Team 2110

N. 2021-22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

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

Attorneys for the Petitioner

QUESTIONS PRESENTED

1. Whether an inmate who is represented by counsel could benefit from the prison mailbox rule if the inmate submits his Notice of Appeal and it does not comply with Federal Rules of Appellate Procedure 4(c)?

2. Whether an inmate's Eighth Amendment right is violated if a prison facility imposes a blanket ban against gender affirmation surgery without permitting the inmate suffering from gender dysphoria to undergo an individualized examination to determine the necessity of the gender affirmation surgery?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Max Posca, in his official capacity as Warden and Administrator of Garum Correctional Facility, Appellee in the Court of Appeals for the Fourteenth Circuit, and Defendant in the United States District Court of Silphium, submits this brief to support their request that this Court reverse the judgement of the Court of Appeals for the Fourteenth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Fourteenth Circuit is underreported and appears in the record at pages 30–47.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment to the United States Constitution, which is reproduced as Appendix "A." This case also involves section §4 of Federal Rules of Appellate Procedure, which is reproduced as Appendix "B."

STATEMENT OF THE CASE

I. Standard of Review

A. Prison Mailbox Rule

Appellate review when considering whether the district court properly applied the prison mailbox rule is a mixed question of law and fact. *Daker v. Sheriff**Error! Bookmark not defined.***, No.19-13672, 2021 WL 2947781, at *1, 1 (11th Cir. R. 2021) (quoting *Jeffries v. United States*, 748 F.3d 1310, 1313 (11th Cir. 2014)). In reviewing the district court's interpretation of the rule, the standard of review is *de novo*. *Id.* The district court's finding of fact is reviewed for clear error. *Id.*

B. Eighth Amendment Cruel and Unusual Punishment

Appellate review when considering whether prison administrators have violated the Eighth Amendment is reviewed *de novo*. *Kosilek v. Spencer*, 774 F. Supp. 3d 63, 84 (1st Cir. 2014). The claim of inadequate medical care, such as whether an actor's conduct amounts to deliberate indifference for purposes of the Eighth Amendment is reviewed *de novo*. *Id.* When reviewing an Eighth Amendment claim of inadequate medical care, appellate courts give "deference to the district resolution of questions of pure fact and issues of credibility" and will reverse the district court's finding on such factual questions only for clear error. *Id.*

II. Statement of the Facts

Mr. Lucas Escoffier ("Respondent") is a transgender man who resides in the State of Silphium. (R. 1). On March 9th, 2011, the Respondent was diagnosed with gender dysphoria. (R. 1). Over a year after the diagnosis, he began to "socially"

transition from his given name to Lucas and identified with the pronouns "he" and "his." (R. 1). In the following weeks, the Respondent noted a sense of relief and a reduction of his depressive symptoms. (R. 16). In 2013, the Respondent requested to continue with the process of transition and began taking masculinizing hormones. (R. 16). The Respondent's response to his social transition and hormone therapy was so good that his outlook on life improved significantly. (R. 1, 17). The Respondent did not legally change his name until June 2017. (R. 17).

In February 2014, for unrelated physical reasons, the Respondent had a double mastectomy. (R. 1). Simultaneously, the Respondent elected to have a reconstructive approach to his surgery. (R. 1). This allowed his chest to be more in line with his male gender identity. (R. 1).[1]

In April of 2018, the Respondent began to suffer from chronic depression and mild suicidal ideation that was related to his gender dysphoria. (R. 1). Days after the Respondent made the decision to surgically transition, he pled guilty to criminal tax fraud in the third degree and was sentenced to five years in prison. (R. 2). The Respondent's period of incarceration began on March 7th, 2020 at Garum Correctional Facility ("Garum"). (R. 2).

While at Garum, the Respondent was evaluated by Dr. Arthur Chewtes, ("Dr. Chewtes"), the supervising psychiatrist at Garum. (R. 13). Dr. Chewtes has more than twenty years of experience in psychiatry and has treated approximately 100 patients with gender dysphoria, six of whom are current inmates at Garum. (R. 13).

[1] The Respondent underwent genetic testing and was found to carry a mutation of the BRCA1 gene that is linked to a significant risk of developing breast cancer. (R. 1).

During his evaluation, Dr. Chewtes confirmed the diagnosis of Gender Dysphoria and continued to prescribe the Respondent masculinizing hormone therapy. (R. 13).

A. Miasmic Syndrome Outbreak

Shortly after the Respondent was imprisoned, there was an outbreak of Miasmic Syndrome ("Miasmic") which is a highly contagious and fatal virus. (R. 2). The outbreak soon became a global pandemic, infecting and killing several million people worldwide. (R. 2). To stop the outbreak of Miasmic, federal, state, and local governments created strict regulations for the health and safety of their communities. (R. 2).

To prevent any further outbreak or spread of Miasmic, Garum instituted several highly strict policies. (R. 2). All programming, job training, classes, and communal recreation were cancelled. (R. 3). This forced inmates to stay in their cells all day except for a short time to shower and a brief moment of recreation. (R. 3). Inmates could no longer have in-person visitation and all court appearances, and attorney-client visits, were conducted via videoconference. (R. 3). The limited amount of computers that Garum had available caused videoconferences to be booked for weeks in advance. (R. 3). Telephone communications were available via appointment. (R. 4).

B. Garum's Gender Dysphoria Treatment Plan

A fifteen-person committee, made up of experienced physicians, was formed at Garum in order to write the policy to treat inmates with gender dysphoria. (R. 13). Among the committee members was Dr. Chewtes, Dr. Bergamot, a general surgeon

who has practiced since 1990, Dr. Cordata, an endocrinology specialist, and Dr. Mitsuba, a plastic surgeon who specializes in reconstructive procedures. (R. 13). The committee was directed to look at the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, published by the World Professional Association for Transgender Health ("WPATH"). (R. 14). The WPATH standards are the most widely used standards for transgender healthcare in the United States. (R. 14).

C. Gender Affirmation Surgery

The Respondent's hormone replacement therapy continued through the pandemic. (R. 4). He experienced depression, bouts of weight and hair loss, loss of appetite, anxiety, paranoia, and perpetual suicidal ideation. (R. 4). The Respondent identified these symptoms as part of his gender dysphoria, informing the staff at Garum that his condition was worsening and that he required gender affirmation surgery. (R. 4). The Respondent met with Dr. Chewtes to discuss other options to treat his gender dysphoria. (R. 4). The Respondent filed a request to receive gender affirmation surgery. (R. 4). However, Dr. Chewtes informed the Respondent that the policy at Garum prohibited gender affirmation surgery. (R. 4). The Respondent submitted several rounds of grievances to Garum's medical department. (R. 5). Each grievance underwent investigation and administrative review and were ultimately denied because the policy prohibited gender affirmation surgery. (R. 5).

D. Assistance of Counsel

After the final denial from Garum's medical department, the Respondent sought the assistance of counsel in bringing a civil rights lawsuit against Garum for denying him gender affirmation surgery. (R. 5). Ms. Sami Pegge ("Ms. Pegge"), a senior associate at Forme Cury ("Forme"), was assigned to the Respondent's case. (R. 5). On October 5th, 2020, Ms. Pegge filed suit, and in response, Warden Max Posca ("Warden") moved to dismiss the complaint on the basis that the prison's policy was not a blanket ban and it did not specifically target the Respondent. (R. 5). The District Court of Silphium converted the Petitioner's motion to dismiss into a motion for summary judgement and found for the Warden, dismissing the action on February 1st, 2021. (R. 6). Thereafter, the Respondent spoke with Ms. Pegge and confirmed that Forme would continue to represent him during the appeal. (R. 6).

Shortly after the conversation, Ms. Pegge contracted a severe form of Miasmic. (R. 7). After some time in the hospital and several days of extensive treatment, Ms. Pegge was fully recovered by March 12th, 2021. (R. 7). During Ms. Pegge's recovery, she did not work and the Respondent's case was not properly managed. (R. 7). This caused the Respondent's case to be calendared incorrectly. (R. 7).

Throughout the month of February, due to the stringent rules and limitations on the inmates at Garum, the Respondent was only able to make three phone calls to Ms. Pegge's office. (R. 7). The Respondent only had one opportunity to use the computer to send an email to Forme via their "Contact Us" page. (R. 7). On March 2nd, another associate at Forme, Mr. Hami Sharafi, ("Mr. Sharafi"), spoke with the

Respondent. (R. 7). During the call, Mr. Sharafi informed the Respondent that Ms. Pegge was hospitalized and that he was not familiarized with the Respondent's case. (R. 7). Additionally, Mr. Sharafi told the Respondent there was not another attorney available to help him and that he needed to submit his Notice of Appeal. (R. 7). That same day, the Respondent put his Notice of Appeal in the prison mailbox along with completed prison mailing forms. (R. 7).

III. Nature of the Proceeding

The Respondent brought suit against the Warden of Garum in the District Court of Silphium. (R. 8). The Respondent alleges that the Warden violated the Respondent's Eighth Amendment right by imposing a blanket ban against gender affirmation surgery and denying him an individualized examination. (R. 8). In the district court proceedings, the Warden moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). (R. 8). The District Court of Silphium converted the motion to dismiss into a motion for summary judgment and granted dismissal of the case on February 1st, 2021. (R. 8) The district court found that there is no genuine issue of material fact and that all necessary evidence is on the record. (R. 8).

The Respondent appealed to the Fourteenth Circuit. (R. 8). The Respondent mailed his Notice of Appeal to the district court on March 2nd, 2021. (R. 8). The Notice of Appeal was received by the district court and stamped "filed" on March 10th, 2021. (R. 8). On appeal, the Fourteenth Circuit heard two issues of first impression. (R. 30). The first issue concerns the timeliness of the Notice of Appeal filed by the Respondent himself. (R. 30). The second issue concerns whether the boundaries in

which a state may validly prescribe certain medical treatment to its prisoners, is consistent with the requirement under the Eighth Amendment. (R. 30). The Fourteenth Circuit found that the Respondent's Notice of Appeal was timely. (R. 30). The court reversed the order from the District Court of Silphium granting summary judgment to the Defendant-Petitioner and remanded this action to the district court for further proceedings consistent with the opinion. (R. 30).

The Defendant-Petitioner filed a petition for writ of certiorari in the Supreme Court of the United States. (R. 9). The Petition was granted on September 22nd, 2021. (R. 9). The Petitioner prays this Court will reverse the Fourteenth Circuit's decision and find that the Notice of Appeal was not filed timely and that there was no Eighth Amendment violation.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit incorrectly held that the Respondent timely filed his Notice of Appeal under the prison mailbox rule. Additionally, the Fourteenth Circuit incorrectly reversed the order granting summary judgment to the Defendant-Petitioner thereby bringing these issues before this Court.

This Court has held, in *Houston v. Lack*, that when an inmate who mails a notice of appeal is acting pro se at the time of mailing, the prison mailbox rule applies. *Houston v. Lack*, 487 U.S. 266, 271(1988). An inmate is considered pro se at the time of mailing because he is unskilled in law, unaided by counsel, and has no control over the delivery of his filing. *United States v. Smotherman*, 838 F.3d 736, 737–38 (6th Cir. 2016). A prisoner is aided by counsel when a lawyer prepares legal documents

on behalf of the prisoner. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). A prisoner has "control" over their filing when they have the ability to have their counsel intervene or check on the status of the filing. *Houston*, 487 U.S. 266 at 270. The Respondent was at all times in control of his filing and aided by counsel. (R. 6, 7). Therefore, the Fourteenth Circuit was not consistent with this Court's ruling in *Houston*.

Second, the Fourteenth Circuit incorrectly held that Garum's gender affirmation policy violates the Eighth Amendment. (R. 44). To successfully establish an Eighth Amendment claim, a prisoner must prove that they have a serious medical need and that the prison showed a deliberate indifference to the prisoner's medical need. *Kosilek*, 774 F. Supp. 3d at 85, 91. A serious medical need is one that is diagnosed by a physician or one that is so obvious that a lay person could recognize the necessity of medical attention. *Id.* at 82. The Petitioner does not disagree that the Respondent has a serious medical need regarding his gender dysphoria.

To prove that the Petitioner showed a deliberate indifference to the Respondent's serious medical need, the Respondent must show that Garum acted with malicious intent. *Gibson v. Collier*, 920 F. Supp. 3d 212, 220 (5th Cir. 2019); *see Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Deliberate indifference must rise to the level of criminal recklessness. *Kosilek*, 774 F. Supp. 3d at 83; *Farmer*, 511 U.S. at 831. Furthermore, "to show deliberate indifference, the [Respondent] must show the course of treatment the [Petitioner] chose was medically unacceptable under the circumstances and that the [Petitioner] chose this course in conscious disregard of an

excessive risk to the [Respondent's] health." *Edmo v. Corizon*, 935 F. Supp. 3d 757, 786 (9th Cir. 2019) (quoting *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016)). The Respondent was evaluated by Dr. Chewtes who is experienced in treating gender dysphoria. (R. 18). After the evaluation, Dr. Chewtes determined that the appropriate treatment for the Respondent was weekly health counseling and masculinizing hormone therapy. (R. 18). Furthermore, hormone therapy is listed as one of the adequate treatments under the WPATH standards. *Edmo*, 935 F. Supp. 3d at 770.

For these reasons, this Court should reverse the decision of the Fourteenth Circuit and find that the Respondent cannot benefit from the prison mailbox rule, thereby finding the filing of his Notice of Appeal untimely. Further, this Court should reverse the decision of the Fourteenth Circuit and hold that Garum's policy on gender affirmation surgery does not violate the Respondent's Eighth Amendment right.

ARGUMENT

I. The Respondent Cannot Benefit from the Prison Mailbox Rule Because the Respondent Received the Aid of Counsel, and the Filing of Their Notice of Appeal Does Not Satisfactorily Comply with Federal Rules of Appellate Procedure 4(c).

The Federal Rules of Appellate Procedure state that when an inmate who is confined to an institution files a notice of appeal, the notice of appeal is timely if it is deposited into the institution's mailing system. Fed. R. App. Proc. 4(c)(2021). A pro se inmate is one acting without the aid of counsel in a court proceeding. *Houston*, 487 U.S. 266, 266 (1988). When an inmate who mails a notice of appeal is acting pro se at the time of mailing, the prison mailbox rule applies. *Id.* Inmates who are

represented by counsel cannot claim the prison mailbox rule because the inmate retains control over their documents once mailed. *Id.* at 271; *Cretacci v. Call*, 988 F.3d 860, 871 (6th Cir. 2021);*United States v. Camilo*, 686 Fed. App'x 645, 646 (11th Cir. 2017). To have "control over their documents" means to have the ability to have their counsel intervene or check on the status of the filing. *Camilo*, 686 Fed. App'x at 646. Inmates that are represented by counsel cannot invoke the prison mailbox rule where the inmate has benefitted from the legal skills of their counsel. *Houston*, 487 U.S. at 271; *Cretacci*, 988 F.3d at 1201; *Stillman*, 319 F.3d at 1201. When an inmate files a notice of appeal in a civil or criminal case, the notice is timely if it is deposited into the prison mailing system and is accompanied by either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, containing the date of deposit and stating that first-class postage is being paid. Fed. R. App. Proc. 4(c)(1)(A)(i). If there is no statement of the date of deposit and postage, evidence of the date of deposit and postage may accompany the mailing. Fed. R. App. Proc. 4(c)(1)(A)(i)–(ii).

The court may exercise its discretion to permit the later filing of the declaration or notarized statement in order for the notice to be considered timely. Fed. R. App. Proc. 4(c)(1)(B). In cases where a prisoner has access to a legal mailing system, the prisoner must use the legal mailing system in order to benefit from the prison mailbox rule. Fed. R. App. Proc. 4(c)(1). An inmate has not satisfactorily complied with Federal Rules of Appellate Procedure 4(c) when their case does not conform to the

legislative intent behind the creation of 4(c)—to protect pro se prisoners in their right to appeal. *See* Fed. R. App. Proc. 4(c); *Houston*, 487 U.S. at 266.

A. The Respondent Cannot Be a Pro Se Inmate Because He Benefited from the Aid of Counsel.

To determine the application of the mailbox rule to prisoner litigants, this Court held that a pro se prisoner's notice of appeal is considered "filed" at the moment of delivery to the prison authorities for forwarding to the court. *Houston*, 487 U.S. at 267. Pro se prisoners have no choice but to hand over their notice of appeal to prison authorities, whom they cannot observe diligently and to whom they surrender full control of their notice. *Id.* at 271. After this holding, Federal Rules of Appellate Procedure 4(c) was created. Fed. R. App. Proc. 4(c). Several courts have held that a prisoner may invoke the prison mailbox rule when they lose control over their notice of appeal upon delivering them to prison authorities for forwarding to the court. *Houston*, 487 U.S. at 271–72; *Cretacci*, 988 F.3d at 866; *Camilo*, 686 Fed. App'x at 646. When a prisoner is represented by counsel, that prisoner is not limited to communicating with the court only through the prison staff and the postal service just because the notice was mailed through the prison mailbox system. *Camilo*, 686 Fed. App'x at 646. The fact that the prisoner filed the document does not mean that they are proceeding without the assistance of counsel for purposes of the prison mailbox rule. *Cretacci*, 988 F.3d at 866.

1. The Respondent Did Not Lose Control Over His Mailed Notice of Appeal When He Filed the Notice of Appeal with the Prison Authorities Because He Was Represented by Counsel.

This Court, in determining how to apply the mailbox rule to prisoners, held that a pro se prisoner's notice of appeal is considered filed at the moment of delivery to the prison authorities for forwarding to the court. *Houston*, 487 U.S. at 267. Pro se prisoners, when filing documents, have no choice but to hand over their notice of appeal to prison authorities, losing control over these documents due to a lack of ability to track or ensure filing. *Id.* at 271. A prisoner may invoke the prison mailbox rule when they lose control over their notice of appeal upon delivering them to prison authorities for forwarding to the court. *Id.* at 271–72; *Cretacci*, 988 F.3d at 866; *Camilo*, 686 Fed. App'x at 646. Prisoners that are represented by counsel are not limited to communicating with the court only through the prison staff and the postal service just because their notice was mailed through the prison system. *Camilo*, 686 Fed. App'x at 646.

This Court first addressed the prison mailbox rule in *Houston v. Lack*. *Houston*, 487 U.S. at 266. There, a Tennessee state prisoner filed a pro se notice of appeal twenty-seven days after judgment. *Id.* The petitioner gave the notice to the prison authorities to be mailed to the district court. *Id.* The notice was stamped "filed" by the district court one day past the statutory period of thirty days. *Id.* This Court held that a pro se prisoner's notice of appeal is considered filed at the moment of delivery to prison authorities. *Id.* This Court reasoned that because a pro se inmate loses control of the notice as soon as they hand the notice to prison authorities,

the prison authority should be treated as the clerk of the court. *Id.* at 267. The time of filing should be construed as the moment the inmate hands their mailing to the prison authorities. *Id.* The inmates hand the notice over to prison authorities without the ability to supervise, track, or prove delivery of the mailing. *Id.* at 271. This Court further explained that a pro se inmate cannot take the steps represented litigants can take to monitor their notice of appeal and ensure that the documents are timely filed. *Id.*

The Eleventh Circuit, in *United States v. Camilo*, determined whether a prisoner represented by counsel can trigger the prison mailbox rule simply by mailing their filings through the prison mailing system. *Camilo*, 686 Fed. App'x at 646. In *Camilo*, the appellant attempted to invoke the prison mailbox rule by mailing their appeal to the district court through the prison mailing system. *Id.* The appellant argued that he was acting as a pro se litigant and that the lower court improperly struck down his filing. *Id.* The court held that the appellant could not benefit from the prison mailbox rule. *Id.* The court reasoned that because the appellant was always represented by counsel, the inmate had the opportunity to communicate with the district court through his attorney, thereby not being limited to communicating through the prison staff. *Id.*

The Sixth Circuit, in *Cretacci v. Call*, addressed an appellant, who was an inmate, who mailed his complaint through the prison mailing system after discovering his attorney was not admitted to practice law in that district. *Cretacci*, 988 F.3d at 864–65. The court in *Cretacci* held that the prisoner could not invoke the

prison mailbox rule to make his filing timely. *Id.* at 867. The court reasoned that just because the prisoner himself filed the complaint through the prison mailing system, does not mean that he is proceeding without the assistance of counsel. *Id.* at 866–67.

Here, similar to the prisoners in *Camilo* and *Cretacci*, who were represented by counsel throughout their proceedings, the Respondent was represented by counsel and had the ability to communicate with his counsel about the status of his filing. (R. 6). Ms. Pegge drafted the Respondent's Notice of Appeal before becoming incapacitated. (R. 6). Additionally, Ms. Pegge left instructions for Forme as to how the Respondent's case was to be managed. (R. 6, 7). However, Forme did not assign the Respondent's case to another associate and did not actively contact Respondent. (R. 6, 7). The Respondent called and emailed Forme multiple times and eventually spoke with another attorney, Mr. Sharafi. (R. 7). Also like the prisoners in *Camilo* and *Cretacci*, when Mr. Sharafi informed the Respondent that there was not another attorney available to help him, and that he needed to submit his notice of appeal immediately, the Respondent used the prison mailing system to mail his Notice of Appeal. (R. 7).

Unlike the prisoner in *Houston*, who mailed his documents through the prison mailing system without being represented by counsel, here, the Respondent delivered his Notice of Appeal to the prison authorities while represented by Ms. Pegge. (R. 7). As a result, the Respondent is deemed to have had control of his Notice of Appeal when he handed the documents to Garum's authorities, precluding him from

benefiting from the prison mailbox rule. Therefore, this Court should adopt the reasoning explained in *Houston*, *Camilo*, and *Cretacci* because the Respondent is not pro se since he was represented by Ms. Pegge and therefore retained control of his Notice of Appeal after filing.

2. The Respondent Cannot Be Considered a Pro Se Inmate Because He Received the Benefit of His Counsel's Legal Skills.

When determining whether the prison mailbox rule applies, this Court has held that inmates that are represented by counsel cannot invoke the prison mailbox rule when the inmate benefits from the legal skills of counsel. *Houston*, 487 U.S. at 270–71. The unique situation of pro se prisoners, being unskilled in law and unaided by counsel, means that they cannot take the steps a represented litigant could to ensure their notice of appeal is filed timely. *Id.* at 266, 270. When counsel prepares legal documents on behalf of a prisoner and arranges for these documents to be signed and filed, the prisoner is proceeding with the assistance of counsel. *Stillman*, 319 F.3d at 1201. Specifically, where there exists an explicit attorney-client relationship between a prisoner and counsel, and counsel has researched, drafted, and written the notice of appeal for the prisoner, the prisoner has benefited from counsel's legal skills. *Cretacci*, 988 F.3d at 866.

This Court, in *Houston*, dealt with a petitioner who filed his notice of appeal through the prison mailing system without any assistance or representation of counsel. *Houston*, 487 U.S. at 266. This Court held that the petitioner was acting as a pro se litigant and was able to invoke the prison mailbox rule. *Id.* This Court reasoned that a pro se prisoner faces unique circumstances, such as being unskilled

in law, unaided by counsel, and unable to take the steps a represented litigant could to ensure the timeliness and correctness of their appeal. *Id.* This Court explained that the prison mailbox rule will apply to a pro se prisoner because a pro se prisoner faces distinctive circumstances in litigation since they do not have the access or readily available information that represented litigators have. *Id.* at 270–71.

In *Stillman v. Lamarque*, the Ninth Circuit dealt with a petitioner that was assisted in preparing and filing his habeas documents by an attorney who did not agree to be the petitioner's counsel. *Stillman*, 319 F.3d at 1201. The petitioner's attorney, on a pro bono basis, prepared pro se legal documents, called the prison to arrange for the signing of the habeas documents, and planned to mail the documents to the district court. *Id.* The court held that the petitioner could not benefit from the prison mailbox rule. *Id.* at 1202. The court reasoned that because the counsel prepared the legal documents and arranged for the documents to be signed and filed, the prisoner benefitted from the assistance of counsel. *Id.* at 1201.

In *Cretacci*, the Sixth Circuit dealt with an appellant who received the benefit of counsel. *Cretacci*, 988 F.3d at 863. The appellant's counsel pinpointed what legal issues to address, drafted the legal documents the prisoner needed, and attempted to file the documents for the appellant before the appellant mailed the documents through the prison's mailing system. *Id.* at 866. The court held that the appellant could not benefit from the prison mailbox rule because the appellant was represented by counsel. *Id.* The court reasoned that even though the appellant "filed" the

documents through the prison mailing system, he continued to benefit from the aid of his counsel. *Id.*

Here, the Respondent was benefitting from Ms. Pegge's aid. (R. 6,7). The Respondent proceeded consistently throughout the process of this litigation with the aid of Forme. (R. 6, 7). After Ms. Pegge drafted the Respondent's documents, Forme instructed the Respondent on how and when the Respondent should file his Notice of Appeal. (R. 6, 7). Forme continued to represent the Respondent even when Ms. Pegge was incapacitated. (R. 5, 6, 7). Similarly, in *Stillman* and *Cretacci*, both inmates were aided by counsel in all steps of their process. *Cretacci*, 988 F.3d at 867; *Stillman*, 319 F.3d at 1201. Unlike the prisoner in *Houston*, who represented himself, the Respondent was aided by counsel throughout the whole process. (R. 5, 6,7). Similar to the prisoners in *Stillman* and *Cretacci*, whose counsel provided all of the legal framework and documentation, the Respondent's Notice of Appeal's legal framework and documentation was also provided by Forme. (R. 5, 6, 7). Thus, the Respondent benefited from the assistance of counsel at all times, denying him the ability to be a pro se prisoner.

For these reasons, this Court should reverse the decision of the Fourteenth Circuit and hold that the Respondent cannot benefit from the prison mailbox rule because he did not lose control of his Notice of Appeal since he was represented by counsel.

B. The Respondent Has Not Satisfactorily Complied with the Requirements Under Federal Rules of Appellate Procedure 4(c)

Under Federal Rules of Appellate Procedure 4(c), "when an inmate files a notice of appeal in a civil or criminal case, the notice is timely if it is deposited into the prison mailing system and is accompanied by either a declaration in compliance with 28 U.S.C. § 1746, or a notarized statement, containing the date of deposit and stating that first-class postage is being paid." Fed. R. App. Proc. 4(c)(1)(A)(i). If there is no statement of date of deposit and postage, evidence of the date of deposit and of postage may accompany the mailing. Fed. R. App. Proc. 4(c)(1)(A)(i)–(ii). The court may exercise its discretion to permit the later filing of the declaration or notarized statement in order for the notice to be considered timely. Fed. R. App. Proc. 4(c)(1)(B). In cases where a prisoner has access to a legal mailing system, the prisoner must use the legal mailing system to benefit from the prison mailbox rule. Fed. R. App. Proc. 4(c)(1).

The Sixth Circuit, in *United States v. Smotherman*, analyzed the current version of the prison mailbox rule as outlined in Federal Rules of Appellate Procedure 4(c). *Smotherman*, 838 F.3d at 737–39. The statute, amended in December of 2016, required that prisoners provide declarations or notarized statements showing the date of mailing and that first-class postage was paid, or provide evidence highlighting the deposit and postage of the mailing. *Id.* at 738 (quoting Fed. R. App. Proc. 4(c)). In *Smotherman*, the appellant delivered his documents to the prison authorities with a declaration that complied with the statute. *Id.* at 739. The court held that the appellant could benefit from the prison mailbox rule. *Id.* The court reasoned that

the prison mailbox rule applied not only because the appellant was a pro se inmate, but because the appellant met the statutory requirements of the prison mailbox rule. *Id.*

Here, the Respondent allegedly mailed his Notice of Appeal through the Garum's legal mailing system on March 2nd, 2021. (R. 7). The last day for the Respondent's Notice of Appeal to be timely filed was March 3rd, 2021, making the documents submitted to the prison within the proper filing period. (R. 45). However, the Notice of Appeal did not include a declaration in compliance with 28 U.S.C. § 1746 nor a notarized statement outlining the date of deposit or whether first-class postage was paid. (R. 46). Here, the Respondent did not produce any evidence of postage in support of timely filing his Notice of Appeal. (R. 46, 47). Unlike the prisoner in *Smotherman*, who proceeded as a pro se litigant without aid from counsel, the Respondent was in an attorney-client relationship with Ms. Pegge and was consistently aided by Forme throughout the whole filing process. (R. 5, 7). Moreover, in *Smotherman*, the appellant filed his documents with proper evidence outlining the date the document was given to prison authorities and that the first-class postage was paid. *Smotherman*, 838 F.3d at 739. Here, the Respondent did not include any evidence of date nor of the postage of the mailing. (R. 47). Therefore, the Respondent does not meet neither the facial requirements of the statute nor the class of individuals that the statute applies to, thereby not satisfactorily complying with the statute.

C. The Legislative Intent Behind the Prison Mailbox Rule

The Federal Rules of Appellate Procedure state that when an inmate confined in an institution files a notice of appeal, the notice is timely if it is deposited into the prison's mailing system. Fed. R. App. Proc. 4(c). The purpose behind the prison mailbox rule is to address the unique situations that pro se inmates face when drafting and filing legal documents. *Smotherman*, 838 F.3d at 737–38 (quoting *Houston*, 487 U.S. at 273–74). Pro se inmates lack the liberty that represented inmates have to ensure the timeliness and delivery of their documents. *Houston*, 487 U.S. at 273–74. Essentially, the Federal Rules of Appellate Procedure codified the holding in *Houston*. *Id.*; *Brown v. Taylor*, 829 F.3d 365, 368 (5th Cir. 2016) (quoting *Houston*, 487 U.S. at 270–71); *Grady v. United States*, 269 F.3d 813, 916 (8th Cir. 2001) (quoting Fed. R. App. Proc. 4(c)). As such, the legislative intent behind the creation of the prison mailbox rule is to specifically protect pro se inmates. *Houston*, 487 U.S. at 270-71. To widen the scope of the rule to include inmates represented by counsel would over broaden the statute beyond its original intent, thus overwhelming the judiciary with arguments regarding the timing of the prisoner's filled documents. *Id.* at 283 (quoting *Thompson v. INS*, 375 U.S. 584, 390 (1964)).

As a result of the legislative intent, the majority of circuits have interpreted the rule as applying only to pro se inmate litigants. *Cretacci*, 988 F.3d at 867 (explaining that the rationale in *Houston* was specifically addressing the circumstances of pro se prisoners); *Camilo*, 686 Fed. App'x at 646 (explaining that the ruling in *Houston* created the rule and is the reason for extending it to only pro se

prisoners); *Brown*, 829 F.3d at 368–69 (explaining that Federal Rules of Appellate. Procedure 4(c) codified *Houston's* holding); *Stillman*, 319 F.3d at 1201 (stating that a requirement of the prison mailbox rule is proceeding as pro se); *United States v. Rodriguez-Aguirre*, 30 Fed. App'x 803, 805 (10th Cir. 2002) (stating that the rule applies when a prisoner files a motion as pro se); *Grady*, 269 F.3d at 916–17 (explaining that the process behind the codification of the prison mailbox rule relies on *Houston*). The minority of circuits, namely the Fourth and Seventh Circuit, have interpreted incorrectly this Court's reasoning in *Houston*. *May v. Mahone*, 876 F.3d 896, 898 (7th Cir. 2017); *Hurlow v. United States*, 726 F.3d 958, 963–64 (7th Cir. 2013); *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994). These circuits have interpreted *Houston's* holding as protecting all prison inmates and that inmate represented by counsel can still invoke the prison mailbox rule. *May*, 876 F.3d at 898; *Hurlow*, 726 F.3d at 963–64; *Moore*, 24 F.3d at 625.

The Sixth Circuit, in *Smotherman* outlines that the history and intent behind the prison mailbox rule is to protect pro se inmates from the problems of filing their legal documents with the courts through the prison. *Smotherman*, 838 F.3d at 737–38. The Sixth Circuit explained the disparities pro se prisoners face as opposed to represented inmates when it comes to filing their notices. *Id.* Pro se inmates lack control over their filing delays, lack evidence to corroborate the timeliness of their filings, and lack aid by counsel. *Id.* "Unskilled in law, unaided by counsel, and unable to leave the prison, a prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access

and the only information he will likely have the date he delivered the notice to those authorities and the date ultimately stamped upon it." *Id.* (quoting *Houston*, 487 U.S. at 266). As the prison mailbox rule was first formed in *Houston*, the codification of Federal Rules of Appellate Procedure 4(c) was based largely on this Court's ruling. *Smotherman*, 838 F.3d at 737 (quoting *Houston*, 487 U.S. at 270–71). Therefore, this Court should find that the Respondent cannot benefit from the prison mailbox rule because the legislature never intended for a represented inmate to benefit from the prison mailbox rule. Therefore, this Court should reverse the Fourteenth Circuit and hold that the Respondent cannot benefit from the mailbox rule and did not statutorily comply with Federal Rules of Appellate Procedure 4(c).

For these reasons, this Court should reverse the decision of the Fourteenth Circuit and hold that the Respondent cannot invoke the prison mailbox rule because the Respondent was aided by counsel and has not satisfactorily complied with the requirements under Federal Rules of Appellate Procedure 4(c).

II. A Prison Who Imposes a Blanket Ban Against Gender Affirmation Surgery, Without Permitting an Individualized Examination, Does Not Violate an Inmate's Eighth Amendment Right Where That Prison Provided Hormone Therapy, Thus Not Showing Deliberate Indifference to the Inmate's Serious Medical Need.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. Amend. VIII. "The Eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Edmo*, 935 F. Supp. 3d at 766 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1993)). Under the Eighth Amendment, society recognizes that inmates "retain the essence of human dignity inherent to all persons." *Id.* To establish an Eighth Amendment violation, a prisoner must satisfy

a two-prong test. *Kosilek*, 774 F. Supp. 3d at 85, 91. First, they must satisfy an objective prong that requires proof of a serious medical need. *Id.* at 85. Second, they must satisfy a subjective prong that mandates a showing of a prison administrator's deliberate indifference to that serious medical need. *Id.* at 91.

A. Gender Dysphoria Is a Serious Medical Need.

To establish a claim of inadequate medical care, a prisoner must first show a serious medical need. *Estelle*, 429 U.S. at 106; *Edmo*, 935 F. Supp. 3d at 785 (quoting *Jett v. Penner*, 439 F. Supp. 3d 1091, 1096 (9th Cir. 2006)). A serious medical need is a need that is diagnosed by a physician mandating treatment or one so obvious that a lay person could recognize the necessity of medical attention. *Kosilek*, 774 F. Supp. 3d at 82. A medical necessity is demonstrated by showing that a failure to treat an inmate's condition could result in further injury or unnecessary and wanton infliction of pain. *Edmo*, 935 F. Supp. 3d at 785; *Kosilek*, 774 F. Supp. 3d at 82. There is a consensus among several courts about the severity of gender dysphoria. *Edmo*, 935 F. Supp. 3d at 768; *Gibson*, 920 F. Supp. 3d at 217; *Kosilek*, 774 F. Supp. 3d at 86. Courts further agree that gender dysphoria may lead an individual to experience severe distress because of the discrepancy between the prisoner's gender identity and the prisoner's sex assigned at birth. *Edmo*, 935 F. Supp. 3d at 768 ("gender dysphoria is [a distress] . . . "); *Gibson*, 920 F. Supp. 3d at 217 (" . . . [gender dysphoria] is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."); *Kosilek*, 774 F. Supp. 3d at 86 ("[gender dysphoria] is a serious medical need, and one which mandates treatment . . . ").

Here, there is no doubt that Respondent has a serious medical need regarding his gender dysphoria. (R. 1). The Respondent was diagnosed with gender dysphoria in 2011 and continues to exhibit symptoms of his diagnosis. (R. 1). Prior to his incarceration, the Respondent received gender alignment therapies and treatment for gender dysphoria. (R. 1). The Respondent began to see improvement in his outlook of life and was responding well to his social transition in connection with his treatment. (R. 1). A year later, the Respondent was arrested, charged, and indicted. (R. 2). During his incarceration at Garum, the Respondent continued to receive therapy for his gender dysphoria, despite the hardships that Garum was facing during the Miasmic outbreak. (R. 3). Specifically, the Respondent was receiving masculinizing hormone therapy. (R. 18). The Respondent's grievances were also reviewed by psychiatrist Dr. Chewtes, by general physician, Dr. Laridum, and the Warden. (R. 20). The Respondent suffers from a serious medical need because of his gender dysphoria.

B. Garum Did Not Show Deliberate Indifference to the Respondent's Serious Medical Need Since Garum's Policy Was Written by Experienced Doctors and Garum Provided Masculinizing Hormone Therapy.

To establish a claim under the Eighth Amendment, there must be evidence of deliberate indifference to a serious medical need. *Edmo*, 935 F. Supp. 3d at 766. Deliberate indifference to a serious medical need of a prisoner constitutes cruel and unusual punishment. *Id.*; *Estelle*, 429 U.S. at 106. The claimant must allege acts or omissions sufficiently harmful to show deliberate indifference. *Farmer*, 511 U.S. at 835; *Estelle*, 429 U.S. at 106. It is not only deliberate indifference to physically

barbaric harm or torture, but also deliberate indifference that would offend "evolving standards of decency." *Estelle*, 429 U.S. at 106. A deliberate indifference is not only ignoring a current serious medical need but can also be ignoring a substantial risk to an inmate. *Farmer*, 511 U.S. at 847. An indifference to a need alone is not sufficient unless the deliberate indifference has the very purpose of causing harm or that the accused had knowledge that the harm would result. *See Edmo*, 935 F. Supp. 3d at 785.

The inmate must show that the prison acted with malicious intent. *Gibson*, 920 F. Supp. 3d at 220; *see Farmer*, 511 U.S. at 835. Medical negligence or an accident would not suffice as deliberate indifference. *Estelle*, 429 U.S. at 291–92. Rather, deliberate indifference must rise to the level of criminal recklessness. *Farmer*, 511 U.S. at 831; *Kosilek*, 774 F. Supp. 3d at 83. Generally, a person is reckless if he "acts or (if the person has a duty to act) fails to act in the face of an unjustifiably substantial risk of harm that is either known or so obvious that it should be known." *Farmer*, 511 U.S. at 836. "To show deliberate indifference, the [Respondent] must show the course of treatment the [Petitioner] chose was medically unacceptable under the circumstances and that the [Petitioner] chose this course in conscious disregard of an excessive risk to the [Respondent's] health." *Edmo*, 935 F. Supp. 3d at 786 (quoting *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016)). However, not every claim by a prisoner that they have not received adequate care violates the Eighth Amendment. *Estelle*, 429 U.S. at 105. The Eighth Amendment does not require prison administrations to provide care that is ideal or of the inmate's choosing.

Kosilek, 774 F. Supp. 3d at 82 (quoting *United States v. Derbes*, 369 F. 3d 579, 583 (1st Cir. 2004)). It solely requires that care does not fall under society's minimum standards of decency. *Id.* at 96.

1. Garum's Policy Is One Side of the Respected On-going Medical Debate Regarding the Necessity of Gender Affirmation Surgery.

There is an on-going medical debate on whether gender affirmation surgery is necessary to treat the serious medical need established by those who have gender dysphoria. *Gibson*, 920 F. Supp. 3d at 220. Courts have established that there is no intentional deprivation of care "if a genuine debate exists within the medical community about the necessity or efficacy of that care." *Id.* If there is a "substantial good faith argument dividing respected members of the expert medical community," there can be no Eighth Amendment violation. *Id.* at 220.

a. Experienced Medical Professionals Developed Garum's Gender Dysphoria Treatment Policy.

In *Edmo v. Corizon*, the Ninth Circuit analyzed the difference between medical professionals who are experienced with gender dysphoria versus those who have no experience with gender dysphoria. *Edmo*, 935 F. Supp. 3d at 787–92. During trial at the district court, several medical professionals testified about whether gender affirmation was necessary for the appellee. *Id.* The district court credited the opinions of the appellee's experts over the opinions of the appellant's experts. *Id.* at 787. The Ninth Circuit held that the district court did not err in crediting the appellee's experts over the appellant's experts. *Id.* at 788. The court reasoned that the experts for the appellee were more experienced than the experts for the appellant.

Id. at 787–89. The court noted that the experts for the appellee were "well qualified to opine on the medical necessity of [gender affirmation surgery]." *Id.* at 787. The appellee's experts had substantial experience treating patients with gender dysphoria and had experience evaluating whether gender affirmation surgery was medically necessary for patients with gender dysphoria. *Id.*

The First Circuit in *Kosilek v. Spencer* addressed the Massachusetts Department of Correction's (DOC) gender affirmation treatment policy developed by medical professionals. *Kosilek*, 774 F. Supp. 3d at 69. In *Kosilek*, the plaintiff brought an action against the defendant, DOC, alleging the DOC's policy constituted a deliberate indifference sufficient to violate the Eighth Amendment. *Id.* The policy refused to provide gender affirmation surgery to treat the plaintiff's gender dysphoria. *Id.* The court held that the defendant's refusal to grant the plaintiff the gender affirmation surgery was not sufficient to adhere to a claim under the Eighth Amendment. *Id.* at 96. The court reasoned that, "in answering the question, it is not the. . . court's belief about medical necessity that controls, but what is known and understood by the prison officials in crafting their policy." *Id.* at 91. The court noted that the prison solicited the opinion of multiple medical professionals and was presented with two alternative options. *Id.* The additional options were developed by different medical professionals to mitigate the severity of the plaintiff's mental distress. *Id.* The court based its holding on the premise that although disfavored by some, the choice of a medical option that is "presented by competent professionals

does not exhibit a level of inattention to a prisoner's needs rising to a constitutional violation." *Id.* at 92.

Here, Dr. Laridum is a board-certified physician licensed to practice medicine. (R. 12). Dr. Laridum was the Chief Physician at Hope State Hospital before she took on a role as the Division of Health Director of Garum. (R. 12). Dr. Laridum assembled a committee to review the inmate-care standard at Garum. (R. 12). The committee who reviewed the policy consisted of fifteen experienced physicians, with specialties that included general surgery, endocrinology, and plastic surgery. (R. 12, 13). Among the committee members is Dr. Chewtes, who has over twenty years of experience in psychiatry. (R. 13). Dr. Chewtes is the supervising psychiatrist at Garum and has treated approximately 100 patients with gender dysphoria, six of whom he is currently treating at Garum. (R. 13). Dr. Chewtes is also the doctor who treated and diagnosed the Respondent with gender dysphoria. (R. 13).

Here, when developing the policy and treatment plan for gender dysphoria, Dr. Chewtes directed the committee to review the WPATH standards. (R. 14). The committee educated themselves by reviewing the WPATH standards and evaluating how they would fit into Garum's policy. (R. 14). After thorough review of the WPATH standards, the committee unanimously voted to preclude gender affirmation surgery from the options of treatments for gender dysphoria. (R. 14). The committee agreed that despite the WPATH standards, there were many other adequate treatment plans, including hormonal therapy. (R. 14). Therefore, this Court should hold that there could not be deliberate indifference because the medical team that developed

Garum's policy was composed of experienced medical professionals whose purpose was to develop a treatment plan to benefit inmates with gender dysphoria.

b. Gender Affirmation Surgery Is Not the Only Adequate Treatment Under the WPATH Standards.

The First Circuit in *Kosilek v. Spencer* addressed the debate on whether gender affirmation surgery is the only adequate treatment for gender dysphoria. *Kosilek*, 774 F. Supp. 3d at 68–69. The court reiterated that there is no medical consensus on the necessity and efficiency of gender affirmation surgery. *Id.* at 114; *Gibson*, 920 F. Supp. 3d at 221. In *Kosilek*, the plaintiff, an inmate, brought an action against the defendant, DOC, alleging the DOC's refusal to provide gender affirmation surgery to treat the plaintiff's gender dysphoria constituted inadequate medical care. *Kosilek*, 774 F. Supp. 3d at 69. Although the plaintiff was not granted gender affirmation surgery, the plaintiff was receiving supportive psychotherapy, antidepressants, and hormones to cope with the symptoms of her gender dysphoria. *Id.* at 69, 89–90. The plaintiff, in response to these treatments, experienced a significant stabilization of her mental health. *Id.* at 90. The First Circuit held that the DOC's decision to deny gender affirmation surgery to treat the plaintiff's gender dysphoria was not sufficiently harmful to the plaintiff as to violate the Eighth Amendment because of the ongoing medical debate. *See id.* The court reasoned that "where two alternative courses of medical treatment exist, and both alleviate the negative effects within the boundaries of modern medicine, it is not the place of the court to . . . require that the DOC adopt the more compassionate of two adequate options." *Id.* at 90.

The Fifth Circuit reaffirmed this reasoning in *Gibson v. Collier*. *Gibson*, 920 F. Supp. 3d at 220. In *Gibson*, the appellant was a transgender prisoner who brought suit against the Director of Texas Department of Criminal Justice, alleging that the department's policy violated his Eighth Amendment right. *Id.* at 216, 218. The policy did not authorize gender affirmation surgery, nor an individualized assessment of the inmate. *Id.* at 217–18. The court held that the appellant's argument regarding the department's policy was flawed. *See id.* at 220–21. The court reasoned that the appellant failed to dispute the on-going medical controversy identified in *Kosilek*. *Id.* at 221. The court reaffirmed *Kosilek's* reasoning that there continues to be no consensus in the medical community about the necessity and efficiency of gender affirmation surgery. *Id.* The court went as far as to say that the WPATH standards of care reflect not a consensus, but "merely one side in a sharply contested medical debate" over gender affirmation surgery. *Id.* "Where there is a robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment. *Id.* at 220.

Unlike *Kosilek* and *Gibson*, the Ninth Circuit, in *Edmo*, provided great emphasis on the medical consensus of the WPATH standards. *Edmo*, 935 F. Supp. 3d at 770. However, they too did not stray away from the fact that not everyone suffering from gender dysphoria needs gender affirmation surgery to treat their symptoms. *See id.* The appellee in *Edmo* brought an action against the Idaho Department of Corrections, alleging that the department's failure to provide her with gender affirmation surgery violated her Eighth Amendment right. *Id.* at 767–68.

The Ninth Circuit affirmed the lower court's holding that gender affirmation surgery was necessary to treat the appellee. *Id.* at 793–94. However, in the court's reasoning, the Ninth Circuit went deep into the standards of the WPATH. *Id.* at 770. The court noted that the WPATH provides other "evidence-based treatment options for individuals with gender dysphoria," such as changes in gender expression and role, psychotherapy, and hormone therapy. *Id.* The court emphasized that gender affirmation surgery was the only adequate treatment under Edmo's specific circumstances of repeat castration attempts, thoughts of castration, and attempted suicide. *See id.* at 792–94.

Despite the holding in *Edmo*, the WPATH's own guidelines lists multiple options for gender dysphoria treatment. *Edmo*, 935 F. Supp. 3d at 770. Therefore, the guidelines imply a deference to medical professionals to decide which treatment may be adequate on a case-by-case basis. *See id.* One of such treatments includes the exact treatment provided to the Respondent in this case, hormone therapy. *Id.* at 770–71; (R. 4,18). Here, the Respondent argues that Garum violated his Eighth Amendment right because Garum failed to provide him with adequate treatment for gender dysphoria as provided by the WPATH. (R. 22). While at Garum, the Respondent was evaluated by Dr. Chewtes and was prescribed with masculinizing hormone therapy. (R. 4). The Respondent at no point attempted suicide, castration, or self-harm. (R. 4).

Here, this Court should adopt the reasoning established in *Kosilek* and *Gibson*, since the policy at Garum reflects one side of a well-respected debate amongst medical

professionals. (R. 14). The policy in this case presents a genuine dispute by medical professionals on whether gender affirmation surgery is necessary to treat gender dysphoria. (R. 14). Garum's policy requires that those who have been diagnosed with gender dysphoria be evaluated by a qualified mental health professional and psychiatrist. (R. 10). Despite Garum's policy to not provide gender affirmation surgery, the policy offers treatment for gender dysphoria, which includes mental health counseling, hormone therapy, and adjustments to the inmate's housing. (R. 10). The policy was developed by a committee of respected medical professionals with experience with gender dysphoria patients. (R. 14). The policy was crafted after review of standards of care for gender dysphoria and represents what the medical professionals hold to be true. (R. 14).

2. Garum Evaluated the Respondent's Serious Medical Need and There Was No Indication of a Future Risk of Substantial Harm.

An inmate's serious medical need is sufficiently harmful to trigger an Eighth Amendment claim if there is a particular risk faced by the prisoner. *Kosilek*, 774 F. Supp. 3d at 89. It is not enough to show the severity of a medical condition. *Id.* at 86. Instead, there must be an obvious "unreasonable risk of serious damage to future health" of the prisoner. *Id.* To be held accountable, the accused must continue to show deliberate indifference and fail to mitigate that risk. *Id.* at 85, 91. The relevant question would be whether the accused knew or should have known about a substantial risk, and nonetheless failed to respond to the substantial risk. *Id.*

a. Garum Did Not Show any Deliberate Indifference to the Respondent's Serious Medical Need Because the Respondent Was Evaluated and Treated for His Gender Dysphoria.

This Court, in *Estelle v. Gamble* addressed the issue of deliberate indifference by a prison where the prison evaluated the inmate. *Estelle*, 429 U.S. at 104–05. In *Estelle*, the respondent filed suit against the petitioner, claiming a failure to provide adequate medical care. *Id.* at 98. At the time, the respondent was provided several forms of treatment for his back pain and was assessed by multiple medical professionals. *Id.* at 99–100. However, the respondent argued that the appropriate form of treatment for his serious medical need constituted at least an x-ray exam of his back. *See id.* at 107. This Court held that the petitioner did not show deliberate indifference and that not providing an x-ray was, at most, medical malpractice. *Id.* This Court reasoned that the inmate had been evaluated by multiple medical professionals and provided multiple treatments for his pain. *Id.* This Court emphasized that although the case could have constituted medical malpractice, the petitioner's determination to evaluate the respondent and provide him treatment for his back pain, high blood pressure, and heart problems, could not rise to the level of deliberate indifference. *Id.*

The Fifth Circuit, in *Gibson*, also addressed the issue of deliberate indifference by a prison when considering the treatment given to the inmate. *Gibson*, 920 F. Supp. 3d at 219–20. In *Gibson*, the appellant was a transgender prisoner who sued the Director of the Texas Department of Criminal Justice, alleging that the department's policy showed a deliberate indifference to the appellant's serious medical need. *Id.*

at 218. The policy did not authorize gender affirmation surgery, nor an individualized assessment of whether surgery was necessary. *Id.* at 217–18. The court held that the appellee did not show deliberate indifference to the appellant's serious medical need. *Id.* at 224. The court reasoned that the appellee could not have been deliberately indifferent where the appellee continued to treat the appellant's gender dysphoria through mental health counseling and hormone therapy. *Id.* at 217, 224. The court noted that the appellee was not required to make an individualized assessment of the appellant because evidence of an individual assessment would not change the holding or reasoning since the inmate was being provided adequate treatment. *Id.* at 224.

Here, the Respondent was evaluated by a physician who was an expert in gender dysphoria and was provided hormone therapy as a treatment for his gender dysphoria. (R. 14, 18). Dr Chewtes, Garum's psychiatrist, evaluated the Respondent for his gender dysphoria, provided him with masculinizing hormone therapy, and allowed him access to weekly mental health counseling. (R. 18). The Respondent's response to his social transition and hormone therapy was so good that his outlook on life improved significantly. (R. 1, 17). Therefore, this Court should follow the holding and reasoning in *Estelle* and *Gibson* and find that the Petitioner could not have shown deliberate indifference because the Petitioner evaluated the Respondent, provided him with masculinizing hormone therapy, and provided him with weekly mental health counseling.

b. The Respondent's Medical Need Is Not Severe Enough to Alert Garum to a Future Risk of Substantial Harm.

The Fourth Circuit noted the severity of an inmate's medical necessity when it addressed the issue of deliberate indifference by a prison. *De'Lonta v. Johnson*, 708 F. Supp. 3d 520, 522 (4th Cir. 2013). In *De'Lonta v. Johnson*, the appellant sued the appellee, claiming a violation of her Eighth Amendment right when the prison denied her gender affirmation surgery. *Id.* at 522–23. The appellant suffered from severe anguish and attempted to castrate herself multiple times to the point of hospitalization. *Id.* at 522. The prison provided the appellant with constant therapy. *Id.* at 522–23. However, despite going to therapy, the inmate continued to exhibit an overwhelming desire to castrate herself which was provoked by the therapy. *Id.* at 522. The inmate gave warnings of her overwhelming thoughts of castration, yet the appellee continued to recommend therapy as treatment. *Id.* at 523. The court discussed the fact that despite knowing that therapy triggered the appellant's thoughts of castration, the appellee continued to provide therapy as a solution. *Id.* at 525. The court did not issue a ruling on the merits of this case. *Id.* at 526. However, they noted that gender affirmation may be necessary under the appellant's specific circumstances because the current treatment was provoking the appellants want to self-harm. *See id.* at 524, 526.

The Ninth Circuit, in *Edmo*, also noted the severity of the inmate's medical need when it addressed the issue of deliberate indifference by a prison. *Edmo*, 935 F. Supp. 3d at 792–93. In *Edmo*, the appellee had been at a substantial risk of self-castration, suicide, and would "self-medicate" by cutting her arms with a razor. *Id.*

at 797. The court held that the appellant had shown deliberate indifference to the appellee's serious medical need. *Id.* at 794. The court reasoned that the course of treatment chosen to alleviate the appellee's gender dysphoria was "medically unacceptable under the circumstances." *Id.* at 786. Since the prison knew of the extreme severity of the appellee's thoughts, the appellant showed indifference because they did not respond to the appellee's serious medical need by providing a form of treatment that was adequate. *Id.* at 786–87. The court reasoned that, considering the substantial risk of harm due to the appellee's thoughts of self-castration and suicide, the treatment provided by the appellant was insufficient. *See id.* The court noted the extremity of the appellee's mental health problems, such as her attempt to castrate herself on more than one occasion, her attempted suicide, and reports of her continued thoughts of castration, all contributed to the necessity of gender affirmation surgery. *Id.* at 772–74.

The First Circuit, in *Kosilek*, also noted the level of substantial risk when it addressed the issue of deliberate indifference by a prison. *Kosilek*, 774 F. Supp. 3d at 89. In *Kosilek*, although the appellee was not granted gender affirmation surgery, she was receiving supportive psychotherapy, antidepressants, and hormones to cope with the symptoms of her gender dysphoria. *Id.* at 69, 89–90. The court held that the appellee did not show sufficient harm or risk of harm to claim deliberate indifference by the appellant. *Id.* at 90. The court reasoned there was no risk of substantial harm since the prison was providing treatment which alleviated the appellee's gender dysphoria symptoms. *Id.* at 90–91.

Here, the Respondent never reached the level of substantial risk of harm like the inmates in *De'Lonta* and *Edmo*. (R. 4). Due to Miasmic, Garum began to instill extremely strict policies at the facility. (R. 3). A policy so strict that the inmates were held in their cells for most of the day with only short periods of time to shower and a brief period of recreation. (R. 3). Despite all the policies placed by Garum, the Respondent continued to receive hormone therapy. (R. 1). The Petitioner does not deny the symptoms that the Respondent had due to his gender dysphoria were severe. (R. 23). However, the Respondent's symptoms do not meet the level of self-castration, suicidal attempts, or self-harm. (R. 4). Additionally, there was no indication that the hormone therapy given to the Respondent was provoking any of these symptoms or thoughts. (R. 4). Therefore, this Court should find that the Respondent's symptoms were not substantial enough to alert Garum to a future risk of substantial harm because the Respondent never attempted suicide, castration, or self-harm and the hormone therapy alleviated his symptoms.

Garum could not have shown deliberate indifference because Garum evaluated the Respondent and the Respondent's medical need was not severe enough to alert to a future risk of substantial harm.

3. Garum Provided the Respondent with Adequate Medical Treatment, Which Included Masculinizing Hormone Therapy.

A court is not required to defer to the judgment of the prison doctors or administrators. *Edmo*, 935 F. Supp. 3d at 786. A court must determine the judgments of prison medical officials and the views of medical professionals in the field to determine whether the treatment given to the inmate was adequate. *Id.* The

care or treatment given must be acceptable but does not need be the most sophisticated or the care believed to be adequate by the inmate. *Gibson*, 920 F. Supp. 3d at 220; *Kosilek*, 774 F. Supp. 3d at 85 (quoting *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir. 1987)). It is the particular risk of harm faced by the inmate that's important, rather than the severity of the inmate's underlying medical condition. *Kosilek*, 774 F. Supp. 3d at 89.

The First Circuit addressed the issue of providing adequate treatment in replacement of gender affirmation surgery when discussing whether the inmate had a claim under the Eighth Amendment. *Kosilek*, 774 F. Supp. 3d at 89. In *Kosilek*, although the appellee was refused gender affirmation surgery, the appellee was receiving supportive psychotherapy, antidepressants, and hormones to cope with the symptoms of her gender dysphoria. *Id.* at 69, 89–90. The court established that the appellee's treatment plan was adequate. *Id.* at 89. The court reasoned that treatment given by the appellant was adequate because there was a lack of substantial risk of harm shown by the appellee. *Id.*

Unlike the First Circuit, the Ninth Circuit, in the case of *Edmo*, held that hormone therapy was inadequate. *Edmo*, 935 F. Supp. 3d at 770. The appellee brought an action against the Idaho Department of Corrections, alleging that the appellant's failure to provide her with gender affirmation did not constitute adequate care. *Id.* at 767. The appellant provided the appellee with hormone therapy. *Id.* at 772. However, the appellee attempted to castrate herself on more than one occasion, and attempted suicide. *Id.* at 772–74. The Ninth Circuit affirmed the lower court's

holding that gender affirmation surgery was necessary to treat the appellee. *Id.* at 786–87. However, the court noted that the WPATH provides other evidence-based treatment options for individuals with gender dysphoria, such as changes in gender expression and role, psychotherapy, and hormone therapy. *Id.* at 770; *see De'Lonta*, 708 F. Supp. 3d at 523. The court also noted that the need of the appellee's gender affirmation surgery to treat the appellee was only necessary under the specific circumstances of the case. *See Edmo*, 935 F. Supp. 3d at 786–87.

Here, the Respondent argues that the denial of gender affirmation surgery is contradictory to the WPATH standards, which the Respondent claims are widely accepted amongst the medical community. (R. 27). However, the Respondent fails to mention that although the WPATH standards are widely accepted, they are not the only view regarding the adequacy of gender affirmation surgery as a treatment for gender dysphoria. *Gibson*, 920 F. Supp. 3d at 221. Similar to the appellee in *Kosilek*, here, the Respondent was receiving treatment to alleviate the symptoms of his gender dysphoria, which included hormone replacement therapy. (R. 3). Also like the appellant in *Kosilek*, the Petitioner did not allege that the Respondent's gender dysphoria was not a medical need and provided the Respondent with another treatment for his gender dysphoria—hormone therapy. (R. 3). Hormone therapy is listed as one of the adequate treatments under the WPATH standards. *Edmo*, 935 F. Supp. 3d at 770; *see De'Lonta*, 708 F. Supp. 3d at 523.

Additionally, this case is distinguishable from *Edmo*. The Respondent's gender dysphoria does not rise to the same level of severity the appellee's gender dysphoria

does, in the case of *Edmo,* since the Respondent did not try to castrate himself, self-harm, or attempt to commit suicide. (R. 4). This is important to note because the court in *Edmo* held that gender affirmation surgery was necessary only under the appellee's specific circumstances. *See Edmo*, 935 F. Supp. 3d at 786. Here, the Respondent's circumstances differ because he never attempted to castrate himself, never had thoughts of castration, and never attempted suicide or self-harm. (R.4). Nothing the record indicates that the Respondent has alleged any risk of substantial future harm while on the hormone treatment plan since the Respondent has not tried any of these severe self-harm measures. Additionally, the Respondent's symptoms must be evaluated not only regarding his gender dysphoria, but regarding his gender dysphoria while considering the whole treatment plan. *See Kosilek*, 774 F. Supp. 3d at 90 (" . . . an assessment of the gravity of that risk, and its appropriate treatment, must encompass the entirety of the [prison's] treatment plan . . . ."). Therefore, this Court should hold that the Respondent cannot have a claim under the Eighth Amendment because the Petitioner provided the Respondent with adequate treatment which alleviated his symptoms of gender dysphoria.

For these reasons, this Court should reverse the Fourteenth Circuit and hold that the Petitioner's policy denying gender affirmation surgery did not violate the Respondent's Eighth Amendment since the Petitioner did not show deliberate indifference to the Respondent's serious medical need.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Court reverse the decision of the Fourteenth Circuit.

Respectfully Submitted,

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Counsel for the 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"

Rule 4(c) Appeal as of Right—When Taken

(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).