Team 2120

Docket 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

COUNSEL FOR PETITIONER
OCTOBER 22, 2021

QUESTIONS PRESENTED

I. Whether an inmate with legal counsel can benefit from the prison mailbox rule when filing a notice of appeal when that inmate's legal counsel was temporarily incapacitated.

II. Whether a prison's ban against providing gender affirmation surgery to inmates in favor of other adequate treatments constitutes a violation of the Eighth Amendment right against cruel and unusual punishment

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The United States District Court of Silphium's February 1, 2021, order granting summary judgment in favor of the Petitioner is unreported and set forth in the Record. Opinion of the District Court of Silphium, R. at 22–29. The United States Fourteenth Circuit Court of Appeal's August 1, 2021, opinion reversing the District Court's order is unreported and set forth in the Record. Opinion of the Fourteenth Circuit, R. at 30–44; Dissent Opinion of the Fourteenth Circuit, R. at 45–48.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions. Relevant portions are included in the Appendix:

U.S. Const. amend. VIII

28 U.S.C § 1291

28 U.S.C. § 2107

42 U.S.C. § 1983

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Posca adopts an expert-rendered policy. On his own initiative, Max Posca ("Posca"), warden and administrator of Garum Correctional Facility ("Garum"), commissioned a team of expert doctors ("Committee"), many who were experienced with treating gender dysphoria ("GD"), to review and revise Garum's sound medical policy. R. at 12. The Committee included Dr. Erica L. Laridum, a physician; Dr

Arthur Chewtes, a psychiatrist; Dr. Bergamot, a surgeon; Dr. Cordata an endocrinologist; Dr. Mitsuba a reconstructive plastic surgeon; and ten other renowned physicians. R. at 13. In August 2019, after the Committee reviewed Garum's policy, considered the World Professional Association for Transgender Health's ("WPATH Standards") most recent *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (2012), and discussed the matters—Posca implemented the expert doctors' recommendations in the Garum Medical Policy Handbook. R. at 15. In relevant portion, the policy states:

> **II. Treatment of GD.**
>
> A. Mental health counseling will be offered.
>
> B. Hormone Therapy shall be made available to the inmate if indicated by current, accepted standards of care. If hormone therapy is indicated, such therapy will be prescribed and monitored by a medical provider competent in such therapy. Division of Health will have final authority over the inmate's clinical plan of care.
>
> C. Surgical interventions are not provided for GD.

R. at 11. This case arises from a prisoner's disagreement with the doctor-backed policy. R. at 5.

The parties. Petitioner, Max Posca, is the warden and administrator of the Garum Correctional Facility, one of the largest prisons in the country. R. at 3, 5. Because of his position, Posca attended the Committee meetings, "but had no influence (nor a vote) on questions of medical treatment. Rather, his role was to provide information requested by the committee, and to formally approve the Handbook once the committee had done so." R. at 13.

Respondent, Lucas Escoffier ("Escoffier"), is a prisoner serving a five-year sentence at Garum Correctional Facility. R. at 2. Escoffier is a transgender man—he was assigned female at birth but began his transition to male in early adulthood after being diagnosed with GD. R. at 1. Escoffier socially transitioned by legally changing his name to Lucas Escoffier and adopting the pronouns "he," "his," and "him." R. at 1. In efforts to medically transition, Escoffier began hormone therapy and underwent reconstructive surgery to align his chest with his gender identity. R. at 1. Also, in December 2019, ten days before his arrest and three months before his incarceration, Escoffier, with the help of his doctor, made the decision to pursue gender affirmation surgery. R. at 1.

Escoffier commits fraud. Escoffier "was arrested, charged, and indicted with criminal tax fraud in the first degree and other underlying charges." R. at 2. Escoffier entered a guilty plea and on March 7, 2020, began his five-year prison sentence at Garum. R. at 2.

Miasmic syndrome sweeps across the globe. Shortly after March 7, 2020, a contagious, deadly disease called Miasmic Syndrome emerged as a pandemic. R. at 2. To protect public safety, "[p]eople were encouraged to remain six feet apart from others, refrain from gathering in enclosed spaces, wash hands vigorously and frequently, wear masks in public, and to quarantine as much as possible. Nearly all business transitioned to remote work, with only essential staff in person." R. at 2. Garum was hit particularly hard, so they enforced strict policies to manage the pandemic, including: "programming, job training, classes, and communal recreation

were cancelled;" inmates were confined to their cells; recreation time was shortened and limited to members of adjoining cells; and in-person visitations were prohibited. R. at 3. Further, court appearances and attorney visits were conducted by videoconference, but Garum only had five computers available for inmates. R. at 3. Inmates also had limited access to phones during this time. R. at 3–4.

Escoffier demands gender affirmation surgery. Once incarcerated, Escoffier experienced "serious depression, bouts of weight and hair loss, loss of appetite, severe anxiety and paranoia, and perpetual suicidal ideation." R. at 4. Although Escoffier continued the same hormone treatment that worked for him for years, he self-diagnosed these symptoms as products of his GD and told Garum staff he required gender affirmation surgery. R. at 4. Escoffier proceeded to meet with Garum's psychiatrist, Dr. Chewtes, to discuss his available treatment options. R. at 4. Due to Garum's policy, Escoffier was denied gender affirmation surgery. R. at 4. "Escoffier submitted several rounds of grievances to the Garum Correctional Facility Medical Department . . . . Each of his grievances underwent an investigation and a subsequent administrative review, and each was ultimately denied" due to Garum's policy. R. at 5.

Escoffier hires Pegge. Escoffier hired attorney Sami Pegge ("Pegge") to represent him. R. at 5. Pegge, who took the case pro bono, was a senior associate at Forme Curry—a firm with approximately twenty-five attorneys and accompanying staff. R. at 5. With Pegge's help, the instant case ensued. After the district court entered its order of final summary judgment in favor of Posca, Pegge agreed to

represent Escoffier in the appeal. R. at 6. Soon after this, Pegge contracted a severe case of Miasmic Syndrome—taking her out of work for over two weeks. R. at 6. During Pegge's bout, no one from Forme Cury contacted Escoffier, "[n]or were any of Pegge's matters properly transitioned to other members of the firm," even though she requested that her legal assistant transfer all inmate matters to another associate. R. at 6. Escoffier attempted to contact both Peggy and her law firm, Forme Cury, via telephone calls, voice message, and e-mail. R. at 7. On March 2, 2021, another Forme Cury associate, Hami Sharafi ("Sharafi") contacted Escoffier, informed him of Pegge's medical circumstances, and told Escoffier to immediately submit his Notice of Appeal to the prison mailbox. R. at 7. On the same day, Escoffier put the Notice of Appeal in the prison mailbox. R. at 7. Fortunately, Pegge recovered from Miasmic Syndrome and returned to work on March 12, 2021. R. at 7.

II. PROCEDURAL HISTORY

United States District Court of Silphium. On October 5, 2020, Escoffier filed a single claim under 42 U.S.C. § 1983 alleging Posca violated his Eighth Amendment rights by upholding Garum's policy and denying Escoffier from gender affirmation surgery. R. at 8, 22. Posca filed a motion to dismiss for failure to state a claim and the court, with agreement from both parties, converted the motion to dismiss into a motion for summary judgment. R. at 8. Since the court found the policy did not "constitute deliberate indifference to the needs of inmates with gender dysphoria," thus not violating the Eighth Amendment, it granted summary judgment in favor of Posca. Opinion of the District Court of Silphium, R. at 29.

Fourteenth Circuit Panel. Escoffier appealed the district's court's decision to the Fourteenth Circuit Court of Appeals. Opinion of the Fourteenth Circuit, R. at 30. The Fourteenth Circuit analyzed two issues on appeal: (1) whether Appellant timely filed his Notice of Appeal making the appeal proper before the court; and (2) whether the policy at Garum prohibiting outright gender affirmation surgery in favor of other medical treatments violates Appellant's Eighth Amendment rights. Opinion of the Fourteenth Circuit, R. at 32. Regarding the first issue, the Fourteenth Circuit applied the prison mailbox rule and found that Appellant's Notice of Appeal was timely filed. Opinion of the Fourteenth Circuit, R. at 39. Regarding the second issue, the Fourteenth Circuit found gender affirmation surgery is medically necessary in appropriate circumstances. Opinion of the Fourteenth Circuit, R. at 43. This led the Fourteenth Circuit to reverse the district court's decision and conclude that Garum's policy, which prohibits inmates from receiving gender affirmation surgery without undergoing individualized evaluations, violates the Eighth Amendment. Opinion of the Fourteenth Circuit, R. at 44.

Posca 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

Prison Mailbox Rule. The Fourteenth Circuit erred in finding that Escoffier's Notice of Appeal was timely filed. To receive the benefit of the prison mailbox rule, a confined inmate must not be represented by legal counsel at the

time of filing. Additionally, the confined inmate must depend upon the institution's internal mail system to file with the clerk of court.

In the present case, Escoffier was continuously represented by legal counsel. Even when Pegge was temporarily incapacitated by Miasmic Syndrome, Escoffier was still represented by the law firm, Forme Cury.

As a legally represented inmate, who did not depend upon the Garum's internal legal mail system, Escoffier was not entitled to benefit from the prison mailbox rule. Consequently, his Notice of Appeal was untimely.

Eighth Amendment Claim. The Fourteenth Circuit erred in finding that the Garum's Gender Affirmation Surgery ban was unconstitutional under the Eighth Amendment of the United States Constitution. To violate Respondent's Eighth Amendment rights, Escoffier must have received inadequate care for a serious medical need, and Posca, in his official capacity, must have acted with deliberate indifference in failing to treat Escoffier's serious medical need.

Escoffier suffers from gender dysphoria which is a serious medical need. However, the treatment Escoffier received was adequate. The WPATH Standards are a guideline for treating inmate-patients suffering with gender dysphoria, but it must not be fully followed to provide adequate care for gender dysphoria. Garum's treatment plan is an example of a treatment policy that does not fully follow the WPATH Standards because it precludes gender affirmation surgery, but still provides adequate treatment to the inmate-patient's medical needs. Mr. Escoffier received a variety of treatments to alleviate the symptoms of gender dysphoria

including: hormone treatment, psychotherapy, and was provided with additional observation to prevent any self-harm.

Additionally, Posca did not act deliberately indifferent to Mr. Escoffier's serious medical need by enacting a treatment plan that precluded surgical intervention for gender dysphoria. The treatment policy was crafted by a committee of medical professionals, a number of which are qualified to treat patients suffering with gender dysphoria. Also, providing Mr. Escoffier with additional security observation to try and prevent any self-harm or suicide attempts is not deliberately indifferent. Furthermore, it would be unfeasible for Garum to provide surgery to Mr. Escoffier in light of the current outbreak of Miasmic syndrome because it would put an additional burden on the prison's health system that would create a security risk.

Since the care Escoffier received was adequate and Mr. Posca did not act with deliberate indifference, there is no violation of Mr. Escoffier's Eighth Amendment rights.

ARGUMENT

Respondent Escoffier asserted a § 1983 claim against Petitioner Posca, alleging a violation of his rights under the Eighth Amendment. R. at 5. The District Court of Silphium entered final summary judgment in favor of Posca, finding that no such violation occurred. R. at 6. On appeal, the Fourteenth Circuit reversed and remanded the district court's final summary judgment. R. at 30.

I. THIS COURT SHOULD REVERSE AND REMAND BECAUSE THE LOWER COURT LACKED APPELLATE JURISDICTION OVER THE UNTIMELY NOTICE OF APPEAL.

Escoffier's notice of appeal missed the applicable filing deadline by over a week. R. at 32. The Fourteenth Circuit impermissibly exercised its adjudicatory powers over Escoffier's untimely appeal. R. at 44. This Court should reverse and remand the lower court's decision for lack of jurisdiction.

A. A timely notice of appeal is essential to establish appellate jurisdiction.

A federal court of appeal's jurisdiction is exclusively appellate. 28 U.S.C § 1291. Accordingly, federal appellate courts have a special obligation to determine whether they have jurisdiction before considering the appeal on its merits. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). This obligation is especially important when courts are deciding questions of constitutional law, such as the Eighth Amendment claim in the present case. *Id.*

This Court noted that a failure to comply with jurisdictional time prescriptions "deprives a court of its adjudicatory authority over a case." *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 (2017).

The jurisdictional time requirements for a civil appeal are set forth in 28 U.S.C. § 2107. A civil appeal must be filed within 30 days of the order or judgment to be appealed. *Id.* A failure to comply with this jurisdictional time prescription would deprive the appellate court of its jurisdiction over the case. *Hamer*, 138 S. Ct. at 17. Jurisdictional defects of this kind are not subject to waiver or forfeiture. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

This Court has stated, "[i]f the concept of a filing deadline is to have any content, the deadline *must* be enforced." *United States v. Boyle,* 469 U.S. 241, 249 (1985) (emphasis added). Failing to strictly enforce filing deadlines would encourage undesirably lax filing practices. *Id*. Therefore, as a matter of policy, filing deadlines are applied harshly and arbitrarily against any party that fails to meet their applicable filing deadlines. *United States v. Locke,* 471 U.S. 84, 100–101 (1985).

In the present case, the Fourteenth Circuit mistakenly determined that it had appellate jurisdiction over Escoffier's Eighth Amendment claim even though his notice of appeal was untimely. R. at 44.

The District Court of Silphium entered its final summary judgment on February 28, 2021. R. at 32. From that date, Escoffier had until March 2, 2021, to file a timely notice of appeal. 28 U.S.C. § 2107. However, the clerk of court did not receive Escoffier's notice of appeal until March 10, 2021—over seven days after the filing deadline had already expired. R. at 45.

Because Escoffier's notice of appeal was untimely, the Fourteenth Circuit was deprived of its jurisdiction over Escoffier's claim. Instead of dismissing the untimely appeal, the Fourteenth Circuit impermissibly exercised its adjudicatory powers by reversing and remanding the district court's final summary judgment in favor of Posca. R. at 44.

B. Escoffier's untimely notice of appeal cannot be rescued by the prison mailbox rule.

Despite the jurisdictional defect caused by Escoffier's untimely filing, the Fourteenth Circuit still claimed jurisdiction by erroneously applying the "prison mailbox rule." R. at 39.

Under the prison mailbox rule, a confined inmate's notice of appeal is constructively "filed" on the date it is delivered to the prison's internal legal mail system. Fed. R. App. P. 4(c). The rule arose as a judicially created doctrine to assist *pro se* prisoners who depend on their prison's internal mail system to file documents with the clerk of court. *See Fallen v. U.S.*, 378 U.S. 139, 144 (1964); *Houston v. Lack*, 487 U.S. 266, 271 (1988).

The doctrine has since been applied to a variety of different appellate filings. *See Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (applying the rule to civil complaints); *Jones v. Bertrand*, 171 F.3d 499, 501–02 (7th Cir. 1999) (applying the rule to habeas corpus petitions); and *Tapia–Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999) (applying the rule to administrative filings).

In the present case, the Fourteenth Circuit supported their erroneous application of the prison mailbox rule with three arguments: (1) it claimed that the prison mailbox rule applies to *all* confined inmates, regardless of whether they are represented by counsel; (2) it claimed that Escoffier was only passively represented when he filed and was therefore effectively proceeding without counsel; and (3) it noted that the Federal Rules of Appellate Procedure do not explicitly state that the

confined inmate needs to be proceeding without counsel in order to benefit from the prison mailbox rule. R. at 38–39.

These arguments were posited over and against a plurality of decisions holding that the prison mailbox rule categorically does not apply to prisoners with counsel. R at 37–38. Each of the Fourteenth Circuit's arguments will be addressed in turn.

1. The prison mailbox rule applies exclusively to *pro se* inmates because they have no choice but to entrust their filings to the prison mail system.

In creating and discussing the prison mailbox rule, this Court noted, "[t]he situation of prisoners seeking to appeal without the aid of counsel is unique." *Houston*, 487 U.S. at 270. The doctrine seeks to address the unique difficulties faced by *unrepresented* prisoners—particularly because these prisoners depend entirely on the prison mail system to file documents with the clerk of court. *Id.* (emphasis added). A plurality of Circuit Court decisions agrees with this characterization of the prison mailbox rule and its intended purpose.[1]

In *Burgs v. Johnson County, Iowa*, the Eighth Circuit held that an inmate could not benefit from the prison mailbox rule because he was represented by counsel at an earlier point in the case, and he could have relied on that counsel to file a timely notice of appeal. 79 F.3d 701, 702 (8th Cir. 1996). Furthermore, the Eighth Circuit said in *Nichols v. Bowersox*, "[t]he prison mailbox rule traditionally

[1] Courtenay Canedy, The Prison Mailbox Rule and Passively Represented Prisoners, 16 Geo. Mason L. Rev. 773 (2009

and appropriately applies only to pro se inmates . . . .” 172 F.3d 1068, 1074 (8th Cir. 1999), *abrogated by Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (abrogated on other grounds).

In *Cousin v. Lensing*, the Fifth Circuit held that a prisoner represented by counsel could not benefit from the rule because the rationale behind the prison mailbox rule “does not support application . . . to prisoner litigants who are represented by counsel.” 310 F.3d 843, 847 (5th Cir. 2002).

In *United States v. Rodriguez-Aguirre*, the Tenth Circuit held that the prison mailbox rule did not apply to a delayed filing caused by the inmate’s counsel’s failure to account for mailing delays. 30 Fed. Appx. 803, 805 (10th Cir. 2002). The court stated, “Counsel should be aware of the potential for delay and is in a position to take precautions to ensure timely filing.” *Id.*

In *Stillman v. LaMarque*, the Ninth Circuit stated that in order for a party to benefit from the prison mailbox rule, “the prisoner must be proceeding without assistance of counsel.” 319 F.3d 1199, 1201 (9th Cir. 2003).

Likewise, in *United States v. Camilo*, the Eleventh Circuit held that the prison mailbox rule did not protect a late filing from a represented prisoner, stating that the rule “. . . was not intended to help prisoners with counsel, so it does not apply.” 686 Fed. Appx. 645, 646 (11th Cir. 2017).

Recently, in *Cretacci v. Call*, the Sixth Circuit agreed with the majority of its sister courts in affirming, “[t]he prison mailbox rule was created to prevent pro se prisoners from being penalized by any delays in filing caused by the prison mail

system." 988 F.3d 860, 867 (6th Cir. 2021). In the context of civil complaints, the Sixth Circuit held that the prison mailbox rule applies exclusively to *pro se* prisoners. *Id.*

All of the foregoing decisions drew a distinction between *pro se* inmates and inmates with legal counsel. Unlike inmates with legal counsel, a *pro se* inmate cannot physically travel to a courthouse to hand their papers to the clerk of court. Likewise, they cannot visually confirm receipt of their filing with the clerk.

In fact, *pro se* prisoners have no choice but to entrust their filings to the prison's internal legal mail system. They are forced to surrender control of their filing to a prison staff, who may or may not deliver documents to the clerk of court on time, and in some extraordinary circumstances, might even be hostile to the success of a prisoner's appeal.

This Court has explicitly acknowledged the concerns faced by *pro se* prisoners. *Houston*, 487 U.S. at 270. "Unskilled in law, unaided by counsel, and unable to leave the prison, a *pro se* prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over . . . ." *Id.* at 266. Without the prison mailbox rule, the timeliness of a *pro se* inmate's filing would depend entirely on the diligence and good will of the institution that binds him.

In contrast, an inmate represented by legal counsel is not entirely dependent on the prison mail system to file documents with the court. These inmates face many of the same difficulties as pro se inmates, however, constraints to their ability to file outside of the prison system are mitigated by the fact that these inmates have

representatives on the outside. These representatives can take any measures necessary to ensure that an inmate's Notice of Appeal is received by the clerk of court on time. In this regard, a confined inmate with legal counsel is essentially in the same position as a nonincarcerated party with legal counsel; while represented inmates and *pro se* inmates are in fundamentally different positions in terms of having opportunities to file outside of the prison mail system.

This distinction is further illustrated by the fact that even *pro se* inmates can be denied the benefits of the prison mailbox rule if they forward their documents to outside parties for filing – even if that third party is not an attorney. *Knickerbocker v. Artuz*, 271 F.3d 35, 36 (2d Cir. 2001).

In *Knickerbocker*, the Second Circuit Court held that the prison mailbox rule did *not* apply when a *pro se* prisoner chose to forward his appeal to his sister for filing. *Id.*; See also *Wilder v. Chairman of the Cent. Classification Bd.*, 926 F.2d 367, 370 (4th Cir.1991) (holding that the policy underlying *Houston v. Lack* did not apply when an inmate addressed documents to a friend, effectively placing them outside the control of prison authorities).

From the foregoing cases, this Court may confidently infer that a prisoner loses the benefits of the prison mailbox rule when that prisoner has opportunities to file outside of the prison's legal mail system—even if the prisoner does happen to be proceeding *pro se*.

In the present case, however, there is no question that Escoffier is not a *pro se* inmate. R. at 35. At every stage of this controversy, Escoffier has been legally

represented by Pegge, a senior associate of Forme Cury. R at 35. Pegge and Forme Cury represented Escoffier before the District Court of Silphium and continued to represent him before the Fourteenth Circuit Court of Appeals. R. at 35.

As an inmate represented by legal counsel, Escoffier is categorically not the type of inmate that is entitled to the benefits of the prison mailbox rule. *Cretacci*, 988 F.3d at 867. Therefore, the lower court erred in extending privileges intended for *pro se* filers to Escoffier's untimely notice of appeal.

2. When Escoffier's counsel was temporarily incapacitated by Miasmic Syndrome, Escoffier was still represented by Forme Cury.

The lower court's decision suggests that Escoffier was effectively proceeding without counsel when he filed his Notice of Appeal. R at 38–39. They cite the Fourth Circuit's contention in *United States v. Moore* that a prisoner filing an appeal on his own is acting "without the aid of counsel," even if he the prisoner is "passively" represented. 24 F.3d 624, 625 (4th Cir. 1994).

This argument lacks merit in the present case, however, because Escoffier was not only represented by Forme Cury when he deposited his notice of appeal; he was acting on the advice of an attorney from Forme Cury when he did so. R. at 7.

Although Pegge was unable to prepare and submit Escoffier's appeal herself, she did put Escoffier on notice that it must be signed and submitted by early March. R. at 6. Additionally, Pegge took measures to ensure that Escoffier would be continuously represented by Forme Cury during her hospitalization. R. at 6–7.

Pegge instructed her legal assistant to transfer management of "all inmate matters" to another associate at the firm. R at 6–7. With approximately 25 civil litigators and forty staff members, Forme Cury was more than capable of handling Escoffier's appeal. R. at 5. Unfortunately, despite Pegge's precautions, the firm failed to properly calendar Escoffier's case. R. at 7. Consequently, his appeal was largely neglected. R. at 7.

Despite these trying circumstances, Escoffier still fundamentally had access and opportunity to file his notice of appeal outside of the prison mail system. As Judge Chang of the Fourteenth Circuit noted in his dissent, Escoffier was not entirely precluded from receiving legal assistance from Forme Cury. R. at 45–48.

Escoffier was able to call the firm on three separate occasions. R. at 7. He even left a voice message requesting assistance with his Notice of Appeal. R. at 7. He was also able to use the prison computer to send an e-mail to Forme Cury's general inbox. R. at 7.

Unfortunately, Escoffier did not receive a response from Forme Cury until the impending deadline had already arrived. R. at 7. Even though Pegge is a senior associate who oversees most of the firm's incarcerated clients, none of Forme Cury's attorneys or staff answered Pegge's phone or checked her voicemail for urgent messages like the one left by Escoffier. R. at 7. The firm also took over 24 hours to respond to Escoffier's e-mail. R. at 7.

Clearly, Escoffier received inadequate assistance from his representation, however, Forme Cury was still indisputably charged with representing him. R. at

36. Insofar as Escoffier received inadequate legal assistance, it was due to his representation's poor case management, not a lack of representation.

This is best illustrated by the fact that Escoffier ultimately entrusted his notice of appeal to the prison mail system because Sharafi, an associate of Forme Cury, told him to do so. R. at 7. Knowing that he was unfamiliar with the case, Sharafi advised Escoffier to mail the notice of appeal himself. R. at 7. Sharafi gave legal advice calculated to take advantage of the prison mailbox rule and Escoffier chose to follow that legal advice from his counsel. R. at 37. Therefore, Escoffier still had legal counsel when Pegge was temporarily hospitalized with Miasmic Syndrome.

Unfortunately for Escoffier, his counsel's failure to account for deadlines is not an acceptable excuse to apply the prison mailbox rule. *Rodriguez-Aguirre*, 30 Fed. Appx. at 805.

3. The 1993 amendment of Federal Rules of Appellate Procedure did not extend the prison mailbox rule to all confined inmates.

The dissenting justices in *Houston v. Lack* conceded that the prison mailbox rule might ultimately be desirable as a matter of policy, but they suggest that it should have been adopted as an amendment to the Federal Rules of Appellate Procedure instead. *Houston*, 487 U.S. at 284 (Scalia, J., dissenting).

Nearly a year after the *Houston* decision, this Court adopted Supreme Court Rule 29.2, a partial codification of the prison mailbox rule; and in 1993, Federal Rule of Appellate Procedure 4(c) was amended to include the rule as well.[2]

Rule 4(c) reads, "[i]f [a confined] 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 . . ."

Notably, the language of Rule 4(c) does not explicitly say that the confined inmate must be proceeding *pro se* to benefit from the prison mailbox rule.

Seizing on this omission, the Seventh Circuit held that the prison mailbox rule applies to both *pro se* inmates *and* legally represented inmates. *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). They argued, "[a] court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd." *Id*.

However, as discussed earlier, the Seventh Circuit's sister courts have not read the 1993 amendment to Rule 4(c) as overturning the principle that the rule applies exclusively to *pro se* inmates.

In fact, even the Seventh Circuit itself continued to acknowledge and accept this principle for a number of years after Rule 4(c) was adopted in 1993. *See Rutledge v. U.S.*, 230 F.3d 1041, 1052 (7th Cir. 2000) ("[W]e hold that the mailbox rule does not apply to prisoners who are represented by counsel.").

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[2] Catherine T. Struve, *The Federal Rules of Inmate Appeals*, 50 Ariz. St. L.J. 247 (2018)

In light of the broad consensus that the prison mailbox rule applies exclusively to *pro se* inmates, even in the years after 1993, it would be unreasonable to apply a decontextualized reading of Rule 4(c) that finds otherwise. Accordingly, this Court should reject the lower court's reading of Rule 4(c).

4. Even if Federal Rule of Appellate Procedure 4(c) did apply to all confined inmates, Escoffier's notice of appeal was still deficient under the requirements of Rule 4(c)(1)(A).

Federal Rule of Appellate Procedure 4(c)(1)(A)(I) requires that an inmate's filing must be accompanied by "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 . . . ." Alternatively, under Rule 4(c)(1)(A)(II), the inmate may provide evidence showing the notice of appeal was deposited with prepaid postage.

To satisfy this requirement, Escoffier provided the lower court with a "Garum Correctional Facility Mailing Certificate." R. at 21. This Mailing Certificate did not satisfy either of the above requirements.

The Mailing Certificate was not accompanied by a declaration of compliance with 28 U.S.C. § 1746. R. at 21. It also did not include a notarized statement establishing the date of deposit and the use of prepaid first-class postage. R. at 21.

With no declaration of compliance or notarized statement, Escoffier should have provided some other form of evidence in accordance with Fed. R. App. P. 4(c)(1)(A)(II). Again, the Mailing Certificate failed to provide sufficient evidence that

Rule 4(c)'s requirements were satisfied. Admittedly, it did indicate that Escoffier deposited *a* document with Garum Correctional Facility. R. at 21. It also provided evidence that Escoffier used pre-paid postage. R. at 21. However, as Judge Chang of the Fourteenth Circuit noted in his dissent below, the Mailing Certificate conspicuously failed to indicate that the deposited document was, in fact, Escoffier's Notice of Appeal. R. at 46–47.

The Fourteenth Circuit's decision to extend the rule to Escoffier was partially predicated on their strict construction of Rule (4)(c). R. at 39. It would be inappropriate, then, to allow the lower court to simultaneously find jurisdiction through a loose construction of the procedural requirements under Rule 4(c)(A)(1)(II)—which requires evidence that Escoffier deposited the notice of appeal itself, not an ultimately unidentifiable document.

Despite this defect, the Fourteenth Circuit, if it had chosen to do so, could have exercised discretion under Rule 4(c)(B) to "permit the later filing of a declaration or notarized statement that satisfies Rule (4)(c)(A)(I)." The lower court did not exercise this discretion. It simply accepted Escoffier's Mailing Certificate as sufficient evidence of his compliance. R. at 39.

Therefore, even if the prison mailbox rule applies equally to *all* confined inmates, a contention that Petitioner rejects, Escoffier's notice of appeal was still deficient. As the Seventh Circuit has previously noted, an inmate must fully comply with Rule 4(c) in order to receive its benefits. *Craig*, 368 F.3d at 740.

Ultimately, the lower court erred in applying the prison mailbox rule in the first place. Escoffier was represented by legal counsel. R. at 5. When Escoffier's counsel was temporarily hospitalized, he was still represented, albeit incompetently, by Forme Cury. R. at 7. Therefore, the Fourteenth Circuit should not have applied the prison mailbox rule to Escoffier's notice of appeal.

Because the prison mailbox rule does not apply to Escoffier's notice of appeal, it was untimely under 28 U.S.C. § 2107 and Fed. R. App. P. 4. Therefore, this Court should reverse and remand the Fourteenth Circuit's decision because it lacked jurisdiction.

Failing that, this Court should still reverse the lower court's holding because Escoffier's substantive Eighth Amendment claim is meritless.

II. THIS COURT SHOULD REVERSE THE DECISION BELOW BECAUSE GARUM'S PRECLUSION OF GENDER AFFIRMATION SURGERY DOES NOT VIOLATE THE EIGHTH AMENDMENT.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. U.S. Const. amend. VII. The courts look at the evolving standards of society over time when evaluating whether a punishment is cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This Court found that the government is obligated to provide medical care for incarcerated individuals. *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). In *Estelle*, this Court held that an inmate's Eighth Amendment rights are violated when a prison acts with deliberate indifference to the inmate's serious medical needs. *Id.* at 104.

To properly show an Eighth Amendment violation due to inadequate medical care, an inmate must satisfy a two-prong test: "(1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). It is not required that a serious medical need is treated with a perfect plan, but the treatment must reasonably fall within prudent professional standards. *Estelle*, 429 U.S. at 103–05. Even if treatment received is inadequate enough to satisfy the first prong it must be shown that prison administrators also acted with "deliberate indifference" to the serious medical need. *Id.* at 105–06.

Therefore, Escoffier does not have a valid Eighth Amendment claim because the treatment received was adequate and Posca did not act deliberately indifferent to Escoffier's serious medical need.

A. Garum's treatment plan includes adequate treatments for gender dysphoria even while precluding gender affirmation surgery.

Escoffier has a serious medical need which is evidenced by Dr. Chewtes diagnosis of gender dysphoria. R. at 18. However, to satisfy the objective prong of an Eighth Amendment claim, an inmate-patient must also show that they received inadequate care for their medical need. *Estelle,* 429 U.S. at 106. This court has found medical care to be inadequate when the care received shocks the conscience. *Id*. This Court has relied on evolving standards of decency of society to determine what shocks the conscience. *Trop*, 356 U.S. at 101. However, Justice Scalia noted

that courts should view evolving standards of decency to determine not what they should be, but what they are. *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005). While the final holding in *Stanford* was eventually abrogated, Justice Scalia's reasoning was not. *Roper*, 543 U.S. at 564 (Relying on national consensus against the death penalty for juveniles to determine that punishment is cruel and unusual).

Difference in opinion between medical providers is not enough to find that care is inadequate. *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), *cert. denied sub nom. Idaho Dept. of Correction v. Edmo*, 141 S. Ct. 610 (2020) (holding that if treatment provided to an inmate is adequate there is no Eighth Amendment violation, even if another medical provider would have given another type of treatment).

1. The WPATH Standards do not set the minimum standard for adequate treatment of gender dysphoria.

There have been multiple circuit court cases where inmate-patients have claimed that not receiving gender affirmation surgery was inadequate treatment because the WPATH Standards were not fully followed. *See Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014) (en banc) (inmate used expert witness at trial to attempt to show that WPATH must be followed to adequately treat gender dysphoria); *Gibson v. Collier*, 920 F.3d 212, 218 (5th Cir. 2019) (inmate attempted to use WPATH to support that gender affirmation surgery is medically necessary); *Edmo*, 935 F.3d at 767 (inmate claimed that WPATH Standards is an appropriate benchmark for treating gender dysphoria).

However, not following the WPATH Standards fully should not automatically make treatment inadequate. *Gibson v. Collier*, 920 F.3d 212, at 222 (5th Cir. 2019) (holding that the WPATH Standards do not decide the baseline treatment for inmates struggling with gender dysphoria). Specifically, a prison deciding to deviate from the WPATH Standards and precluding gender affirmation surgery should not mean the prison is unable to provide other treatments that are adequate. *Id.* (There is no medical consensus that gender affirmation surgery is medically necessary to treat gender dysphoria).

The First Circuit has provided the most detailed analysis of the WPATH Standards by any court to date.

The court looked at the text of the WPATH Standards to determine what role the document plays in treating patients with gender dysphoria. *Kosilek v. Spencer*, 774 F.3d at 87. The Court noted that the text of the WPATH Standard states that "the Standards of Care are Clinical *Guidelines*" and are "intended to provide *flexible* directions" to medical professionals in crafting treatment plans. *Id.* (emphasis added).

The court also looked at the expert testimony provided by Dr. Stephen Levine to the trial court. *Id.* at 77. Dr. Levine helped author the fifth version of the Standards of Care. *Id*. Specifically, the court looked at a report authored by Dr. Levine which discussed the focus of the WPATH in writing the Standards. *Id.* Dr. Levine stated in his report that the WPATH is "supportive" to those who want gender affirmation surgery, and that skepticism and alternative views were not well

tolerated. *Id.* at 78. Dr. Levine also wrote that the WPATH Standards are not a politically neutral document because WPATH strives to be both a scientific and an advocacy group for the transgendered. *Id*. Dr. Levine further testified that prudent professionals can reasonably differ as to what is at least minimally adequate treatment. *Id*. at 87.

Looking at the text of the WPATH Standards and the testimony of Dr. Levine brought the First Circuit to its ultimate conclusion: the WPATH Standards provide for "significant flexibility" in their "interpretation and application." *Id.* Therefore, there can be more than one adequate way to treat an inmate suffering with gender dysphoria and not providing gender affirmation surgery is not automatically inadequate treatment. *Id*. at 96. The Fifth Circuit agreed with this reasoning in relation to the WPATH Standards. *Gibson*, 920 F.3d at 223 ("the unmistakable conclusion that emerges from the testimony is this: There is no medical consensus that sex reassignment surgery is necessary or even effective treatment for gender dysphoria").

This Court should recognize the WPATH Standards for what they are – flexible, biased guidelines that serve to guide medical professionals in their treatment of gender dysphoria. However, they need not be followed wholly to provide adequate treatment.

2. There are adequate forms of treatment for gender dysphoria even when gender affirmation surgery is not provided.

There is genuine medical debate about the efficacy and necessity of providing gender affirmation surgery to inmate-patients struggling with gender dysphoria. *Gibson*, 920 F.3d at 221. The Fifth Circuit found that gender affirmation surgery is never medically necessary to properly treat gender dysphoria. *Id*. (holding that respected doctors profoundly disagree about whether gender affirmation surgery is medically necessary). Additionally, courts have found there are adequate means to treat inmate-patients with gender dysphoria outside of gender affirmation surgery. *See Kosilek*, 774 F.3d at 96 (Department of Corrections directly treated gender dysphoria even without providing gender affirmation surgery).

In *Kosilek*, the Massachusetts Department of Corrections ("DOC") declined to provide Gender Affirmation Surgery to an inmate-patient with gender dysphoria in light of all the other treatments the DOC was providing to the inmate-patient. *Id.* at 89. The inmate-patient was being provided with the following treatments: hormone, electrolysis, feminine clothing and accessories, and mental health services. *Id*. The First Circuit held that even though the DOC did not provide gender affirmation surgery to the inmate-patient, the treatment was not inadequate. *Id* at 90 ("The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries in modern medicine, it is not the place of court to 'second guess medical judgments' or to require that the DOC adopt the more compassionate of two adequate options").

Granted, in *Kosilek*, the DOC's policy did not preclude gender affirmation surgery, but this confirms that there is adequate treatment outside of providing gender affirmation surgery. When there are multiple adequate forms of treatment the courts should defer to the medical professionals providing treatment.

3. Escoffier received adequate treatment under Garum's treatment policy.

Under the Garum's policy for treating inmate-patients suffering with gender dysphoria there are a wide range of treatments available. R. at 10–11. Inmate-patients at Garum with documented or claimed history of gender dysphoria receive comprehensive physical and mental health evaluations. R. at 10. Inmate-patients who are determined to have gender dysphoria will then receive mental health counseling, hormone therapy, and housing adjustment if they are recommended by the inmate-patients provider and are feasible for security purposes. R. at 11. Even though Escoffier was not evaluated for gender affirmation surgery by Dr. Chewtes due to the prison's policy, he still received other forms of care from the prison. R. at 19.

After being evaluated by Dr. Arthur Chewtes, M.D., Escoffier was recommended for: (1) continued masculinizing hormone therapy that is consistent with pre-detention usage, (2) weekly mental health counseling that would continue for either the full duration of detention or until complete remission of gender dysphoria symptoms, and (3) hourly observation by custody. R. at 18.

Garum's medical treatment policy is a specific example of a treatment plan that can adequately treat inmate-patients suffering with gender dysphoria without

considering the inmate for gender affirmation surgery. The inmate-patients are still eligible to receive hormone therapy, mental health counseling, and can receive regular observation to protect patients from self-harm. It is not the function of the courts to enter the province of medical professionals and determine treatment plans contrary to those developed by doctors. This would set a dangerous precedent of judicial interference

B. Garum did not act with deliberate indifference to Escoffier's serious medical need by precluding gender affirmation surgery.

"Deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). To satisfy the subjective prong of an Eighth Amendment claim the inmate must show that "officials acted with a sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). An official negligently or inadvertently failing to provide adequate medical care is not "an unnecessary and wanton infliction of pain" or "repugnant to the conscience of mankind." *Estelle*, 429 U.S. at 105–06.

To be deliberately indifferent prison administration must disregard an excessive serious risk to inmate health and safety. *Farmer*, 511 U.S. at 837. The Fifth Circuit has held that until a medical treatment is universally accepted and there is no genuine debate within the medical community about the necessity of the care there can be no intentional or wanton deprivation of care. *Gibson v. Collier,* 920 at 219 (quoting *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997)).

1. The prison administration did not disregard the risk of harm to inmates when crafting Garum's gender dysphoria treatment policy.

It is not enough to show that gender affirmation surgery is the only medically adequate treatment, it must also be shown that Garum was or should have been aware of this and failed to respond appropriately. *Wilson v. Seiter*, 501 U.S. at 298. When enacting medical policies, it is not indifferent for prison administration to consult multiple medical professionals. *Kosilek*, 774 F.3d, at 91. "The choice of a medical option that, although disfavored by some in the field, is presented by competent medical professionals does not exhibit a level of inattention or callousness to a prisoner's needs rising to a constitutional violation." *Id.* at 91–92.

Posca used a team of medical professionals before deciding to implement a blanket ban on gender affirmation surgery. R. at 14. Posca asked Erica Laridum, M.D., who is a board-certified physician licensed to practice medicine in Silphium since 1989, to take a temporary role as the Division of Health Director of Garum. R. at 12. Dr. Laridum was tasked with assembling a committee to review the inmate-care standards at Garum. R. at 12. Dr. Laridum assembled a fifteen-person committee made up of physicians throughout Silphium. R. at 13. Dr. Arthur Chewtes, the supervising psychiatrist at Garum, was a member of this committee. R. at 13.

Dr. Chewtes has more than twenty years of experience in psychiatry and has treated approximately one-hundred patients with gender dysphoria. R. at 13. The committee included: Dr. Bergamot, a general surgeon who has practiced since 1990;

Dr. Cordata, who specializes in endocrinology and has practiced since 1992; and Dr. Mitsuba, a plastic surgeon, who specializes in reconstructive procedures and has practiced since 1988. R. at 13.

When the committee was developing the treatment plan for inmate-patients with gender dysphoria, Dr. Chewtes directed the committee to the WPATH Standards of Care. R. at 14. The committee carefully considered the several treatment options included in the WPATH Standards. R. at 14. Even though the WPATH Standards includes the consideration of gender affirmation surgery, Dr. Cordata believed that there were many other treatment options available to treat gender dysphoria and therefore, surgical intervention was never medically necessary. R. at 14. Dr. Chewtes confirmed that hormone therapy is a common and well-tolerated treatment. R. at 14. Dr. Chewtes also noted the effectiveness of hormone therapy when combined with other non-surgical interventions including psychotherapy and gender-affirming social interventions. R. at 14. Even after noting that not providing gender affirmation surgery was counter to WPATH Standards, there was a unanimous vote to preclude gender affirmation surgery from Garum's treatment plan for inmate-patients with gender dysphoria. R. at 14.

Since Posca had a committee of licensed medical professionals create the treatment plan that was used to treat inmate-patients with gender dysphoria; there was no intentional or wanton deprivation of care of the inmate's serious medical need. There is no reason to assume the licensed medical professionals would

deliberately disregard the risk of harm to the inmate-patient's while enacting Garum's treatment plan.

2. Various courts have held that prison administrators were not deliberately indifferent when they did not provide gender affirmation surgery.

In *Kosilek*, the First Circuit had the opportunity to recognize that not providing gender affirmation surgery is deliberate indifference to an inmate's serious medical need and declined to do so. 774 F.3d at 91. The court noted that "nothing in the Constitution mechanically gives controlling weight to one set of professional judgments." *Kosilek*, F.3d at 96 (quoting *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir. 1993)).

In *Gibson*, the Fifth Circuit had the opportunity to find prison administration was deliberately indifferent by enacting a blanket ban on gender affirmation surgery and declined to do so. 920 F.3d at 228. The *Gibson* court held that it could never be deliberate indifference to deny gender affirmation surgery as treatment for gender dysphoria because there was a good faith medical debate over gender affirmation surgery. Id. at 221.

In *Lamb*, a district court in Kansas had the opportunity to recognize treatment that fell short of WPATH standards was deliberately indifferent, but declined to do so. *Lamb v. Norwood*, 262 F. Supp. 3d 1151, 1156 (D. Kan. 2017). The inmate claimed that she was entitled to, among other things, gender affirmation surgery. *Id.* The District Court concluded that even though prison medical providers

deviated from the WPATH Standards, they were not deliberately indifferent in their treatment of the inmate. Id at 1158–59. The Tenth Circuit affirmed the decision and stated that even though prison officials did not authorize gender affirmation surgery, their treatment of the inmate was not deliberately indifferent. *Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018).

While only Gibson deals directly with precluding an inmate for consideration of gender affirmation surgery, the aforementioned cases still deal with care that is below the WPATH Standards, and none found the care to be deliberately indifferent to an inmate's serious medical need.

3. The Prison administration did not disregard Escoffier's risk of suicide because additional observation was provided to make sure he could not harm himself.

Escoffier has threatened suicide because of the symptoms he feels from his gender dysphoria. R. at 18. However, the prison administration responded to this risk in their treatment of Escoffier by recommending that Escoffier be observed hourly. R. at 18. The observation is to help ensure that Escoffier will not be able to harm himself and commit suicide. R. at 20. This shows that the prison administration did not wantonly disregard Escoffier's risk of suicide due to his gender dysphoria, but in fact took steps to keep him safe.

4. Due to Miasmic Syndrome, gender affirmation surgery is unfeasible and poses a security risk.

When considering the subjective prong, security considerations of the prison must be given significant weight. *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986). This Court has found that as long as the judgments were made in "good faith" the officials' actions were not deliberate indifference. *Id*. at 319.

Even if there was no preclusion of gender affirmation surgery, it would not be feasible to provide surgery due to Miasmic Syndrome. R. at 20. Max Posca notes that even if the surgery was considered, the facility's health system is already stressed trying to keep staff and inmates safe from Miasmic Syndrome. Therefore, it would not be feasible to provide gender affirmation surgery. R. at 20.

Placing an additional burden on an already stressed health system would lead to resources not being available to treat inmates who contract Miasmic Syndrome. This is a risk to the security for the prison and a safety risk for the inmates. Therefore, even if gender affirmation surgery was medically necessary to treat gender dysphoria and the prison administration was indifferent in their crafting of Garum's treatment policy, the prison is not deliberately indifferent by not providing surgical intervention due to the security risk it would place on the prison.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the Fourteenth Circuit's decision to reverse the district court's final summary judgment in favor of Posca.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution:

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

28 U.S. Code § 1291 provides, in relevant part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

28 U.S.C. § 2107 provides, in relevant part:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

42 U.S.C. § 1983 provides, in relevant part:

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 . . . 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[.]

PROCEDURAL RULES

Federal Rule of Appellate Procedure 4 provides, in relevant part:

(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.

(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).

Supreme Court Rule 29.2 provides, in relevant part:

If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. §1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. §1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.