

**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
]	
MATTHEW J. FRANK	]	No. 04 C 1154
Secretary,]	
Respondent - Appellee]	J. P. Stadtmueller,
]	Judge

REPLY BRIEF AND APPENDIX OF PETITIONERS-APPELLANTS

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. Rush’s Supplemental Declaration Satisfies the Third Sentence of Rule 4(c)	1
A. In June 2006, Waupun Had a Policy of Paying Postage for Indigent Inmates’ Notices of Appeal in Cases Challenging Their Underlying Convictions	1
B. Both Ingram’s and Rush’s Statements Thus Satisfied Rule 4(c), Even If the Third Sentence Is Seen as Mandatory	4
II. The Third Sentence of Rule 4(c) Is Not Mandatory	5
Conclusion	10

TABLE OF AUTHORITIES

Statutes and Rules

Fed. R. App. P. 4(c) passim

I. Rush's Supplemental Declaration Satisfies the Third Sentence of Rule 4(c)

A. In June 2006, Waupun Had a Policy of Paying Postage for Indigent Inmates' Notices of Appeal in Cases Challenging Their Underlying Convictions

In June 2006, Malcolm Rush was imprisoned in the Waupun Correctional Institution. At the time, Waupun had a policy of paying postage for indigent inmates' legal mail challenging the inmates' underlying convictions.

We know the nature of this policy from then-Warden Phil Kingston's own memorandum to Rush: "[O]nce you have reached your \$200 annual [legal loan] limit you are allowed postage for correspondence in which . . . the inmate is challenging his underlying conviction." SA68. In the next paragraph, the Warden treated the phrase "[claim] challenging his underlying conviction" as tantamount to "claim . . . regarding post-conviction relief." *Id.* The Warden expressly characterized the notice of appeal in Rush's case as "relat[ing] to [Rush's] underlying conviction." *Id.* And he applied this policy to conclude that Rush was entitled to the postage loan. *Id.*

Secretary Frank is correct in saying that "a prisoner has to follow reasonable prison regulations governing outgoing mail to reap the benefit of the mailbox rule." Frank Br. at 14. Rush followed such regulations. "Frank and Rush agree that he deposited his notice of appeal in the prison's internal

mail system within the thirty-day period following entry of the district court's judgment." *Id.* at 11. As prison policy permitted, the notice was accompanied by a request that the prison prepay postage. And the Warden acknowledged that the request fit within the prison's policy covering "postage for correspondence in which . . . the inmate is challenging his underlying conviction" even when the postage puts the inmate beyond the normal \$200 legal loan limit. SA68.

The then-applicable Internal Management Procedures for the Wisconsin prison system, App. to Frank Br. at 17, might not have been entirely consistent with actual Waupun prison policy. The Internal Procedures literally provide that "[t]he loan balance *may not* exceed \$200 per calendar year" (emphasis added), unless the loan request falls within certain exceptions (such as the exception for challenges to convictions filed in state court). Therefore, if Secretary Frank is correct that Rush's request does not fall within those exceptions, Frank Br. at 21, the Warden's policy violated the Internal Procedures by allowing the sort of loan that Rush was given.

This, though, simply reflects the reality that, in many organizations, actual departmental policies differ from what the internal procedures promulgated by the headquarters would suggest. Perhaps the Division of Adult Institutions expects its Internal Management Procedures to be seen as

guidelines that could be departed from by highly experienced professional managers, not as attempts to micromanage Wardens' operation of their prisons. Or perhaps the Warden was violating the obligations imposed by the Division (obligations about which, as far as the record reveals, Waupun prisoners were never informed). The Division may wish to take this up with the Warden, so that the Warden changes Waupun policy to conform to the Internal Procedures—or so that the Division changes its procedures to conform to Waupun policy.

But in any event, the Warden's own statement reveals what Waupun policy in June 2006 actually was: The prison prepaid postage for “correspondence relat[ing] to [an indigent inmate's] underlying conviction,” including a notice of appeal from a federal habeas decision challenging that conviction, even after the indigent inmate had already gotten a \$200 loan. Even Secretary Frank acknowledges that the Warden's statement “might [have] reflect[ed] an unwritten policy.” Frank Br. at 22. More precisely, the Warden was discussing, in writing, the actual policy that he was applying. And under that policy, Rush was expressly “allowed postage for correspondence in which [he was] challenging his underlying conviction,” SA68, including the Notice of Appeal involved in this very case, *id.*

**B. Both Ingram's and Rush's Statements Thus Satisfied Rule 4(c),
Even If the Third Sentence Is Seen as Mandatory**

Both petitioners' supplemental statements thus satisfy Rule 4(c), even if the third sentence is seen as mandatory rather than permissive. Petitioners and respondents agree that the notices of appeal were "deposited in the institution's internal mail system on or before the last day for filing." Rule 4(c). *See* Frank Br. at 11; McCann Br. at 37 (acknowledging that Ingram's notice of appeal complied with Rule 4(c)). Petitioners and respondents agree that petitioners' supplemental declarations may satisfy Rule 4(c) even though they were filed after the notices of appeal. Frank Br. at 17-18; McCann Br. at 7. Petitioners and respondents agree that the supplemental declarations may be valid if they state "the prison has prepaid postage." Frank Br. at 17; *see also* McCann Br. at 37. Both petitioners' declarations did indeed so state.

In fact, both prisons did prepay postage: They paid the necessary postage prior to placing the notices of appeal in the U.S. mail. And both prisons had preexisting policies under which postage would be prepaid. Stateville had a policy of paying for all legal mail of inmates. McCann Br. at 30. Waupun, contrary to Secretary Frank's argument, Frank Br. at 18, had a policy of paying for "correspondence relat[ing] to [an indigent inmate's] underlying

conviction,” which included notices of appeal from federal habeas petitions. SA68; *see supra* Part I.A.

II. The Third Sentence of Rule 4(c) Is Not Mandatory

As these cases show, many prisoners throughout the country send legal mail without prepaying postage themselves. Some, like petitioner Ingram, have all their legal mail paid for, pursuant to a federal court consent decree. SA40. Some, like petitioner Rush, have certain items of legal mail paid for if they are indigent. SA68; Pet’rs Brief at 13-14. Some, like Ingram, are even prohibited by prison rule from keeping stamps in their cells, and “even if [they] are able to purchase pre-stamped envelopes from the commissary, they cannot be certain how much postage is required.” McCann Br. at 32.

The question is how Rule 4(c) should be interpreted in a way that fits this reality, that is faithful to the Rule’s text, and that is clear to the inmates whose rights turn on correctly reading the Rule. Petitioners argue for a reading that precisely matches the text:

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

Fed. R. App. P. 4(c) (emphasis added).

Under the first sentence, the notice of appeal is timely if it is deposited in the internal mail system in time. (Obviously, it must be deposited in a way that complies with the rules of the mail system, such as the requirement that mail either be stamped or be eligible for free mailing, and the requirement that mail be properly addressed. *See, e.g.*, Frank Br. at 14.)

Under the second sentence, the inmate *must* use a legal mail system if it is adequate and available. The second sentence is not applicable to the facts in these cases, Frank Br. at 10-11; McCann Br. at 18-19, but it shows that the Rule's drafters phrased mandatory commands using mandatory language.

Under the third sentence, the inmate *may* show timely filing in a particular way, and is encouraged to do so if possible; and such a showing would shift the burden of disproving timeliness onto the state. Pet'rs Brief at 11. But an inmate may demonstrate the deposit date in other ways (for instance, when the prison itself records the deposit date, as Waupun does, SA72) if the inmate concludes that he cannot satisfy the third sentence. An inmate whose mail was paid for by the prison may come to such a conclusion if he interprets the phrase "state that first-class postage has been prepaid" as meaning "state that you prepaid the first-class postage." Such an

inmate would understandably believe himself unable to file the precise statement that the third sentence describes.

The respondents would instead (1) read the “may” in the third sentence as “must,” and would then deal with the situation of inmates who do not themselves prepay postage by (2) interpreting the third sentence as allowing inmates to certify that postage has been prepaid by the prison. As petitioners have argued in their opening brief (at 9-12), reading (1) is mistaken, and is likely to create a trap for inmates who naturally read “may” as permissive, not mandatory.

Reading (2) is correct: The phrase “first-class postage has been prepaid” is in the passive voice, so the third sentence of Rule 4(c) does not specify who must have prepaid the postage. But requiring inmates to anticipate this reading also sets a trap for the unwary because many people may reasonably misread the passive “has been prepaid” as meaning “the inmate has prepaid it.”

Both petitioner Ingram and the Assistant Attorney General who signed Warden McCann’s brief originally misread the Rule precisely this way. SA29; RA2.¹ In an earlier filing in the *Ingram* case, the Assistant Attorney General wrote that “jurisdiction is lacking here because petitioner did not

¹ RA__ refers to the Appendix to this Reply Brief.

satisfy the other requirement that Rule 4(c) imposes before an inmate is given the benefit of the mailbox rule—the prisoner must declare that *he prepaid* first-class postage.” RA2 (emphasis added).

Fortunately, the Assistant Attorney General’s merits brief corrects this misreading; the brief concludes that “the rule should not require the prisoner to pay for postage if he or she knows the prison will pay for it,” McCann Br. at 30, and that therefore the prisoner need not declare that he prepaid first-class postage, *id.* at 37. The original misreading was the sort of understandable misinterpretation into which even a thoughtful lawyer can easily fall.

But that is precisely our point: Though a provision that an inmate “state that first-class postage has been prepaid” should not be read as requiring that the inmate “state that *he prepaid* first-class postage,” even experienced and highly educated appellate lawyers can easily misread the rule this way. It should be no surprise that inmates with no formal legal education make similar errors.

So under the respondents’ reading of Rule 4(c), inmates such as Ingram might not grasp how to claim the benefit of the Rule even when respondents would agree that the inmates are entitled to this benefit. The inmates may correctly read “may” in the third sentence as “may,” and assume that they

need not file the statement specifically described by the third sentence. Or the inmates may understandably misread “first-class postage has been prepaid” as “the inmate has prepaid first-class postage”—and may therefore wrongly assume that Rule 4(c) does not cover them, because the postage was prepaid by the prison and not prepaid by the inmates themselves.

At best, such an inmate may file the proper document but only after time-consuming prodding from a court, for instance if the court orders the filing of a supplemental statement but makes clear that one can “state that first-class postage has been prepaid” by stating that the prison has prepaid first-class postage. At worst, such an inmate may file a document such as that filed by Ingram and face a response—an incorrect response, albeit one submitted in perfect good faith—that the document is categorically inadequate because “the prisoner must declare that he prepaid first-class postage.”

All this can be avoided by reading Rule 4(c) as written. The first sentence would require that the notice of appeal be timely placed in the internal mail system. The second sentence would say what *must* be done in prisons that maintain a legal mail system. The third sentence would say what *may* be done to show timeliness. Those prisoners who prepay postage themselves would naturally use the procedure set forth in the third sentence.

Those prisoners who read the third sentence as not applying to them because they do not themselves prepay the postage could demonstrate timeliness in other ways.

The optimal solution may well be for the federal rulemaking committees to recommend, and for the Supreme Court to adopt, a rule that explicitly and clearly explains what inmates need to do in these situations. Such a rule might well say, for instance, that “[t]imely filing ~~may~~ *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 inmate or paid by the institution pursuant to a preexisting institutional policy*” (strikeout and italicized text added). But the most sensible way of reading the text as currently written is the approach petitioners have outlined.

CONCLUSION

Both petitioners’ notices of appeal were timely filed; Warden McCann has acknowledged as much, and the arguments of Secretary Frank to the contrary are mistaken. The Court should therefore conclude that Rule 4(c)(1) does not deny the Court jurisdiction over petitioners’ appeals.

Respectfully submitted,

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July 13, 2007

TABLE OF CONTENTS OF THE APPENDIX

Respondent-Appellee's Response to Petitioner's Supplemental Notarized
Statement, *Ingram v. Battaglia*, No. 06-2766 (7th Cir. Aug. 8, 2006)
..... RA1

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

I certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of the brief. The only item in the appendix is not available electronically in non-scanned, searchable PDF format, and is therefore not included in the digital version.

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July 13, 2007

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 2782 words, without excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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July 13, 2007

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing REPLY BRIEF AND APPENDIX OF PETITIONERS-APPELLANTS, along with a digital version of the brief, to be served on:

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