

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

EDMUND INGRAM,	]	Appeal from the United
Petitioner - Appellant	]	States District Court for
	]	the Northern District of
No. 06-2766	v.]	Illinois, Eastern Division
]	
TERRY L. MCCANN, Warden,	]	No. 04 C 6600
Respondent - Appellee]		
	]	Samuel Der-Yeghiayan,
-----	]	Judge
]		
MALCOLM RUSH,	]	Appeal from the United
Petitioner - Appellant	]	States District Court for
	]	the Eastern District of
No. 06-2879	v.]	Wisconsin
]	
PHILLIP A. KINGSTON,	]	No. 04 C 1154
Warden,]		
Respondent - Appellee]	J. P. Stadtmueller,	
]	Judge	

BRIEF OF PETITIONERS-APPELLANTS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request oral argument. This case raises the question whether the Seventh Circuit should overrule its prior decision in *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004). Appellants argue that the decision in *Craig* is inconsistent with the text of Federal Rule of Appellate Procedure 4(c)(1), and was made without the benefit of full adversary briefing.

The proper interpretation of Rule 4(c)(1) is a matter of considerable controversy; for instance, in *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), three circuit judges dissented from denial of rehearing en banc on this subject, and expressly disagreed with the three-judge panel's ruling on the matter. Likewise, in this very case the Court has appointed counsel to brief the issue, rather than just deferring to the authority of the *Craig* decision. Oral argument may significantly aid the decisional process on this contested question.

JURISDICTIONAL STATEMENT

The district courts had jurisdiction under 28 U.S.C. § 2254.

This appeal consolidates, by order of the Court of Appeals, two prisoner habeas appeals. The common issue—the only one the Court appointed counsel to brief—is whether the Court has “appellate jurisdiction in light of Fed. R. App. P. 4(c)(1)’s language that an inmate’s notice of appeal ‘is

timely if it is deposited in the institution's internal mail system on or before the last day for filing' although both appellants admittedly failed to affix first-class postage at the time their notices were deposited for mailing." SA31. The Argument will explain why the Court indeed has jurisdiction; but in any event, the Court has "jurisdiction to determine [its] jurisdiction." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

Malcolm Rush's notice of appeal was filed on June 23, 2006, SA59, over 30 days after May 17, 2006, the date on which the district court dismissed Rush's habeas petition, A17. Rush, however, has declared under penalty of perjury that he deposited his notice of appeal in the Waupun Correctional Institution prison mail system on June 9, 2006, SA67, within 30 days of the May 17 order. Edmund Ingram's notice of appeal was filed on November 18, 2005, SA20, over 30 days after October 12, 2005, the date on which the district court dismissed Ingram's habeas petition, A5. Ingram, however, has declared under penalty of perjury that he deposited his notice of appeal in the Stateville Correctional Center prison mail system on November 11, 2005, SA28, within 30 days of the October 12 order. Whether these "filing dates establish[] the timeliness of the appeal," Fed. R. App. P. 28(a)(4)(C), is precisely the issue in this appeal.

The appeals are from final judgments that dispose of all parties' claims.
A1; A6.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether this Court has “appellate jurisdiction in light of Fed. R. App. P. 4(c)(1)’s language that an inmate’s notice of appeal ‘is timely if it is deposited in the institution’s internal mail system on or before the last day for filing’ although both appellants admittedly failed to affix first-class postage at the time their notices were deposited for mailing.” SA31.

STATEMENT OF THE CASE

Malcolm Rush and Edmund Ingram filed habeas petitions in district court (the Northern District of Illinois in Ingram’s case, the Eastern District of Wisconsin in Rush’s). The district courts dismissed the petitions.

Rush and Ingram appealed the dismissals, and their uncontroverted statements show that they deposited their notices of appeal within 30 days after the decisions from which they were appealing. But because the notices of appeal did not arrive until after the 30-day period had elapsed, the Court instructed Rush and Ingram to file statements of the sort described in Fed. R. App. P. 4(c)(1), “setting forth the date the notice of appeal was deposited in the prison[’s] internal mail system and stating whether first class postage was prepaid.” SA15; SA27; SA63. Rush and Ingram both filed statements

setting forth the dates on which they had placed the mail in the prison mail systems, but not stating that they had attached postage to the mail. SA21; SA28-29; SA64-65; SA67. The Court then consolidated these cases and appointed counsel to brief the question whether the Court has “appellate jurisdiction in light of Fed. R. App. P. 4(c)(1)’s language that an inmate’s notice of appeal ‘is timely if it is deposited in the institution’s internal mail system on or before the last day for filing’ although both appellants admittedly failed to affix first-class postage at the time their notices were deposited for mailing.” SA30-31.

STATEMENT OF FACTS

Malcolm Rush was convicted in the Circuit Court of Milwaukee County, Wisconsin of witness intimidation. A7-A8; SA46. On December 1, 2004, after his state appeals were exhausted, he filed a habeas petition in the Eastern District of Wisconsin alleging various constitutional errors. A6; SA51. The district court dismissed the petition on May 17, 2006. A17. Rush has declared under penalty of perjury that he deposited his notice of appeal in the Waupun Correctional Institution prison mail system on June 9, 2006. SA67. The State of Wisconsin has stated, based on its own records that, it “appears that Rush’s notice of appeal in this matter was deposited in the prison mail system by June 13, 2006, three days before expiration of the

time for filing a notice of appeal.” SA72. The notice of appeal was filed in the district court on June 23, 2006. SA59.

Edmund Ingram was convicted in the Circuit Court of Cook County, Illinois of “first-degree murder, attempted first degree murder, and unlawful use of a weapon by a felon.” A1. On December 13, 2004, after his state appeals were exhausted, he filed a habeas petition in the Northern District of Illinois alleging various constitutional errors. A2. The district court dismissed the petition on October 12, 2005. A5. Ingram has declared under penalty of perjury that he deposited his notice of appeal in the Stateville Correctional Center prison mail system on November 11, 2005. SA28. The notice of appeal was filed in the district court on November 18, 2005. SA20.

Because the notices of appeal were not filed until more than 30 days after the judgments were entered, the Court instructed Rush and Ingram to explain why the appeal should not be dismissed for lack of jurisdiction, but stated that, in the alternative, appellants could file statements of the sort described in Fed. R. App. P. 4(c)(1), “setting forth the date the notice of appeal was deposited in the prison’s internal mail system and stating whether first class postage was prepaid.” SA15; SA63. Rush filed a statement setting forth the date on which he had placed the notice of appeal in the prison mail system, but making clear that he had not attached postage to the notice. SA64-65;

SA67. Ingram filed a jurisdictional memorandum that did not state whether he had attached postage to the notice of appeal, SA21, which led the Court to instruct Ingram to file a supplemental statement or declaration that would “state[] whether first class postage was prepaid. See Federal Rule of Appellate Procedure 4(c),” SA27. Ingram then filed a statement setting forth the date on which he had placed the notice of appeal in the prison mail system, but making clear that he had not attached postage to the notice of appeal. SA28-29.

The Court then consolidated these cases and appointed counsel to brief the question of whether the Court has “appellate jurisdiction in light of Fed. R. App. P. 4(c)(1)’s language that an inmate’s notice of appeal ‘is timely if it is deposited in the institution’s internal mail system on or before the last day for filing’ although both appellants admittedly failed to affix first-class postage at the time their notices were deposited for mailing.” SA30-31.

SUMMARY OF ARGUMENT

Rule 4(c)(1) specifies, in its first sentence, that a notice of appeal filed by an inmate “is timely if it is deposited in the institution’s internal mail system on or before the last day for filing.” The notices of appeal in these cases were so deposited. In Rush’s appeal, the State of Wisconsin expressly acknowledged that the notice was so deposited, SA72; in Ingram’s appeal,

the State of Illinois never denied that it was so deposited. The notices are therefore timely.

The last sentence of Rule 4(c)(1) does say that “[t]imely filing *may* be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.” (Emphasis added.) But this is permissive language, not mandatory; nothing says that timely filing must be shown through this mechanism. Prisons, for instance, may stamp or meter prisoner legal mail themselves, without requiring the prisoners to prepay the postage. In such a situation, a prisoner may understandably not file a statement saying that “first-class postage has been prepaid,” if “prepaid” is read to mean “paid beforehand by the prisoner.” The prisoner’s not filing such a statement—a statement that Rule 4(c)(1) does not mandate—does not deprive of timeliness a notice that “is timely [because] it is deposited in the institution’s internal mail system on or before the last day for filing.”

Finally, even if Rule 4(c)(1) is read as “[t]imely filing [*must*] be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid,” the appellants have satisfied this

requirement: They have filed supplemental declarations that do set forth the dates of deposit and state that first-class postage was prepaid by the prisons when the prisons placed the notices of appeal into the U.S. mail. SA32-33; SA82-83.

STANDARD OF REVIEW

The issue in this appeal is whether the Court has appellate jurisdiction. The Court must decide this issue in the first instance because there are no lower court decisions on this subject to be reviewed.

ARGUMENT

I. Under Rule 4(c)(1), Notice Is Timely if It Is Deposited in the Prison's Internal Mail System by the Last Day for Filing

A. The Text of Rule 4(c)(1) Provides That Notice Is Timely if It Is Deposited in the Prison's Internal Mail System by the Last Day for Filing

In its first sentence, Rule 4(c)(1) expressly states:

If an inmate confined in an institution 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.

(Emphasis added.)

Both appellants' notices of appeal were therefore timely filed. Both appellants have declared under penalty of perjury, without contradiction from respondents, that the notices were filed on or before the last day for

filing (here, 30 days after the judgments were entered). SA28; SA67. The State of Wisconsin has admitted that Rush's notice was so filed. SA72.

The second sentence of Rule 4(c)(1) limits the first by *mandating* that inmates follow a certain procedure in certain cases:

If an institution has a system designed for legal mail, the inmate *must* use that system to receive the benefit of this rule.

(Emphasis added.) This sentence is inapplicable here, but it illustrates that the Advisory Committee was careful to use mandatory language (“must use that system”) when it wanted to mandate that inmates do certain things.

In contrast, the third sentence of Rule 4(c)(1) does not tell inmates what they must do; nor does it limit the simple “timely if it is deposited in the institution’s internal mail system on or before the last day for filing” rule of the first sentence. Rather, it is phrased permissively, providing what inmates *may* do:

Timely filing *may be shown* by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(Emphasis added.) If the declaration or statement is used, then it must contain certain information; but nothing requires that the declaration or statement be used. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (holding that a regulation framed in terms of what a document “may

include” should be read as “permissive, not mandatory,” and not interpreted to mean that the specified items “must be included”); *Carmichael v. Payment Center, Inc.*, 336 F.3d 636, 640 (7th Cir. 2003) (holding that a “provision’s use of the word ‘may’ indicates that” the specified course of action “is a permissive, instead of mandatory, means of satisfying” the provision’s broader commands); *American Fed’n of Gov’t Employees v. Rumsfeld*, 262 F.3d 649, 656 n.7 (7th Cir. 2001) (holding a statute’s provision that something “‘may’” be done makes the statute “permissive,” and distinguishes the statute from an otherwise similar statute that provides that something “‘shall’” be done); *United States v. Cunningham*, 54 F.3d 295, 302 (7th Cir. 1995) (stressing that “may” language is “permissive, not mandatory: the district court *may* consider, not *must* consider, [certain] information”); *Delta Mining Corp v. Big Rivers Elec. Corp.*, 18 F.3d 1398, 1403 (7th Cir. 1994) (holding that the clause “‘shall be as may be mutually agreed upon’” should be read as permissive because of the presence of the term “may,” since treating it as mandatory would improperly “treat[] the words ‘as may be’ as surplusage”).

In this respect, Rule 4(c)(1) differs markedly from Supreme Court Rule 29.2, from which Rule 4(c)(1) “descends,” *Grady v. United States*, 269 F.3d

913, 918 (8th Cir. 2001); *see also* Rule 4(c) advisory committee's note to 1993 amend. Supreme Court Rule 29.2 provides:

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.

Under the Supreme Court Rule, a document is timely filed if two conditions are met: (1) the filer declares that it was deposited in the prison mail system in time, and (2) first-class postage has been prepaid. Rule 4(c)(1), on the other hand, provides only one mandatory condition for timely filing (except when a legal mail system is available): that the document was in fact deposited in the prison mail system in time.

Under Rule 4(c)(1), the declaration setting forth the date of deposit and stating that first-class postage has been prepaid is just one means that "may" be used to show timely filing. Such a declaration may be quite helpful to an appellant: As the Eleventh Circuit has held, it may mean "that the burden of proof should be placed upon the state" to show (if it wishes) that despite the declaration the document wasn't "deposited in the institution's internal mail system on or before the last day for filing." *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006). But by the plain terms of Rule 4(c)(1), the statement is not mandatory.

B. The Court Ought Not Depart from the Text of Rule 4(c)(1)

Nor would it be proper for the Court to depart from the Rule's text, and to recast "may be shown" as "must be shown."

1. Prisoners Are Entitled To Rely on the Plain Language of Rules Provisions

First, such a recasting would be inconsistent with the plain language of the provision, on which *pro se* prisoners are entitled to rely. Most prisoners are not well versed in statutory construction, but they do know ordinary English, and can tell what "may be" done from what "must be" done. To judicially interpret "may" as "must," while telling the prisoners to follow the Rules of Appellate Procedure, which expressly say "may," would set a trap for the unwary.

2. Prisoners Should Be Able To Rely on Prison Rules Providing for Mailing Legal Mail Without Postage, Given That Rule 4(c)(1) Does Not State the Contrary

Requiring prisoners to declare that they have prepaid first-class postage would also be inconsistent with the way many state prisons operate. Ingram and Rush were incarcerated in two of the many prisons that provide inmates with free legal mail in some circumstances, so that the inmate need not stamp the mail before depositing it in the prison's mail system. Stateville Correctional Center, where Ingram is imprisoned, is under a consent decree requiring that the Illinois Department of Corrections provide "free postage"

“for all legal mail of residents.” SA40.¹ This very case demonstrates this policy in action: Ingram submitted his notice of appeal without postage attached, and Stateville mailed it out.

Likewise, Wis. Admin. Code DOC § 309.51 provides that “[i]nmates without sufficient funds in their general account to pay for . . . postage [to courts] may receive a loan from the institution where they reside.” Rush, who was imprisoned in the Waupun Correctional Institution, submitted his notice of appeal under this regulation, without postage attached; the prison mailed it out by metering it rather than by asking the prisoner to attach a stamp. SA61. Many other prisons operate the same way. *See, e.g.*, Ill. Admin. Code tit. 20, § 525.130(a) (“Offenders with insufficient money in their trust fund accounts to purchase postage shall be permitted to send reasonable amounts of legal mail and mail to clerks of any court . . . if they attach signed money vouchers authorizing deductions of future funds to

¹ We ask the court to take judicial notice of the contents of this consent decree. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (approving judicial notice of “the contents of court records”); *Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996) (noting that relevant proceedings in other courts are judicially noticeable, including by the Court of Appeals); Fed. R. Evid. 201(f) (“Judicial notice may be taken at any stage of the proceeding.”); *id.* advisory committee’s note (“judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal”).

cover the cost of the postage.”); Cal. Code Regs. tit. 15, § 3134 (“An indigent inmate shall have free and unlimited postage . . . for the filing of legal documents to any court”); *id.* § 3165(d) (“The cost of postage for mailing documents to the courts will be charged against an inmate’s trust account unless the inmate is without funds at the time the material is submitted for mailing and remains without funds for 30 days after the documents are mailed.”); Kan. Admin. Regs. § 44-12-601(f)(3) (“The cost of postage for legal or official mail paid by the facility on behalf of an indigent inmate shall be deducted from the inmate’s funds, if available.”); 103 Code Mass. Regs. § 481.10 (“[A]n indigent inmate shall be permitted, where necessary, to send an unlimited number of letters of any weight to any court official at institution expense.”); N.Y. Comp. Codes R. & Regs. tit. 7, § 721.3(a)(3)(iv) (providing that an inmate may request that the facility “pay for first class mail postage [for legal mail] if the inmate has insufficient funds” and certain other conditions are met).

Naturally, prisoners often get used to these procedures, and come to rely on the prison’s mailing unstamped legal materials for them. If the Advisory Committee had written Rule 4(c)(1) to explicitly inform prisoners that they cannot rely on such prison policies but instead *must* attach first-class postage themselves, such wording would have put prisoners on notice that the

normal prison procedures are inadequate. But Rule 4(c)(1) speaks of how timely filing *may* be shown, not how it must be shown. Prisoners will understandably conclude that the standard mailing procedure offered by the prison remains a suitable alternative to prepaying the postage themselves.

This having been said, it may be that a careful and risk-averse lawyer would likely err on the side of caution, guard against the possibility that a court might read the third sentence of Rule 4(c)(1) as mandatory, and thus attach a stamp notwithstanding the prison's offer of free mailing. But *pro se* prisoners are not lawyers, and are often not as careful and risk-averse as lawyers have been trained to be. The most that the judicial system should expect from such litigants is that they read plain rules according to their plain language, not that they read them with a lawyerly tendency to err on the side of caution.

3. Reading the Third Sentence as Mandatory Would Invalidate Many Notices of Appeal That Are Indubitably Timely

Reading the third sentence as requiring prisoners to declare that they have prepaid postage would also invalidate many notices of appeal that are indubitably timely. Consider, for instance, an inmate who takes advantage of familiar prison procedures for sending unstamped legal mail, and also places the mail in the prison mail system well in advance of the 30-day deadline; and say that the prison attaches the proper postage and puts the

mail into the U.S. mail system before the deadline expires. *See, e.g., Sulik v. Taney County*, 316 F.3d 813, 814 (8th Cir. 2003) (describing a case in which the postmark clearly showed that the letter was mailed in time, though not noting whether the postage was attached by the inmate or by the prison).

The postmark itself would demonstrate that the first sentence was complied with, and that “the notice is timely”: Given that the notice was deposited in the U.S. mail system on or before the last day of filing, it must surely have been “deposited in the institution’s internal mail system on or before the last day for filing.”

Yet if the third sentence is read as mandating that the prisoner declare that he has prepaid postage, a court would have to reject the clearly timely filing; after all, the prisoner could not honestly say that first-class postage was prepaid by him. This surely cannot be right—and it simply illustrates that when the Advisory Committee said that “[t]imely filing may be shown” in a certain way, it meant that it “may” be shown that way, not that it must be shown that way.

Or consider Rush’s case, in which the State of Wisconsin has expressly admitted, based on its own records, that “Rush’s notice of appeal in this matter was deposited in the prison mail system by June 13, 2006, three days before expiration of the time for filing a notice of appeal.” SA72. Under the

first sentence of Rule 4(c)(1), Rush’s notice of appeal “is timely.” It would be illogical to reject it as untimely in the face of the state’s own admission simply because Rush declined to take advantage of a procedure that the Rule later says he “may” use.

4. The Court Ought Not Follow Cases That Have Departed from the Rule’s Text

United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004), did hold—without closely discussing the text of Rule 4(c)(1), and without the benefit of adversary briefing on the subject—that the Rule *requires* a declaration setting forth the date on which the notice is filed and stating that the prisoner “prepaid first-class postage.”

Rather than relying on the text of Rule 4(c)(1), the panel chiefly reasoned that “[t]he postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger.” *Id.* That might be reason for the Advisory Committee to change the “may” in the rule to a “must”—a change the federal bench and appellate bar could easily implement if they see fit (though prison practices allowing prisoners to send legal mail without attaching a stamp would counsel against such a change).

But the panel’s reasoning does not support reading the Rule as imposing a “postage requirement.” By its plain text, the Rule imposes no such postage requirement: It simply specifies one way, though not the only way, to

demonstrate the sole fact required by the Rule, which is that “the notice . . . [was] deposited in the institution’s internal mail system on or before the last day for filing.” We therefore ask the Court to overrule the *Craig* holding, *see* 7th Cir. R. 40(e), and to interpret the Rule as written (an interpretive approach that *Craig* itself acknowledged was proper, 368 F.3d at 740-41).

Comment [v1]: Helene: You asked whether this citation is appropriate here. I cite Circuit Rule 40(e) to make clear the Circuit's authority to overrule past holdings; do you think this is superfluous, or inapt?

The panel’s error in *Craig* may have stemmed from the lack of adequate adversary briefing. *Craig*’s opening brief did not provide argument about how Rule 4(c)(1) should be interpreted; it mentioned Rule 4(c)(1) only in the jurisdictional statement, which provided a narrative description of *Craig*’s filings. SA121-22; SA124.² *Craig* filed no reply brief, and no petition for rehearing. SA86-87. *Craig*’s pre-brief jurisdictional memoranda related the complicated factual history of the appeal, but never discussed the meaning of Rule 4(c)(1). SA88 (not mentioning Rule 4(c)(1)); SA94 (mentioning Rule 4(c)(1) at SA95-96 but not discussing the first-class prepaid postage issue); SA98 (not mentioning Rule 4(c)(1)).

Moreover, the United States’ brief *acknowledged* that *Craig*’s affidavit was “substantially in compliance with Rule 4(c) — though it failed to indicate whether first class postage was prepaid,” SA173. The United States

² We ask the court to take judicial notice of the contents of these briefs. *See supra* note 1.

thus rejected the theory that prisoners are required to assert that postage was prepaid, since absence of such an assertion still left the declaration “substantially in compliance with Rule 4(c).” Instead, the United States argued only that Rule 4(c)(1) “appl[ies] only to incarcerated prisoners who are unrepresented,” SA173, a position the panel ultimately rejected.

Similarly, the United States’ pre-briefing response to defendant’s jurisdictional statement stated only that

Under Federal Rule of Appellate Procedure 4(c), an appeal by an inmate confined in an institution is timely if it is deposited in the institution’s internal mail system on or before the last day for filing. Timely filing *may* be shown by a notarized statement, that sets forth the date of deposit and states that first class postage was prepaid. There was no such affidavit filed in this case. The district court had evidence that the notice of appeal was mailed after the last day of filing.

SA109 (emphasis added, paragraph break omitted). The United States thus treated the third sentence as permissive, argued simply that the weight of the evidence cut against the conclusion that the notice of appeal was deposited by the last day for filing, and did not go further in analyzing Rule 4(c)(1).

Thus, neither side in *Craig* provided the Court with argument for or against the proposition that Rule 4(c)(1) embodies a “postage requirement.” And, lacking adversary briefing on the matter, the Court regrettably erred in its analysis. *See Leyva v. Ashcroft*, 380 F.3d 303, 306 (7th Cir. 2004) (declining to follow an earlier holding—which had been joined by the author

of the *Leyva* opinion—partly because the earlier case was not “directly on point,” in that it involved a similar but different statutory provision, and partly because in the earlier case, “the government agreed” with the petitioner on the relevant point, “so the court never had the benefit of adversary briefing as to that issue”).³

Outside this Circuit, a Tenth Circuit panel in *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143-44 (10th Cir. 2004), discussed the must/may distinction in more detail, and acknowledged that “reading the third sentence of the Fed. R. App. P. 4(c)(1) in isolation could lead one to believe that the Rule only lists two of the many ways in which a prisoner *may* prove timely compliance.” The panel, though, went on to “reject this myopic approach to statutory construction,” reasoning that “may” is used only as an alternative to what is said in the second sentence: “a prisoner ‘may’ file an appropriate declaration or notarized statement with his notice of appeal in lieu of

³ The Third and Eighth Circuits have asserted that Rule 4(c)(1) mandates a declaration reporting the date the notice of appeal was deposited, and stating that postage has been prepaid; but these were bare assertions unaccompanied with any analysis or explanation of why the permissive “may” sentence should be read as mandatory. *Sulik v. Taney County*, 316 F.3d 813, 814 (8th Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 315 n.3 (3d Cir. 2001), *overruled in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002), *as recognized by Brooks v. Walls*, 301 F.3d 839, 841 (7th Cir. 2002).

documenting the time of deposit by way of the legal mail system.” *Id.* at 1144.

In our view—and in the view of Tenth Circuit Judges Hartz, Briscoe, and Lucero, dissenting from denial of rehearing en banc in *Ceballos-Martinez*, 387 F.3d at 1141—reading the Rule as it is written is hardly “myopic.” We “can think of no reason why the drafters of Rule 4(c)(1) would have used ‘may’ rather than ‘must’ to convey the meaning [that a prisoner must file a statement that postage was prepaid]. The natural, common-sense meaning of the rule is that proof by declaration or affidavit is permissive.” *Id.*

And looking at all three sentences only supports reading the third sentence as permissive, rather than revealing such a reading to be “myopic.” The first sentence defines when a notice is timely: it is timely if it is deposited by the deadline in the institution’s internal mail system. The second sentence uses “must” in its normal sense: to provide that, under a certain condition—when a legal mail system is available—the prisoner must do something. The third sentence, instead of similarly saying how timely filing “must” be shown under the opposite condition (when no legal mail system is available), says how it “may” be shown.

A prisoner who is in no way afflicted with myopia may reasonably read the rule precisely this way. This, we take it, is why the Eleventh Circuit, in *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006), treated the filing of a statement in the way allowed by the third sentence as a burden-shifting rule, not as a mandatory requirement mysteriously framed as a permissive requirement.

II. The Appellants Have Adequately Stated That Postage Has Been Prepaid

The third sentence of Rule 4(c)(1) provides that timely filing of a notice of appeal may be shown by a statement that “set[s] forth the date of deposit and state[s] that first-class postage has been prepaid.” The third sentence does not say that first-class postage must have been prepaid *by the inmate*. In fact, some prisons, including the ones involved in this case, prepay the first-class postage themselves. *See supra* pp. 12-14. This is how Ingram’s and Rush’s notices of appeal arrived at the Court of Appeals.

Rule 4(c)(1) also does not say that the statement must be filed at the time of the mailing.

[T]he Rule does not specify *when* a prisoner must file an affidavit or notarized statement. The literal terms of the Rule do not require a prisoner to accompany his motion with proof of timely filing and proper postage. The Rule mandates only that a prisoner submit such proof. While it might be sensible to require prisoners to file their affidavits at the same time they file their motions or notices of

appeal, it would be imprudent for a court to graft this new requirement onto Rule 4(c), which bears Congress's imprimatur.

Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001); *see also United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (suggesting that a litigant may get the benefit of Rule 4(c)(1) by complying with it not only “when he filed the appeal,” but also “in the ensuing year” before the appeal is decided).

When appellants filed their original Rule 4(c)(1) statements, they lacked counsel and mistakenly read “first-class postage has been prepaid” as meaning “has been prepaid by the inmate.” They have since, however, filed supplemental declarations setting forth the dates on which they deposited the notices of appeal, and stating that first-class postage had been prepaid by the prisons, pursuant to the prison policies on which they were relying. SA32-33; SA82-83. Moreover, Ingram’s earlier Rule 4(c)(1) statement expressly said that “postage was processed and paid by the Institution. Stateville C.C.” SA29. His immediately preceding assertion that “first class postage was NOT prepaid,” *id.*, in context simply meant that he himself had not prepaid the postage.

Under the first sentence of Rule 4(c), “the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing”—which both notices were. Under the third sentence, this

timeliness “may be shown” by declarations or statements that “set forth the date of deposit and state that first-class postage has been prepaid.” The supplemental declarations qualify and thus demonstrate timeliness.

Given this, “the burden of proof should be placed upon the state” to show (if it wishes) that despite this, the document was not indeed “deposited in the institution’s internal mail system on or before the last day for filing.” *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006). Should the state wish to make such an argument—and we do not see why it would—the case ought to be remanded to the trial court for factual findings about when the notice was indeed deposited in the prison mail system. *Id.* at 1199.

This having been said, we recognize that the Court might prefer to read “has been prepaid” in Rule 4(c)(1) as meaning “has been prepaid by the prisoner as of the time that the notice of appeal was deposited in the institution’s internal mail system.” But such a reading would make it all the more imperative to recognize that the last sentence of Rule 4(c)(1) offers a way in which the prisoner *may* show timely filing rather than the way the prisoner must show such filing. Treating the declaration “that first-class postage has been prepaid” as mandatory, and as mandating that the postage be prepaid by the prisoner when he places the notice of appeal in the mail

system, would render pointless Stateville's, Waupun's, and other prisons' policies of allowing prisoners to send legal mail without attaching stamps.

Such federal undermining of those state prison policies should not be undertaken lightly, absent a plain statement in the Rules mandating such an approach. A hypothetical rule stating that "Timely filing [must] be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid [by the prisoner as of the time that the notice of appeal was deposited in the institution's internal mail system]" would have to be read as undermining the state prison policies. The current rule, which states only that "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid," ought not be so read.

CONCLUSION

Appellants' notices of appeal were timely under Rule 4(c)(1) in two ways. First, their notices were "deposited in the institution's internal mail system on or before the last day for filing," and are thus "timely" under the only mandatory sentence of Rule 4(c)(1) that is applicable here. Second, even if the last sentence of Rule 4(c)(1) is read as mandatory—despite its

use of the permissive “may”—appellants have still complied with it: Their supplemental declarations expressly “set forth the date of deposit” and “state that first-class postage has been prepaid” by the prisons. The Court should therefore conclude that Rule 4(c)(1) does not deny the Court jurisdiction over appellants’ appeals.

Respectfully submitted,

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February 23, 2007

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I certify that the appendices to this brief include all the materials required by Circuit Rule 30(a) & (b).

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February 23, 2007

CERTIFICATE REQUIRED BY CIRCUIT RULE 31(e)(1)

I certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available electronically in non-scanned, searchable PDF format.

The following appendix documents are not available electronically in non-scanned, searchable PDF format, and are therefore not included in the digital version:

- Memorandum Opinion, *Ingram v. Battaglia*, No. 04 C 6600 (N.D. Ill. Oct. 12, 2005).
- Docket Entry, *Ingram v. Battaglia*, No. 04 C 6600 (N.D. Ill. Oct. 12, 2005).
- Judgment, *Ingram v. Battaglia*, No. 04 C 6600 (N.D. Ill. Oct. 12, 2005).
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- General Docket, *Ingram v. McCann*, No. 06-2766 (7th Cir. Feb. 1, 2007).

- Notice of Appeal, *Ingram v. Battaglia*, No. 04-C-6600 (N.D. Ill. Nov. 18, 2005).
- Jurisdictional Memorandum/Declaration, *Ingram v. Battaglia*, No. 06-2766 (7th Cir. July 14, 2006).
- Supplemental Notarized Statement, *Ingram v. Battaglia*, No. 06-2766 (7th Cir. Aug. 2, 2006).
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- General Docket, *United States v. Craig*, No. 03-2424 (7th Cir. Oct. 18, 2004).
- Defendant-Appellant's Memorandum Regarding Untimely Filing of Notice of Appeal, *United States v. Craig*, No. 03-2424 (7th Cir. June 13, 2003).
- Defendant-Appellant Craig's Second Supplemental Jurisdictional Memorandum, *United States v. Craig*, No. 03-2424 (7th Cir. July 7, 2003).
- Defendant-Appellant Craig's Third Supplemental Jurisdictional Memorandum, *United States v. Craig*, No. 03-2424 (7th Cir. July 21, 2003).

- The United States of America's Response to Defendant-Appellant's Jurisdictional Statement, *United States v. Craig*, No. 03-2424 (7th Cir. July 9, 2003).

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The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing BRIEF OF PETITIONERS-APPELLANTS with the required short appendix, and one copy of the SEPARATE APPENDIX OF PETITIONERS-APPELLANTS, along with a digital version of the brief and of those portions of the appendices that are available in non-scanned, searchable PDF format, to be served on:

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