3d at 847; R. at 5–7. Ms. Pegge and the other attorneys at Forme Curry represented Respondent in his initial suit against

Petitioner and in Respondent's subsequent appeal. R. at 5–7. Respondent could not leave the custody of GCF, Respondent still had access to the phones, and the library which included access to computers to communicate with counsel. R. at 7. While Respondent's access to the phones and the library were limited to stop the spread of Miasmic Syndrome in GCF, Respondent still had access. R. at 7.

Forme Curry's failure to timely respond to their client does not change or diminish their representation of Respondent. *Rodriguez-Aguirre*, 30 Fed. Appx. at 805 (holding the prison mailbox rule does not apply to a prisoner with counsel who should be aware of potential delays and take precautions to timely file). Respondent as a prisoner with counsel was in the same position as others with counsel. *See Burgs v. Johnson,* 79 F.3d 701, 702 (8th Cir. 1996) (finding a prisoner represented by counsel was in the same position as others represented by counsel who rely on counsel to timely file notice of appeal). Forme Curry should have monitored Respondent's appeals process and ensured Respondent's Notice of Appeal was timely filed. Instead, Forme Curry failed to timely file Respondent's Notice of Appeal. R. at 7. On the day of Respondent's filing deadline, Mr. Sharafi advised Respondent to immediately file his Notice of Appeal to the prison mailbox in an attempt to "trigger" the prison mailbox rule. *Cretacci*, 988 F.3d at 866; R. at 7.

As Respondent was represented by Forme Curry when he submitted his Notice of Appeal to the prison mailbox, Respondent is not permitted to benefit from the prison mailbox rule.

C. Respondent did not comply with Federal Rule of Appellate Procedure 4.

Per Federal Rule of Appellate Procedure 4(a)(1)(A) "the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." In the present case, the district court dismissed Respondent's action on February 1, 2021. R. at 6. For Respondent's Notice of Appeal to be deemed timely, the Notice of Appeal must have been received by the district court clerk by March 2, 2021. Fed. R. App. P. 4(a)(1)(A). Respondent submitted his Notice of Appeal to GCF on March 2, 2021. Due to delays partially caused by Miasmic Syndrome, GCF mailed the Notice of Appeal on March 7, 2021. R. at 7, 21. The district court received the Notice of Appeal on March 10, 2021. R. at 7. Therefore, Respondent's Notice of Appeal was filed untimely according to Federal Rule of Appellate Procedure 4. Further, as Respondent was a prisoner represented by counsel at the time he submitted his Notice of Appeal, Respondent may not benefit from the prison mailbox rule. *See Houston 487* U.S. at 270; *Cretacci*, 988 F.3d at 865.

Accordingly, Respondent failed to comply with Federal Rule of Appellate Procedure 4 and therefore his filing is untimely. For this reason, the Fourteenth Circuit Court of Appeal erred when it considered Respondent's Notice of Appeal timely.

II. PETITIONER'S BLANKET BAN DENYING GENDER AFFIRMATION SURGERY DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE IT DOES NOT DENY ACCESS TO NECESSARY MEDICAL CARE AND PROVIDES ACCESS TO OTHER EFFECTIVE TREATMENTS.

In *Estelle v. Gamble*, the Court held that the state has a duty to provide medical care to prisoners. 429 U.S. 97, 103 (1976). This is so because prisoners rely on the state to treat their medical needs while incarcerated. *Id.* If the state fails to treat a prisoner's medical needs, those needs will go unmet. *Id.* And when those needs go unmet, prisoners may experience "physical torture" or "lingering death." *Id.* In other cases, they may experience pain and suffering that is inflicted without a penological purpose. *Id.* Therefore, whenever the state acts with "deliberate indifference" towards a prisoner's serious medical needs, the state violates the Eighth Amendment. *Id.* at 104.

In cases like the present one, where a prisoner is challenging the denial of medical treatment, circuit courts have required a showing of two elements to prove a constitutional violation under *Estelle*. First, proof of a serious medical need. *Edmo v. Corizon, Inc.*, 935 F.2d 757, 785 (9th Cir. 2019) (holding that to prove an Eighth Amendment violation a prisoner must first show proof of a serious medical need); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (holding the same). Second, circuit courts have required proof of deliberate indifference. *See Edmo,* 935 F.2d at 803; *Kosilek*, 774 F.3d at 91; *Gibson v. Collier,* 920 F.3d 212, 220 (5th Cir. 2019). Circuit courts have held that deliberate indifference is shown where the facts demonstrate that the treatment being denied is medically necessary to treat the

plaintiff's serious medical needs. *See Edmo,* 935 F.2d at 803; *Gibson,* 920 F.3d at 220.

Here, Petitioner and Respondent do not dispute that Respondent and all others subject to Petitioner's blanket ban have a serious medical need: gender dysphoria (GD). R. at 27, n.4. Rather, Petitioner and Respondent disagree on whether GAS is medically necessary to treat GD. R. at 43–44. And therefore whether Petitioner's blanket ban denying GAS is deliberately indifferent to the serious medical needs of transgender prisoners suffering from GD. R. at 44.

In its opinion below, the United States Court of Appeals for the Fourteenth Circuit held that Petitioner's blanket ban is unconstitutional. R. at 43. The lower court reasoned that Petitioner's blanket ban is unconstitutional because the consensus medical view is that GAS is medically necessary to treat GD. R. at 43. Therefore, Petitioner's blanket ban denying GAS is deliberately indifferent to the serious medicals needs of Respondent and other transgender prisoners with GD. R. at 44. However, the lower court erred for two reasons. First, because there is a substantial disagreement as to whether GAS is medically necessary to treat GD. R. at 29. Second, because Petitioner's blanket ban provides access to other effective treatments for GD. R. at 14, 29.

A. Petitioner's blanket ban denying GAS is constitutional because GAS is not medically necessary care.

In *Gibson v. Collier*, the Fifth Circuit considered whether a correctional facility's denial of GAS to transgender prisoners violated the Eighth Amendment. 920 F.3d 212, 215 (5th Cir. 2019), *cert. denied*, 140 S. Ct 653 (2019). There, the

plaintiff was a male-to-female transgender prisoner. *Id.* at 217. The plaintiff was diagnosed with Gender Identity Disorder (GID). *Id.* The plaintiff requested GAS to treat her condition. *Id.* However, prison officials refused. *Id.* The plaintiff filed suit alleging the state was denying her necessary medical care in violation of the Eighth Amendment. *Id.* at 218. The district court entered summary judgment in favor of the state, because there was a disagreement as to whether GAS was medically necessary. *Id.*

On appeal, the Fifth Circuit affirmed the decision of the lower court. *Id.* at 220. The Fifth Circuit explained: "there is no intentional or wanton deprivation of care if a genuine debate exists within the medical community about the necessity or efficacy of the care." *Id.* at 220 (internal citation omitted). The plaintiff pointed to the WPATH Standards of Care to argue that GAS was medically necessary. *Id.* at 218, 220. The Fifth Circuit considered the WPATH standards and concluded that those standards did not reflect the consensus medical view on GAS. *Id.* at 221. Rather, the WPATH standards reflected one side of the medical debate as to whether GAS was medically necessary. *Id.* To support its conclusion, the Fifth Circuit pointed to the expert testimony in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014). In *Kosilek*, two medical experts from the John Hopkins School of Medicine testified that GAS was not medically necessary. *Gibson*, 920 F.3d at 221–22 (citing *Kosilek,* 774 F.3d at 63). The *Kosilek* court's court appointed expert also concluded that GAS was not medically necessary. *Gibson*, 920 F.3d at 221–22. After citing the expert testimony in *Kosilek*, the *Gibson* court cited the Center for Medicare &

Medicaid Services "Decision Memo for Gender Dysphoria and Gender Reassignment Surgery." *Id.* at 223, n.7. The memo surveyed medical literature and found that there was a lack of evidence showing GAS was medically necessary. *See id*. After citing the above evidence showing a disagreement as to whether GAS was medically necessary, the *Gibson* court stated:

> "We see no basis in Eighth Amendment precedent—and certainly none in the text or original understanding of the Constitution—that would allow us to hold a state official deliberately (and unconstitutionally) indifferent, for doing nothing more than refusing to provide medical treatment whose necessity and efficacy is hotly disputed within the medical community."

Id. at 227. In the present case, Respondent, like the plaintiff in *Gibson*, is a transgender prisoner who has been diagnosed with GD and has requested GAS to treat his condition. R. at 1, 4. And Respondent, like the plaintiff in *Gibson*, challenges Petitioner's denial of GAS as a violation of the Eighth Amendment. R. at 32. And here, just like in *Gibson*, there is substantial disagreement among medical professionals as to whether GAS is medically necessary. R. at 29.

Despite the factual similarities between the present case and *Gibson*, the lower court declined to follow *Gibson.* R. at 43. The lower court reasoned that *Gibson* does not apply here, because *Gibson's* view that GAS is not medically necessary is "outdated." *Id.* Instead, the lower court turned to the Ninth Circuit's opinion in *Edmo v. Corizon, Inc*., 935 F.2d 757 (9th Cir. 2019). And the lower court relied almost exclusively on the facts and reasoning in *Edmo* to reach the conclusion that GAS is medically necessary to treat GD. R. at 43–44. From there, the lower court held that Petitioner's blanket ban is

unconstitutional. R. at 44. However, the lower court erred in declining to follow *Gibson* and electing to follow the facts and reasoning in *Edmo,* because the lower court overlooked key facts that render *Edmo* inapplicable here.

In *Edmo*, the Ninth Circuit considered whether GAS was medically necessary to treat the plaintiff's GD. 935 F.3d at 757. There, the parties agreed that the WPATH standards was the appropriate medical standard to follow. *Id.* at 767. The parties dispute centered on whether GAS was medically necessary for the plaintiff under the WPATH standards. *Id.* The district court heard testimony from several medical experts. *Id.* at 775–80. The experts disagreed on whether GAS was medically necessary under the WPATH standards. *Id.* The state's experts said it was not. *Id.* The plaintiff's experts said it was. *Id.* After discrediting the testimony of the state's experts, and relying solely on the testimony of the plaintiff's experts, the district court found in favor of the plaintiff. *See id.* at 767.

On appeal, the Ninth Circuit affirmed the decision of the district court. *Id.* at 803. The Ninth Circuit explained that the district court did not err in discrediting the testimony of the state's experts as to the medical necessity of GAS. *Id.* at 787. First, because the state's experts lacked "meaningful experience directly treating people with gender dysphoria." *Id.* Second, because the state's experts interpreted the WPATH standards "in a way that directly contradicted them." *Id.* at 789. After its fact-based analysis, the *Edmo* court concluded by stating that Eighth Amendment cases require "a

fact-specific analysis of the record." 935 F.3d at 794 (internal citations omitted).

Applying the *Edmo* court's own reasoning here, a fact-specific analysis of the record on appeal shows that the facts of the present case render *Edmo* inapplicable for two reasons.

First, unlike the state in *Edmo*, Petitioner here does not agree to be governed by the WPATH standards. Therefore, unlike in *Edmo*, the opinions of Petitioner's panel of medical experts, even if they conflict with the WPATH standards, cannot be deemed invalid solely because they conflict with those standards.

Second, unlike in *Edmo*, Petitioner's blanket ban here was the result of a carefully considered panel of medical experts *who have experience treating GD*. R. at 28. (emphasis added). And as the *Edmo* court explained, the opinions of medical experts who have experience treating GD are credible and should be considered when determining whether GAS is medically necessary. 935 F.3d 787. Therefore, under the *Edmo* court's own reasoning, the opinions of Petitioner's panel here should be taken into account when considering whether GAS is medically necessary in the present case.

When taking the opinions of Petitioner's panel into account, it is clear that there is still a substantial disagreement among medical experts as to whether GAS is medically necessary to treat GD. R. at 14, 29. Therefore, contrary to the lower court's contention, *Gibson's* view that GAS is not

medically necessary is not "outdated." R. at 43. Rather, the facts of the present case support *Gibson*'s view that there is still an ongoing debate as to whether GAS is medically necessary to treat GD. *Gibson*, 920 F.3d at 220. And as the *Gibson* court stated: "But where, as here, there is robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment." *Id.*

Accordingly, the lower court erred in relying on *Edmo* to find that GAS is medically necessary as a matter of law. Because here, like in *Gibson*, there is still a substantial good faith disagreement among credible medical experts as to whether GAS is medically necessary to treat GD.

B. Petitioner's blanket ban denying GAS is constitutional because it provides access to other effective treatments.

The opinions of the First, Tenth, Eleventh, and Seventh circuits provide further support for Petitioner's blanket ban. These circuits have all held that when the state denies treatment, but provides access to other effective treatments, the state does not violate the Eighth Amendment.

In *Kosilek*, the First Circuit considered whether denying GAS to transgender prisoners violated the Eighth Amendment. 774 F.3d 63, 89 (1st Cir. 2014). There the plaintiff was a male-to-female transgender prisoner suffering from GID. *Id.* at 68. The plaintiff was receiving hormone treatment, psychotherapy, and other treatments for her condition. *Id.* at 69–70. However, one doctor recommended that the plaintiff also receive GAS. *Id.* at

70. After speaking with other medical professionals, the prison decided not to provide the plaintiff with GAS. *Id.* at 71–74. The plaintiff filed suit. *Id.* At trial, expert witnesses disagreed on whether GAS was medically necessary. *Id.* at 75–79. After considering all the expert testimony, the district court determined that GAS was medically necessary and found in favor of the plaintiff. *Id.* at 86–87.

On appeal, the First Circuit reversed. *Id.* at 96. First, because it was not clear based on expert testimony that GAS was medically necessary. *Id.* at 89. Second, because the state provided access to other treatments that had proven effective at treating the plaintiff's medical needs. *Id.* at 90.

In *Lamb v. Norwood*, the Tenth Circuit also considered whether the state's denial of GAS violated the Eighth Amendment. 899 F.3d 1159, 1163 (10th Cir. 2018). There, the plaintiff was a transgender prisoner receiving hormone therapy, testosterone-blocking medicine, and weekly counseling sessions. *Id.* However, the plaintiff requested GAS as well. *Id.* Prison officials refused, because existing treatments were effective and GAS was impractical and unnecessary in light of these existing treatments. *Id.* The *Lamb* court agreed with the state, finding no constitutional violation, because the state provided access to other effective treatment options. *See id.* at 1162–63.

In *Keohane*, the Eleventh Circuit considered whether the state's denial of social transitioning measures violated the Eighth Amendment. *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1266 (11th Cir. 2020), *cert. denied*

sub nom. *Keohane v. Inch*, No. 20-1553, 2021 WL 4507694 (U.S. Oct. 4, 2021). There the plaintiff was a transgender prisoner receiving hormone therapy. *Id.* at 1262–63. The plaintiff requested social transitioning measures. *Id.* at 1262. The state refused. *Id.* The plaintiff filed suit alleging the state's denial of social transitioning measures violated her Eighth Amendment rights. *Id.* at 1263. On appeal, the Eleventh Circuit found in favor of the state. *Id.* at 1277. The court noted that there was a division of medical opinion as to whether the plaintiff's requested treatment was medically necessary. *Id.* at 1274. And the state was providing other treatment options that were adequate under the circumstances. *Id.* at 1277.[2]

Lastly, in *Fields v. Smith*, the Seventh Circuit considered whether a Wisconsin statute banning *both* hormone therapy and GAS violated the Eighth Amendment. 653 F.3d 550, 555 (7th Cir. 2011) (emphasis added). The district court held that the statute was unconstitutional. *Id.* On appeal, the Seventh Circuit affirmed. *Id.* at 559. The Seventh Circuit explained that

[2] The *Keohane* court also discussed the state's security concerns. *Id.* at 1275. The court explained that it afforded greater deference to the state's treatment plan given the state's security concerns. *See id.* at 1275–76. However, the court's opinion suggests that the state's provision of other effective treatments–not the security concerns–was outcome dispositive. As can be seen in the court's conclusion: "[The state] chose a meaningful course of treatment to address Keohane's gender-dysphoria symptoms—treatment that, while perhaps different from (and less than) what Keohane preferred, is sufficient to clear the low deliberate-indifference bar." *Id.* at 1277.

However, assuming the prison's security concerns in *Keohane* played an outsized role in the Court's decision, that does not render *Keohane* inapplicable here. Petitioner has stated that its blanket ban reflects the prison's concerns that providing GAS during the pandemic may unduly burden the prison's medical system. R. at 20. Therefore, just like in *Keohane*, there is an administrative concern here and greater deference should be afforded to Petitioner's blanket ban given these concerns. *Keohane*, 952 F.3d at 1276 (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

the statute was unconstitutional because it denied access to the *only* effective treatment for GD – hormone therapy. *Id.* at 556–57 (emphasis added).

In the present case, Petitioner's blanket ban on GAS is constitutional under the reasoning set forth by the First, Tenth, Eleventh, and Seventh circuits. Here, Petitioner's blanket ban, just like the policies upheld by the court's in *Kosilek*, *Lamb*, and *Keohane*, provides access to effective treatment options for GD. R. at 11. These treatments include hormone therapy, mental health counseling, and social transitioning measures. R. at 11, 15. All these treatments are known to be effective at treating GD. R. at 14, 29. And they have even proven effective at treating Respondent's own GD. R. at 1. Thus, unlike in *Fields*, Petitioner's blanket ban does not deny access to the *only* effective treatment for GD. Rather, like in *Kosilek*, *Lamb*, and *Keohane*, Petitioner's ban provides access to effective treatments.

Therefore, under the reasoning set forth by the First, Tenth, Eleventh, and Seventh circuits, Petitioner's blanket ban is constitutional because it does not deny access to the only effective treatment for GD and provides access to other effective treatments.

C. A ruling in favor of Petitioner is consistent with this Court's Eighth Amendment principles.

"Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

Petitioner's blanket ban on GAS is a reasonable response to the medical needs of transgender prisoners. The purpose of the Eighth Amendment is to protect prisoners from the "unnecessary *and* wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). And from conditions that are "repugnant to the conscious of mankind." *Id.* at 106. Petitioner's blanket ban on GAS does not inflict unnecessary and wanton pain. Instead, it allows transgender prisoners to receive multiple treatments that have proven effective at alleviating GD. R. at 14. Petitioner's blanket ban on GAS does not create conditions that are repugnant to the conscious of mankind. It does the opposite: it allows transgender prisoners to receive medical treatment that has been recommended by a panel of experienced medical professionals. R. at 12–15. At the same time, Petitioner's ban allows Petitioner and other prison officials to manage their burdened healthcare systems. R. at 20. Systems that have become unduly strained during the pandemic.
Petitioner's blanket ban is thus a reasonable response that attends to the medical needs of transgender prisoners and affords prison officials the discretion they need to manage their limited resources.

In its decision below, the lower court stepped in to an ongoing medical debate and replaced the judgment of a credible panel of medical experts with its own. *Kosilek v. Spencer*, 774 F.3d 63, 88–89 (1st Cir. 2014); *Gibson v. Collier*, 920 F.3d 212, 225 (5th Cir. 2019). In doing so, the lower court intervened in the process of prison administration, invading the province of the executive and legislative branches:

> "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."

Turner v. Safley, 482 U.S. 78, 84–85 (1987) (emphasis added). The lower court's decision was a step too far.

CONCLUSION

As Respondent was a prisoner represented by counsel at the time Respondent submitted his Notice of Appeal, Respondent is not permitted to benefit from the prison mailbox rule therefore Respondent's Notice of Appeal was untimely filed.

Petitioner's blanket ban on GAS is constitutional. It does not deny necessary medical care for prisoners with GD, it does not deny access to the only effective care available for GD, and it allows for access to other effective treatments for GD. For the foregoing reasons, Petitioner respectfully requests this Court to reverse the lower court's ruling on de novo review.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 2021, I served a copy of the Brief for Petitioner as required by Rule 4.

|s| Team 2106

Team 2106

Counsel for Petitioner

APPENDIX A

U.S. const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX B

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C

FED. R. APP. P. 4

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(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 and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.