No. _____

IN THE
Supreme Court of the United States

BLAKE CRETACCI,
Petitioner,

v.

JOE CALL, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Houston v. Lack*, 487 U.S. 266 (1988), this Court held that filings by prisoners receive the benefit of the mailbox rule, which means that a prisoner's filing is deemed timely if it is placed in the prison mail system by the date it is due. This case presents a recurring question on which the courts of appeals are split. In some instances, a prisoner who is nominally represented by counsel submits a filing through the prison mail system. Such filings can result from miscommunication over representation status, abandonment by counsel, or as was the case here, counsel's inability to submit the filing.

The question presented is: Whether a prisoner who submits a filing through the prison mail system loses the benefit of the mailbox rule if he has counsel?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Blake Cretacci.

Respondents (defendants-appellees below) are Deputy Joe Call; Deputy Brian Keith; Deputy Jared Nelson; Deputy Jesse Harden; Deputy Cody Faust; and Coffee County, Tennessee.

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Blake Cretacci petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at *Cretacci v. Call*, 988 F.3d 860 (3d Cir. 2021) and is reproduced in the Appendix attached hereto at Pet. App. 1a-26a. The opinion of the district court is not reported in the Federal Supplement but is available at 2020 WL 2561945 and is reproduced at Pet. App. 27a-62a.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2021. The court of appeals denied the petition for panel rehearing on March 17, 2021. Pet. App. 63a. On March 19, 2020, this Court extended the time within which to file petition for a writ of certiorari to and including August 13, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

In *Houston v. Lack*, 487 U.S. 266 (1988), this Court held that the mailbox rule applies to a notice of appeal mailed by a prisoner. Under that rule, the notice is deemed filed as of the date it is delivered to the prison authorities for mailing rather than the date it is received by the court. The Court explained that because the inmate's "control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities," the filing should be treated as timely if it is delivered to those authorities by its due date. *Id.* at 271. *Houston*'s rule has since been applied to myriad kinds of legal filings, including civil complaints.

A question that has repeatedly arisen and divided the circuits since *Houston* is whether a prisoner who has counsel is entitled to the mailbox rule for filings sent by the prisoner through the prison system. Inmates who nominally have counsel may nonetheless submit filings via the prison mail system for a variety of reasons. There may be confusion—particularly at the commencement of a case—as to whether the prisoner is actually represented. An inmate's counsel may have effectively abandoned his client. Or, as was the case here, counsel may not be capable of filing the document.

Petitioner Blake Cretacci was a pre-trial detainee who filed a § 1983 civil complaint alleging gross abuse by his jailors. Mr. Cretacci had the aid of counsel in preparing the complaint, but his counsel was unable to file the pleading because he was not a member of the bar of the relevant judicial district. Although Mr. Cretacci submitted his *pro se* complaint via the inmate mail

system before the limitations period on his claims expired, the pleading was received by the district court after the statutory deadline. The Sixth Circuit held that because Mr. Cretacci was "represented" within the meaning of governing state law, he was not entitled to the mailbox rule, and therefore that his claims were time-barred.

In so holding, the Sixth Circuit deepened an acknowledged split on the scope of the mailbox rule. Had Mr. Cretacci filed his complaint in the Fourth Circuit, he would have received the benefit of the mailbox rule. That court has held that a filing submitted via the prison mail system should be subject to the mailbox rule regardless if the prisoner has counsel. *United States v. Carter*, 474 F. App'x 331, 333 (4th Cir. 2012). The Fourth Circuit has explained that "the same concerns" about control over timely delivery "are present" whenever a prisoner submits a filing via the inmate mail system regardless whether the prisoner has counsel. *United States v. Moore*, 24 F.3d 624, 625-26 (4th Cir. 1994).

Three other circuits, including now the Sixth, hold that a prisoner filing does not receive the benefit of the mailbox rule if the prisoner is represented by counsel. These circuits reason that "[r]epresented prisoners are in no different position than litigants who are at liberty." *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990), *superseded by rule as stated in United States v. Craig*, 368 F.3d 738 (7th Cir. 2004); *see also Burgs v. Johnson Cnty.*, 79 F.3d 701, 702 (8th Cir. 1996) (per curiam) (finding that represented prisoners are "in the

same position as other litigants who rely on their attorneys").

This Court should resolve whether prisoners who have counsel are entitled to the mailbox rule, and hold that they are. The approach taken by the Sixth Circuit forces a complicated inquiry into whether the prisoner was represented within the meaning of state law. As the concurring opinion below noted, that inquiry can amount to a trap for the unwary prisoner and turn on formalisms that do not reflect the prisoner's actual ability to rely on this counsel. Moreover, once a prisoner submits a filing via the inmate mail system, he has no control over the filing regardless of whether he is represented by counsel. A prisoner who incorrectly believes he is not represented or, as here, had to file the document because his counsel could not, should not have the courthouse doors closed to him on limitations grounds if he timely submits his filing via the inmate mail system.

Petitioner respectfully asks that this Court grant the petition.

STATEMENT OF THE CASE

A. Factual Background

The underlying claims in this suit concern an incident on September 29, 2015 at the Coffee County jail, where Mr. Cretacci was being held as a pre-trial detainee. Pl.'s Resp. to Am. Mot. for Summ. J. at 2, *Cretacci v. Call*, No. 16-CV-97 (E.D. Tenn. Sept. 3, 2019), ECF No. 69 ("Pl.'s Am. Summ. J. Resp."). On that day, three inmates organized a "peaceful riot" in the dayroom, a common area, to protest conditions in the jail. Mr. Cretacci was not part of that group and wanted no part in the riot, but

was unable to return to his cell because it was locked, and he could not signal the guards to unlock it. Pet. App. 29a.

When the guards entered the dayroom in response to the riot, Mr. Cretacci was peaceful and compliant. Am. Compl. ¶ 7, *Cretacci v. Call*, No. 16-CV-97 (E.D. Tenn. Mar. 11, 2017), ECF No. 18 ("Am. Compl."); *see also* Pet. App. 29a ("[T]he inmates complied within a minute or two"). Despite Mr. Cretacci's compliance, guards threw him to the ground, shot him in the face with pepperballs at point-blank range and sprayed his eyes with mace.[1] Am. Compl. ¶ 8; Pet. App. 29a.

The guards then punished the entire cell block by turning off the toilets, showers, and sinks, and depriving the inmates of hygiene items like toilet paper for several days. As a result, the inmates lived and ate surrounded by human waste and covered in mace. Pl.'s Am. Summ. J. Resp. at 4.

On September 29, 2016, the final day of the statute of limitations period for his claims regarding the riot, Mr. Cretacci signed and delivered to the prison authorities a *pro se* complaint alleging § 1983 violations by the guards and Coffee County. The complaint had been drafted by an attorney, Drew Justice, but earlier that day Mr. Justice realized that he was not a member of the bar of the Eastern District of Tennessee, where the complaint was to be filed. Because there was insufficient time for him to be admitted *pro hac vice*, Mr. Justice handed the

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[1] Pepperballs are similar to paint balls in size and operation. However, they are filled with mace. Pl.'s Am. Summ. J. Resp. at 2-3.

complaint to Mr. Cretacci at the jail, explaining that Mr. Cretacci could file his complaint *pro se* within the limitations period under the prison mailbox rule. On October 3, 2016, the district court received Mr. Cretacci's complaint by mail, which was signed by him, not his attorney. Compl., *Cretacci v. Call*, No. 16-CV-97 (E.D. Tenn. Oct. 3, 2016), ECF No. 2.

B. Lower Court Decisions

On May 20, 2020, the district court granted respondents' (defendants-appellees below) motion for summary judgment. The court held that Mr. Cretacci's claims stemming from the September 29, 2015 abuse were time-barred. The court first held that under Tennessee law Mr. Cretacci "was represented at the time of filing" notwithstanding the fact that his counsel was unable to file his complaint. Pet. App. 48a. The district court then observed there was "a circuit split as to whether the prison mailbox rule can be utilized by represented prisoners." Pet. App. 50a. The court noted that the Sixth Circuit had not weighed in on the split, but concluded that although the Sixth Circuit had expressly extended the mailbox rule to civil complaints filed by prisoners, that extension "was a narrow one" and did not encompass complaints filed by prisoners even nominally represented by counsel. Pet. App. 51a-53a. Finally, the Court dismissed on other grounds additional claims brought by Mr. Cretacci concerning subsequent unrelated conduct by the defendants. Pet. App. 53a-62a.

The Sixth Circuit affirmed the district court's decision. The court of appeals agreed that Mr. Cretacci was represented when he filed his complaint because an

attorney had drafted the complaint and instructed Mr. Cretacci to file it. Pet. App. 10a (citing Tenn. Code Ann. § 23-3-101(3)). The panel then held that a represented prisoner is not entitled to the benefit of the mailbox rule. In its view, "if a prisoner does not need to use the prison mail system, and instead relies on counsel to file a pleading on his or her behalf, the prison is no longer responsible for any delays and the rationale of the prison mailbox rule does not apply." Pet. App. 12a.

The court acknowledged a circuit split on whether the mailbox rule extends to represented prisoners. It observed that although several courts of appeals had declined to apply the rule in that context, the Fourth and Seventh Circuits had "extended the prison mailbox rule to represented prisoners." *Id.* The Sixth Circuit sought to distinguish those decisions as concerning notices of appeal. *Id.* Federal Rule of Appellate Procedure 4(c), which governs the timeliness of notices of appeal, was amended after *Houston* to provide that "[i]f 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." Fed. R. App. P. 4(c)(1). The Sixth Circuit concluded that the Fourth and Seventh Circuits' decision to apply the mailbox rule rested on Rule 4's generic reference to "inmate[s]" rather than unrepresented inmates in particular. Pet. App. 12a-13a.

Judge Readler concurred, adding that he was sympathetic to "the challenges inmates face in pursuing legal remedies[,]" and that a mailbox rule "makes a great deal of sense." Pet. App. 22a (quoting *Houston*, 487 U.S. at 277 (Scalia, J., dissenting)) (internal quotation marks

omitted). Judge Readler emphasized that a rule turning on representation is hard to administer. "[Our rule] seemingly leaves judges with the unenviable task of determining whether an inmate was 'represented' at the time of filing. Which, as this case and others demonstrate, is often no easy task. Is an inmate 'represented,' for instance, if her counsel is not admitted in the state in which the inmate's case must be filed?" Pet. App. 24a (internal citation omitted). Judge Readler also expressed concern that not applying the mailbox rule would lead to formalisms. "[T]he seemingly obvious solution for an inmate in this circumstance—a solution that may well have saved Cretacci's complaint here—would be for the inmate to fire her counsel immediately before she turns her complaint over to a prison official." Pet. App. 24a-25a. Judge Readler concluded however that a mailbox rule should be adopted via a federal rule of procedure rather than a judicial decision. Pet. App. 22a-24a.

This petition was thereafter timely filed.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split on the Question Presented

Review is warranted because the circuits are divided on the question of whether *Houston*'s prison mailbox rule applies to represented prisoners. The Fourth Circuit applies the prison mailbox rule to represented prisoners, while the Sixth, Seventh, and Eighth Circuits do not.

If Mr. Cretacci had filed his complaint in the Fourth Circuit, his claims would have been deemed timely under the prison mailbox rule. In *Moore*, the Fourth Circuit

held that "*Houston* governs all notices of appeal filed by prisoners in a criminal proceeding, without regard to whether they are represented by counsel." 24 F.3d at 626. While *Moore* concerned a notice of appeal, the Fourth Circuit found that the *Houston* rule should apply broadly to all kinds of filings, noting that "[t]he mechanism" the prisoner uses "makes no difference" to the applicability of *Houston*. *Id.* at 625. The *Moore* court also found that "there [was] little justification for limiting *Houston*'s applicability to situations where the prisoner is not represented by counsel," explaining that if "it is possible that prison officials could choose to delay a prisoner's attempt to communicate with the courts, it is just as possible that they could choose to delay his access to counsel." *Id.* Following *Moore*, the Fourth Circuit has reaffirmed the application of *Houston* to represented prisoners like Mr. Cretacci. *See Carter*, 474 F. App'x at 333 (citing *Moore*, 24 F.3d at 625-26).

The Sixth Circuit in this case joined two other circuits in holding that the *pro se* filings of represented prisoners are excluded from the prison mailbox rule. *See Kimberlin*, 898 F.2d at 1265 (declining to apply the mailbox rule because "[r]epresented prisoners are in no different position than litigants who are at liberty"); *Burgs*, 79 F.3d at 702 (holding that the plaintiff was "not entitled to the benefit of *Houston* because he was represented by counsel").[2]

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[2] In its characterization of the split, the Sixth Circuit cited cases from two circuits that withheld the mailbox rule from represented prisoners under different circumstances. One case concerned the

In this case, the Sixth Circuit panel contended that the Fourth Circuit's extension of the mailbox rule to represented prisoners turned on the wording of Federal Rule of Appellate Procedure 4(c), which states that the mailbox rule applies to "inmates" filing notices of appeal. Pet. App. 12a; Fed. R. App. P. 4(c)(1). But as discussed above, *Moore* did not rest on the language of Rule 4. Rather, the opinion rested on the broader principle that *Houston*'s reasoning applies to all prisoners who submit filings via the prison mail system, regardless of the particular kind of filing at issue, and regardless if they are represented.[3] *See Moore*, 24 F.3d at 624 ("The mechanism … – whether habeas petition or notice of appeal – makes no difference [to whether *Houston* applies]."); *id.* at 625 ("We note that whenever a prisoner attempts to file a notice of appeal from prison he is acting 'without the aid of counsel,'" so "[t]he same concerns are present in either case," regardless of representation.). Indeed, the Fourth Circuit went out of its way to make clear that its holding was based on Supreme Court

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timeliness of a filing by counsel for a prisoner. *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002). Another involved a prisoner who mailed a filing to his counsel rather than to the court. *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003). Two other circuits have issued non-precedential opinions declining to apply the mailbox rule to a represented prisoner. *United States v. Rodriguez-Aguirre*, 30 F. App'x 803, 805 (10th Cir. 2002); *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017).

[3] The Sixth Circuit also characterized the Seventh Circuit as applying the mailbox rule to represented prisoners solely in the context of notices of appeal governed by Rule 4. Pet. App. 12a. That characterization is correct. Compare *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) with *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000).

precedent and not the recently promulgated Fed. R. App. P. 4(c). *Id.* at 626 n.3 (remarking that the court's holding "is consistent" with Fed. R. App. P. 4(c) and expressing "confiden[ce] that [its] interpretation of *Houston* is the correct one.").

A filing's timeliness should not turn on whether it is sent to a federal court in Tennessee instead of Virginia. This Court should resolve the split of authority on this issue.

II. The Petition Presents an Important and Recurring Question of Federal Law

Review is also merited because whether *pro se* filings by represented inmates like Mr. Cretacci can benefit from the prison mailbox rule is an important question.

The question of whether the rule applies to a represented prisoner comes up with regularity in the federal courts. *See, e.g.*, *Craig*, 368 F.3d at 740; *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003); *Cousin*, 310 F.3d at 847; *Rutledge*, 230 F.3d at 1052; *Burgs*, 79 F.3d at 702; *Moore*, 24 F.3d at 626; *Kimberlin*, 898 F.2d at 1265; *Camilo*, 686 F. App'x at 646; *Carter*, 474 F. App'x at 333; *Rodriguez-Aguirre*, 30 F. App'x at 805.

And the Federal Reports are replete with scenarios in which a prisoner who is nominally represented might mail a filing himself. For example, the prisoner might be effectively abandoned by his counsel. *E.g.*, *Vaughan v. Ricketts*, 950 F.2d 1464, 1466–68 (9th Cir. 1991). Or the prisoner might seek to move against his counsel. *E.g.*, *Michelson v. Duncan*, No. 17-CV-50, 2020 WL 1692345, at *2 (W.D.N.C. Apr. 7, 2020), *aff'd sub nom. Michelson v. Coon*, No. 20-6480, __ F. App'x __, 2021 WL 2981501

(4th Cir. July 15, 2021). Or the prisoner might be represented by multiple counsel at the same time and become confused as to who should file papers on his behalf. *E.g.*, *Telfair v. Tandy*, 797 F. Supp. 2d 508, 511 (D.N.J. 2011).

The Court should address this frequently recurring issue. Clarity is particularly important here because jurisdictional rules should be clear and because the consequences of a limitations ruling are so severe. A claim deemed untimely will never be heard on the merits, no matter how meritorious it is. Only this Court can clear up the confusion about how *Houston* applies, and it should do so.

III. The Decision Below Is Wrong

Review is also warranted because the Sixth Circuit's decision is incorrect. The premise of the Sixth Circuit's decision is that "if a prisoner does not need to use the prison mail system, and instead relies on counsel to file a pleading on his or her behalf, the prison is no longer responsible for any delays and the rationale of the prison mailbox rule does not apply." Pet. App. 12a.

But, as this case and the others cited above demonstrate, nominally represented prisoners sometimes *do* need to use the prison mail system because they cannot or will not rely on their counsel to undertake the filing. By definition, that inmate will not be able to place his filing "directly into the hands of the United States Postal Service" nor "personally travel to the courthouse" to deliver it. *Houston*, 487 U.S. at 271. And once a document is delivered to the prison authorities, the prospect of delay remains the same

regardless if the prisoner has counsel. *Houston*'s rationales apply with equal force to the inmate who has no counsel and the represented inmate who does not rely upon counsel, and it is irrational and unfair to treat timeliness of the two inmates' filings differently.

That is particularly so because the deciding factor in the Sixth Circuit's analysis—whether the prisoner was represented—will often involve "thorny" questions that an inmate is unlikely to perceive, let alone correctly resolve, on his own, and that require a court to undertake a complex analysis. For example, as both the majority and concurring opinions pointed to below, courts have found a prisoner "represented" even where counsel explicitly stated she was not able to "assume responsibility for representing him" but nevertheless assisted with his *pro se* habeas petitions. *Stillman*, 319 F.3d at 1200 (9th Cir. 2003); *see also* Pet. App. 10a, 24a.

In this case, the lawyer who drafted the complaint told Mr. Cretacci that he could not file the pleading; while Mr. Cretacci was represented within the meaning of Tennessee law, he could not have been expected to know that, and he should not be punished by his lawyer's inability to submit a filing. And, as Judge Readler observed, if Mr. Cretacci *had* concluded that he was still represented, he apparently could have terminated that representation in order to get the benefit of the mailbox rule. Pet. App. 24a-25a. Whether a court has the opportunity to address serious claims of abuse Mr. Cretacci has alleged should not turn on such fortuities and formalisms.

Moreover, even where a prisoner obtains or is provided counsel, the fact of representation does not in

and of itself cure the limitations imposed by incarceration. Communications between a prisoner and his lawyer may be subject to interference—intentional or otherwise—that would not be possible but for the same conditions motivating the Supreme Court's decision in *Houston*. *See Moore*, 24 F.3d at 626 ("The Supreme Court did not expressly limit *Houston*'s application to cases involving unrepresented prisoners, and the Seventh Circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communicating with counsel.").

The concurrence below suggested that the mailbox rule could be authorized via an amendment to the Federal Rules, akin to the amendment to Fed. R. App. P. 4, which extends the mailbox rule to all inmates for notices of appeal. Pet. App. 25a-26a. But that amendment was merely intended to "reflect" this Court's decision in *Houston*. Fed. R. App. P. 4 advisory committee's note to 1993 amendment.[4] And *Houston* in turn has been interpreted to apply to filings of all kinds, not just notices of appeal. Having held in *Houston* that prisoners should be entitled to the mailbox rule, this Court should make clear that *Houston* applies to filings by inmates whether or not they have counsel.

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[4] That the text of Fed. R. App. P. 4(c) currently applies only to notices of appeal is thus an outgrowth of the fact that *Houston*, itself, was a case about a notice of appeal. As noted, that rule was intended to "reflect" *Houston*, and given that it is well-settled that *Houston* applies to all prisoner filings and not just notices of appeal, this Court should confirm that *Houston* applies to all inmates who file using the prison mail system, regardless if they are represented.

Finally, applying the mailbox rule to all filings made via the prison system will not lead to abuse. A court always has the discretion not to allow a *pro se* filing, including because the inmate has representation. *See, e.g.*, *United States v. Flowers*, 428 F. App'x 526, 530 (6th Cir. 2011) (citing *United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009) (further citations omitted)). But if a court would otherwise allow the filing, it should not be deemed untimely simply because the inmate chose to use the prison mail system to file it.

IV. The Petition Squarely Presents the Issue

This case is the ideal vehicle to resolve the circuit split over whether represented prisoners may benefit from the prison mailbox rule. The question is squarely presented and dispositive.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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August 13, 2021

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BLAKE CRETACCI,

Plaintiff-Appellant,

v.

JOE CALL; BRIAN KEITH; JARED NELSON; JESSE HARDEN; CODY FAUST; COFFEE COUNTY, TENNESSEE,

Defendants-Appellees.

No. 20-5669

Appeal from the United States District Court for the Eastern District of Tennessee at Winchester.

No. 4:16-cv-00097—Christopher Harper Steger, Magistrate Judge.

Argued: January 12, 2021

Decided and Filed: February 17, 2021

Rehearing Denied March 17, 2021

Before: SUHRHEINRICH, McKEAGUE, and READLER, Circuit Judges.

COUNSEL

ARGUED: Drew Justice, JUSTICE LAW OFFICE, Murfreesboro, Tennessee, for Appellant. Darrell G. Townsend, HOWELL & FISHER, PLLC, Nashville, Tennessee, for Appellees. **ON BRIEF:** Drew Justice, JUSTICE LAW OFFICE, Murfreesboro, Tennessee, for Appellant. Darrell G. Townsend, Nicholas A. Lastra, HOWELL & FISHER, PLLC, Nashville, Tennessee, for Appellees.

McKEAGUE, J., delivered the opinion of the court in which SUHRHEINRICH and READLER, JJ., joined. READLER, J. (pp. 13–17), delivered a separate concurring opinion.

OPINION

McKEAGUE, Circuit Judge. Blake Cretacci sued Coffee County and Coffee County Jail Deputies Joe Call, Brian Keith, Jared Nelson, Jesse Harden, and Cody Faust ("Appellees") pursuant to 42 U.S.C. § 1983 for constitutional violations that occurred while Cretacci was a pretrial detainee at Coffee County Jail. The district court granted summary judgment in favor of Appellees, finding that two claims were barred by the statute of limitations and that there were no constitutional violations underlying the remaining two claims.

The untimely claims implicate the issue of whether the prison mailbox rule applies to prisoners who are represented by counsel, an issue of first impression in the Sixth Circuit. A majority of circuits have declined to extend the rule to represented prisoners, finding that

the rule established in *Houston v. Lack*, 487 U.S. 266 (1988), is premised on the relaxed procedural requirements traditionally afforded to pro se prisoners who have no choice but to rely on the prison authorities to file their pleadings. We agree and hold that, in the context of filing civil complaints in federal court, the prison mailbox rule applies only to prisoners who are not represented by counsel.

Finding no error in the district court's judgment, we **AFFIRM**.

I.

Cretacci's claims arise from three separate incidents occurring on three separate days—September 29, 2015, October 11, 2015, and January 14, 2017—while Cretacci was a pretrial detainee at the Coffee County Jail.

On September 29, 2015, three inmates in the BC pod[1] of the Coffee County Jail—Jeremy Mathis, BJ Murray, and Josh Byford—decided to lead a "peaceful riot" to protest the conditions in the jail. The three ringleaders of the riot told the other inmates that if they refused to participate they would be beaten up. The riot involved inmates refusing to return to their cells for lockdown when instructed. Cretacci, who was housed in the BC pod, did not want to participate in the riot but took the threats of the ring leaders seriously, so he did not return to his cell. When officers entered the pod, they grabbed Cretacci and put him on the floor. While Cretacci was on

[1] "The pod is one large room, referred to as the dayroom, with a two-story ceiling." Officers refers to pods as letters, such as BA, BB, BC and BD.

the ground, he was struck twice with pepperballs. Cretacci also alleges that after the incident the water in the sinks and toilets of the cells were turned off for at least three days, that the inmates were denied toilet paper, and that they were not allowed to shower.

After the September 29 riot, Cretacci wanted to be moved to a different pod, but never submitted a written request. Instead, Cretacci told multiple officers that he "need[ed] to get out of [the] pod," but he does not remember to whom he said it. Cretacci "would just say it out loud," to "[a]ny cop that came in pretty much at certain times." Cretacci does not recall telling any officers that he feared for his safety, because he was not "afraid of these three people," but remembers telling officers that "[the] pod is crazy," and that "[t]hese people are nuts. I need to get out of this pod. You guys need to move me into another pod."

Early in the morning on October 11, 2015, the three ringleaders of the riot were in the dayroom talking loudly. Cretacci walked out of his cell to ask them to be quiet and then returned to his cell. A few minutes later, Mathis came into Cretacci's cell and assaulted him. Cretacci was able to "hit [Mathis] out the door" and back into the dayroom, but Byford and Murray then came to Mathis's assistance, and the three of them attempted to push Cretacci back into his cell. Cretacci forced his way out into the dayroom and "started to have more words with" his assailants. When the four of them got out into the dayroom, officers entered the pod and Cretacci walked back into his cell. The physical fighting had ended before the officers came in. The officers asked Cretacci what happened, and Cretacci replied: "I don't

know what the f*** is going on." The officers spoke to Mathis, Murray, and Byford in the dayroom, but Cretacci could not hear what they said. After the officers left the pod, Mathis, Murray, and Byford threatened to kill Cretacci.

Thirty minutes later, breakfast was served. Cretacci grabbed his tray of food and set it down on the table. Cretacci then went into his cell to grab his spoon and Mathis followed him. Mathis hit Cretacci and Cretacci fell to the floor. Mathis punched Cretacci "four or five times" and then left the cell. Cretacci got up and started walking back to the table when Officer Keith came up behind him, grabbed him, and put him up against the wall to keep him from being assaulted. Officers Keith and Call took Cretacci to the medical unit for examination. Cretacci was then permanently transferred to the AD pod.

Officer Call's incident report stated that "a verbal altercation began with Inmates Mathis, Byford, Murray, and Cretacci, regarding a conflict that started this morning around [6:00 a.m.]." Officer Call testified that he learned about the 6:00 a.m. altercation when he spoke to Cretacci after removing him from the pod.

On January 14, 2017, corrections officers overheard an inmate threaten to stab another inmate in the AD pod, where Cretacci was housed. Officer Faust ordered Officer Dubicki to make an announcement over the loudspeaker in the dayroom of the AD pod instructing the inmates to lie on their stomachs. Officer Faust heard

Officer Dubicki give this order, but Cretacci did not.[2] Officer Dubicki observed that the inmates were not complying with his order and alerted Officer Faust. Officer Faust and five other officers then entered the pod, and Officer Faust repeated Officer Dubicki's order to get on the ground. Cretacci was sitting in the dayroom playing chess when he saw the officers enter the pod and heard Officer Faust's order. Cretacci did not comply with the order, so Officer Faust fired pepperballs towards Cretacci. Cretacci alleges he was hit once or twice on the arm. Cretacci then stood up from his chair and began yelling at the officers, so Officer Faust ordered him to lay down. When Cretacci refused, Officer Faust again launched pepperballs towards Cretacci, hitting him once on the back. Cretacci then finally complied and laid back down on the floor.

Cretacci secured an attorney, Andrew Justice, to represent him in a lawsuit against the jail. Justice drafted a complaint and intended to file it electronically, but on the evening of September 28, 2016, the day before the statute of limitations expired on Cretacci's claims stemming from the September 29, 2015 incident, Justice realized he was not admitted to practice law in the district that encompassed Coffee County Jail, the Eastern District of Tennessee. Justice was only admitted in the Middle District of Tennessee, where he mistakenly believed Coffee County Jail was located. The next day, Justice looked into being admitted into the

[2] In a declaration, Cretacci stated: "the dayroom does not have a loudspeaker." It is not clear whether he was referencing the dayroom in the BC pod, the AD pod, or speaking generally about all the jail's pods.

Eastern District pro hac vice so that he could electronically file the complaint, but did not think he could complete the requirements in time. Accordingly, Justice drove to the Winchester courthouse in the Eastern District to attempt to file the complaint in person. However, the Winchester courthouse does not have a staffed clerk's office and documents cannot be filed in-person there. Justice determined he would not be able to drive to the Chattanooga courthouse before it closed, so instead he took the complaint to Cretacci at the Coffee County Jail for Cretacci to file. Justice gave Cretacci an envelope stamped and addressed to the Chattanooga courthouse and told him to deliver it to the correctional officers immediately, explaining that because he was an inmate, he could take advantage of the prison mailbox rule, which allows inmate filings to be assessed for timeliness on the day they are handed over to the jail authorities rather than on the day the district court receives them. Cretacci did so on the night of September 29, and the district court received the complaint on October 3. Justice monitored the case on PACER, and on November 22, 2016, Justice was admitted pro hac vice into the Eastern District. He entered his appearance in the case that same day.

Plaintiff's complaint alleged three counts under 42 U.S.C. § 1983: a deliberate indifference claim against Officers Call, Keith, Nelson, Harden and Coffee County[3] for the assaults that occurred on October 11, 2015; an excessive force claim against Coffee County arising from

[3] Cretacci withdrew his deliberate indifference claim against Coffee County.

the September 29, 2015 riot; and a claim against Coffee County for failure to "distribute essential supplies to the inmates" after the September 29, 2015 riot. After the January 14, 2017 incident, Cretacci amended his complaint to include Count IV, alleging excessive force against Officer Faust and Coffee County.[4]

Defendants moved for summary judgment, arguing that Counts II and III were barred by the statute of limitations because Cretacci was represented by counsel when he filed his complaint and therefore could not benefit from the prison mailbox rule, and that there were no constitutional violations underlying Counts I and IV. The district court agreed and granted summary judgment in full in favor of Defendants. Cretacci now appeals.

II.

In *Houston v. Lack*, the Supreme Court held that notices of appeal from pro se prisoners are considered filed when the prisoner delivers the notice to prison authorities for mailing. 487 U.S. 266, 270 (1988). This is now known as the prison mailbox rule.[5] In adopting the rule, the Court emphasized the unique challenges faced

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[4] Count IV alleges Coffee County is also responsible for Officer Faust's use of excessive force, but Cretacci has withdrawn that argument on appeal.

[5] The prison mailbox rule applicable to the filing of a notice of appeal was later codified in the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 4 advisory committee's note to 1993 amendment. Today, that Rule states, in relevant part: "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." Fed. R. App. P. 4(c)(1).

by pro se prisoners seeking to appeal: they cannot travel to the courthouse to file the notice, they cannot place the filing "directly into the hands of the United States Postal Service" and track its progress, nor "do they have lawyers who can take these precautions for them." *Id.* at 271. Because pro se prisoners are "[u]nskilled in law, unaided by counsel, and unable to leave the prison," they have "no choice but to entrust the forwarding of [their] notice of appeal to prison authorities whom [they] cannot control nor supervise and who may have every incentive to delay." *Id.*

The prison mailbox rule has since been extended in some circuits to apply to filings other than notices of appeal. *See, e.g.*, *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (per curiam) (civil complaints); *Jones v. Bertrand*, 171 F.3d 499, 501–02 (7th Cir. 1999) (habeas corpus petitions); *In re Flanagan*, 999 F.2d 753, 755 (3d Cir. 1993) (appeals of bankruptcy order); *Tapia–Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999) (administrative filings under the Federal Tort Claims Act). Following the amendment to Federal Rule of Appellate Procedure 4, the Fourth and Seventh Circuits have also applied the mailbox rule to prisoners represented by counsel in the context of a notice of appeal in criminal proceedings. *See United States v. Moore*, 24 F.3d 624, 626 (4th Cir. 1994); *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). *But see Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000) (declining to extend the prison mailbox rule to a motion to amend filed by a represented inmate).

Cretacci first argues that he should receive the benefit of the prison mailbox rule because he was not represented by Justice when he filed his complaint. In

the alternative, if he was represented, Cretacci asks this Court to extend the application of the prison mailbox rule to prisoners proceeding with assistance of counsel. We address each argument in turn.

A.

Cretacci was not proceeding without assistance of counsel. Justice and Cretacci had an explicit attorney-client relationship in which Justice agreed to represent Cretacci in his lawsuit against the jail. Importantly, Justice developed Cretacci's case against Coffee County, identified the proper legal causes of action to bring, and wrote the complaint. When an attorney agrees to represent a client and then prepares legal documents on his behalf, the client is not proceeding without assistance of counsel. *See* Tenn. Code Ann. § 23-3-101(3) (defining "practice of law" as "the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court"); *see also Stillman v. LaMarque*, 319 F.3d 1199, 1200–01 (9th Cir. 2003) (using California's definition of practicing law, "the preparing of legal documents and the giving of legal advice," to hold that prisoner was represented for the purposes of the prison mailbox rule because an attorney prepared and filed a habeas petition on his behalf, despite the attorney's specific admonition that she would not "assume responsibility for representing him").

And the fact that Cretacci himself filed the complaint does not lead to a different result. Justice attempted to file the complaint several times, and only when those attempts proved unsuccessful, advised Cretacci to file it

with prison officials in an effort to trigger the prison mailbox rule. Moreover, Justice's and Cretacci's attorney-client relationship did not end after Justice drafted the complaint. Justice represented Cretacci throughout the proceedings at the district court and continues to represent him here on appeal. *See Stillman*, 319 F.3d at 1201 n.3 ("Our conclusion that a lawyer-client relationship existed is buttressed by the fact that [the prisoner's] lawyer later assisted him with numerous other legal matters.").

We affirm the district court's finding that Cretacci was represented by counsel when he filed his complaint. Thus, we turn now to the question of whether represented prisoners can take advantage of the prison mailbox rule.

B.

The majority of circuits have declined to extend the prison mailbox rule to prisoners proceeding with counsel.[6] These circuits reasoned that the rationale of *Houston* was premised on the plight of pro se prisoners specifically, who have no means to file legal documents except through the prison mail system and who cannot

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[6] These circuits have concluded in contexts other than the one we consider today (the filing of a civil complaint) that the mailbox rule does not apply to represented prisoners. *See Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (habeas petition); *Rutledge*, 230 F.3d at 1052 (motion to amend); *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996) (per curiam) (notice of appeal); *Stillman*, 319 F.3d at 1201 (habeas petition); *United States v. Rodriguez-Aguirre*, 30 F. App'x 803, 805 (10th Cir. 2002) (habeas petition); *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017) (filings objecting to a plea agreement and prison sentence).

monitor the status of their mailings to ensure timely delivery. *See, e.g.*, *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017). Represented prisoners, on the other hand, are not dependent on the prison mail system and can rely on their attorneys to file the necessary pleadings on time. *See Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996) (per curiam); *United States v. Rodriguez-Aguirre*, 30 F. App'x 803, 805 (10th Cir. 2002).

The two circuits that have extended the prison mailbox rule to represented prisoners did so in the context of notices of appeal, not the filing of civil complaints, and relied on the text of Federal Rule of Appellate Procedure 4, which was amended after *Houston* to add subsection (c). Rule 4, these circuits reasoned, does not distinguish between pro se and represented prisoners: "If an inmate files a notice of appeal . . . [it] is timely if it is deposited in the institution's internal mail system on or before the last day for filing." *See Moore*, 24 F.3d at 626; *Craig*, 368 F.3d at 740.

We agree with the majority of circuits. The prison mailbox rule was created to prevent pro se prisoners from being penalized by any delays in filing caused by the prison mail system. But if a prisoner does not need to use the prison mail system, and instead relies on counsel to file a pleading on his or her behalf, the prison is no longer responsible for any delays and the rationale of the prison mailbox rule does not apply. And because this case is not governed by Appellate Rule 4(c), it is readily distinguished from *Moore* and *Craig*.

Accordingly, we hold that, in the context of the filing of civil complaints, the prison mailbox rule applies only to prisoners who are not represented by counsel and are proceeding pro se.

III.

We turn now to the merits of Cretacci's constitutional claims. This Court reviews a district court's grant of summary judgment de novo, "viewing all the evidence in the light most favorable to the nonmoving party and drawing 'all justifiable inferences' in his favor." *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 416 (6th Cir. 2020) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The central question is "whether the evidence presents a sufficient factual disagreement to require submission of the case to the jury, or whether the evidence is so one-sided that the moving parties should prevail as a matter of law." *Payne v. Novartis Pharms. Corp.*, 767 F.3d 526, 530 (6th Cir. 2014).

A.

In Counts II and III, Cretacci brings claims for excessive force and for failure to "distribute essential supplies to the inmates" against Coffee County for the events arising from the September 29, 2015 riot and the three subsequent days. Because Cretacci cannot take advantage of the prison mailbox rule, his complaint was filed on October 3, 2016, when it was received by the district court. Counts II and III are therefore barred by the statute of limitations, which expired on September 29, 2016, or October 2, 2016, at the latest. *See* Tenn. Code

Ann. § 28-3-104(a)(1); *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634–35 (6th Cir. 2007).

B.

In Count I, Cretacci alleges that Officers Call, Keith, Nelson, and Harden showed deliberate indifference to his safety when they allowed him to be attacked by Mathis, Murray, and Byford on October 11.

Cretacci has the burden of "presenting evidence from which a reasonable juror could conclude that the individual defendants were deliberately indifferent to a substantial risk of serious harm to [him] and that they disregarded that risk by failing to take reasonable measures to protect him." *Richko v. Wayne County*, 819 F.3d 907, 915 (6th Cir. 2016) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). Cretacci must satisfy both an objective component and subjective component: (1) that the risk of harm was objectively, sufficiently serious, and (2) that "'the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner,' . . . the official 'did in fact draw the inference,' and . . . the official 'then disregarded that risk.'" *Id.* (quoting *Rouster v. County of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014)); *accord Roberts v. Coffee County*, 826 F. App'x 549, 552 (6th Cir. 2020).

Cretacci cannot satisfy the subjective component. Cretacci has not put forth any evidence that Appellee officers knew that Cretacci was attacked by Mathis, Murray, and Byford at 6:00 a.m. before breakfast. Cretacci himself testified that the physical violence had ended by the time the officers entered the pod. And when the officers asked Cretacci what had happened, he

did not tell them that he was assaulted, instead replying that he had no idea what was going on. Cretacci argues that because Officer Call's incident report referenced the 6:00 a.m. attack, Officer Call must have been aware of the attack before Cretacci was assaulted for the second time. But Officer Call testified that he received that information from Cretacci after removing him from the pod, and Cretacci has not offered any evidence to the contrary.

Cretacci also argues that the district court erred by basing its holding on the fact that "the guards could not have seen the fight because the cell door was closed." But the district court did not make such a finding. In its order granting summary judgment, the court wrote: "the cell has a solid door except for a very narrow window. There is no evidence that the officers could see inside the cell when the first assault happened." And the court did not base its holding on the fact that the officers could not have seen through the small window. It found that the officers did not perceive facts from which to infer Cretacci was at risk of serious harm because Cretacci presented no evidence that the officers had seen the fight, especially considering that Cretacci testified that when the officers entered the pod, the inmates were in the dayroom and the fight was only verbal.

Thus, because Cretacci failed to provide evidence showing that the officers perceived facts from which they could infer Cretacci was at risk of being assaulted, we affirm the district court's grant of summary judgment to Appellees on Count I.

C.

In Count IV, Cretacci alleges that Officer Faust used excessive force when he struck Cretacci with pepperballs on January 14, 2017 following the security threat in which officers overheard an inmate threaten to stab another inmate.

"[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)). To prevail on an excessive force claim, a pretrial detainee must show "that the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 396–97. "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case,'" *id.* at 397 (quoting *Graham*, 490 U.S. at 396), including

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. Courts must make this totality-of-the-circumstances determination based on what a reasonable officer on the scene knew at the time and account for the jail's legitimate interest in maintaining their facility, "deferring to 'policies and practices that . . . are needed to preserve internal order and discipline and to maintain

institutional security.'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 540, 547 (1979)).

Here, it was reasonable for Officer Faust to use force against Cretacci when he did not obey the order to get on the ground. Based on the threat the officers overheard, Officer Faust had a legitimate interest in maintaining order to prevent violence and protect the inmates. Further, Officer Faust used a non-lethal weapon against Cretacci, a pepperball launcher, which led only to minor injuries—bruises that lasted for a few days.

Cretacci makes much of the fact that he did not hear Officer Dubicki's order to get on the ground over the loudspeaker. He claims that there is an evidentiary dispute over whether the guards even gave such a command, and therefore summary judgment should not have been granted. However, viewing the record in the light most favorable to Cretacci, and assuming no announcement was ever made, it is undisputed that Officer Faust made the announcement when he entered the pod, and Cretacci stated that he heard that order. Moreover, Officer Faust had no reason to believe that Officer Dubicki never gave the order over the loudspeaker because Officer Faust heard it himself.

Cretacci next argues that the second time Officer Faust deployed pepperballs against him was excessive force because Officer Faust did not give him an opportunity to comply with his order. But Cretacci was not in the process of complying with Officer Faust's order when he was hit with a pepperball the second time; he was beginning to stand up and yell at Faust. And "[a]ctive resistance to an officer's command can

legitimize" an officer's use of force. *Hanson v. Madison Cnty. Det. Ctr.*, 736 F. App'x 521, 531 (6th Cir. 2018) (quoting *Goodwin v. City of Painesville*, 781 F.3d 314, 323 (6th Cir. 2015)). "Such resistance can take the form of 'verbal hostility' or 'a deliberate act of defiance.'" *Id.* (emphasis omitted) (quoting *Goodwin*, 781 F.3d at 323). Officer Faust did not act unreasonably in hitting Cretacci with a pepperball for a second time after Cretacci actively resisted the order to get on the ground by yelling and standing up.

Considering the totality of the circumstances, Officer Faust did not use excessive force against Cretacci when he did not obey the order to get on the ground. We affirm the district court's grant of summary judgment to Appellees on Count IV.

IV.

For the foregoing reasons, we **AFFIRM** the decision of the district court.

CONCURRENCE

CHAD A. READLER, Circuit Judge, concurring. I concur in full with the majority opinion. I write separately to emphasize that any rewriting of our federal filing requirements to create exceptions for incarcerated individuals should come from Congress or the Judicial Conference's Committee on Rules of Practice and Procedure, commonly known as the "Standing Committee," rather than individual judges.

1. Including the Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), various federal courts have been tinkering with the otherwise clear filing requirements in the respective Federal Rules of Civil and Appellate Procedure. In *Houston*, the Supreme Court effectively rewrote the then-existing versions of Federal Rules of Appellate Procedure 3(a) and 4(a)(1), which together required that a notice of appeal in a civil case "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." *Id.* at 272 (quoting Fed. R. App. P. 4(a)(1) (1986)). *Houston* interpreted those Rules to mean that a prisoner, upon handing his notice of appeal to *a prison official*, has "filed his notice . . . [with] *the District Court*." *Id.* at 270 (emphasis added). That creative rewriting of the Federal Rules set the foundation for what has come to be known as the "prison mailbox rule." *See United States v. Smotherman*, 838 F.3d 736, 737 (6th Cir. 2016).

Our Court too has not been shy about rewriting federal filing requirements. Taking our cue from *Houston*, we extended the "mailbox rule" from the notice of appeal setting to instances when "civil complaints [are] filed by pro se petitioners incarcerated at the time of filing." *Richard v. Ray*, 290 F.3d. 810, 813 (6th Cir. 2002) (per curiam). As then-Federal Rule of Civil Procedure 5(e) explained, "[t]he filing of papers with the court as required by these rules shall be made by filing them *with the clerk of court*." Fed. R. Civ. P. 5(e) (2000) (emphasis added). In departing from that plain text to deem a prisoner to have "filed" a complaint with the court simply by handing those papers to a prison official, we invoked the policy concerns "highlighted by the Supreme Court in *Houston v. Lack*." *Richard*, 290 F.3d at 813. Those policy concerns coupled with the notion that "*Houston* gives no indication, in either text or analytical framework, that it should be limited to the habeas context," seemingly gave us license to ignore the text of Civil Rule 5(e) and overhaul the filing requirements for civil complaints by inmates. *Id.* That is a curious conclusion—and not just because it ignores the Rule's text in favor of a judge's policy preferences. As a matter of interpreting precedent, simply because the Supreme Court cracks open a door in one context does not mean we should kick the door wide open at the next possible opportunity. Today, we understandably curtail any further expansion of this atextual, judge-inspired rewriting of the Federal Rules.

Reason for caution in this setting is further reflected by the fact that *Richard* and cases like it have the potential to upset substantive state law rules. *See* 28

U.S.C. § 2072(b) (requiring that rules of procedure created by the Supreme Court "shall not abridge, enlarge or modify any substantive right"). By allowing a civil complaint to be deemed "filed" before it is received by a court clerk, *Richard* arguably created a tolling amendment to a state's statute of limitations. To be sure, one way to read *Richard* is that it simply interprets the meaning of "filing" under the Federal Rules to include an inmate handing her complaint to a prison official. But another way to understand the decision is that it effectively extends the period for filing set by state law. In *Richard*, Kentucky law required that the inmate's medical malpractice claim be filed within one year of May 20, 1999, yet the complaint was accepted as timely despite being stamped "filed" with the federal district court on May 23, 2000. 290 F.3d at 812–13. In that way, the rule from *Richard* arguably tolled the applicable state statute of limitations.

All of this is to say that, to my mind, it is dangerous practice for federal judges to be rewriting the Federal Rules on their own whims. In addition to potentially undermining principles of state law, doing so effectively implements policy judgments regarding the equities of prisoner litigation. Those policy judgments, however, are better made by subject-matter experts: Congress, or in its absence, the Standing Committee. Especially so, it seems, when federal courts, in making those policy judgments, also "expand and contract the scope of their own competence." *Houston*, 487 U.S. at 279 (Scalia, J., dissenting). Allowing individual judges to rewrite the rules of procedure also undermines the overarching goal of "uniform meaning" for "ordinary statutory deadlines"

as well as "court-created rules." *Id.* A contrary patchwork system of federal rules, as *Richard* and other cases invite, has far less appeal. Why, for example, would we prefer a system in which an unrepresented federal prisoner in Ohio can file her complaint simply by handing it to a prison official, whereas a prisoner in neighboring Pennsylvania cannot? *See Jackson v. Nicoletti*, 875 F. Supp. 1107, 1109–14 (E.D. Pa. 1994) (declining to extend the prison mailbox rule to the filing of a civil complaint). Yet that is the natural result of ad hoc, atextual, court-created filing rules.

2. Despite my disagreement with the process that gave rise to the "mailbox rule," I am not blind to the challenges inmates face in pursuing legal remedies. *See, e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Accommodating those challenges when possible, in fact, "makes a good deal of sense." *Houston*, 487 U.S. at 277 (Scalia, J., dissenting). As a policy matter, one can see why a litigant who cannot personally ensure a timely filing with the court should benefit from a filing rule that accounts for her unique circumstance. But reconciling those policy concerns should come from Congress, or, as often occurs, the Standing Committee, whose proposals take effect when, once reported by the Supreme Court, are not altered by Congress in the ensuing seven months. *See* 28 U.S.C. §§ 2071–74; *How the Rulemaking Process Works*, United States Courts, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Feb. 16, 2021). Just as it was difficult "to understand why the [Supreme] Court" in *Houston* "felt the need to short-circuit the orderly process of rule amendment in order

to provide immediate relief in the present case," 487 U.S. at 284 (Scalia, J., dissenting), I share that same confusion over our decision in *Richard*. But I also have reason to believe that the Standing Committee would be up to the task of resolving whether to alter the procedural rules applicable to the filing of civil complaints by incarcerated individuals.

Indeed, one need look no further than the Standing Committee's amendment to Appellate Rule 4, which accommodated the challenges an inmate faces in filing a notice of appeal. *See* Fed. R. App. P. 4 advisory committee's note to 1993 amendment. Rule 4(c) now provides: "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." Fed. R. App. P. 4(c) (2019). In enacting amended Rule 4, the Standing Committee was also able to address relevant considerations unaddressed by *Houston*, for example, how an inmate certifies the date of filing, and how the mailbox rule affects when other parties' time to file an appeal begins to run. *See id.*

A similar process would provide uniform direction on whether to extend the "mailbox rule" to the filing of a civil complaint. *Cf. Smith v. State*, 47 A.3d 481, 487 (Del. 2012) (referring the issue to the state rules committee to consider whether the court system "should consider adopting the prison mailbox rule as a rule of procedure"). Unlike a panel of appellate judges, the Standing Committee may study a proposed rule's impact, hear from interested constituencies, consult experts, and then debate whether a rule amendment ultimately

should be adopted. That process also affords Congress a voice, as all new proposed rules must be submitted to Congress for review before enactment. 28 U.S.C. § 2074. And it has the benefit of uniformity. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (explaining that a "uniform rule" preserves "operational consistency and predictability"); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." (citation omitted)). The Standing Committee stepping in would also surely curtail the temptation for judges to tinker with our otherwise uniform rules of procedure.

3. Were the Standing Committee, following its review, inclined to extend the prison mailbox rule to a prisoner's filing of a civil complaint, it should consider doing so irrespective of whether that inmate is represented. As today's case reflects, any other approach seemingly leaves judges with the unenviable task of determining whether an inmate was "represented" at the time of filing. Which, as this case and others demonstrate, is often no easy task. *See, e.g.*, *Stillman v. LaMarque*, 319 F.3d 1199, 1201 & n.3 (9th Cir. 2003). Is an inmate "represented," for instance, if her counsel is not admitted in the state in which the inmate's case must be filed? Or if she has consulted with a lawyer only informally? Or with a family member with a law degree who has offered to assist the inmate, but not to formally represent her? And the seemingly obvious solution for an inmate in this circumstance—a solution that may well have saved Cretacci's complaint here—would be for the inmate to fire her counsel

immediately before she turns her complaint over to a prison official. After all, that ostensibly would leave the inmate unrepresented, and thus free to avail herself of the prison mailbox rule. *See Richard*, 290 F.3d at 813.

This is the approach the Standing Committee followed in revising Federal Rule of Appellate Procedure 4. By its plain terms, Rule 4(c)'s articulation of the mailbox rule applies to "an inmate," whether pro se or represented, when she files a notice of appeal. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (Easterbrook, J.) ("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."); *United States v. Moore*, 24 F.3d 624, 626 & n.3 (4th Cir. 1994) (applying the prison mailbox rule to a represented inmate and recognizing its holding to be "consistent" with the amendment to Rule 4). Taking that same approach here would instill a bright-line rule that asks only whether the litigant filing the complaint is an inmate, not whether the inmate is also unrepresented. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178–80 (1989) (recognizing bright-line rules as advantageous because they create predictability and consistency, provide assurance to litigants that their case was decided fairly, and constrain judges from indulging their personal preferences). Doing so would avoid tasking courts with resolving thorny questions of representation. And it would avoid incentivizing inmates to game the system as to whether they were represented at the time of filing.

Of course, there may well be other considerations at play. This is simply one judge's view. But that give and

take can be debated by the Standing Committee, if it so chooses. Better them, as I see it, than us.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

BLAKE CRETACCI, *Plaintiff,* v. JOE CALL, BRIAN KEITH, JARED NELSON, JESSE HARDEN, CODY FAUST, and COFFEE COUNTY, *Defendants.*	)	Case No. 4:16-cv-97-CHS Filed 05/20/2020

MEMORANDUM OPINION

I. Introduction.

Defendants, Coffee County Deputies Joe Call, Brian Keith, Jared Nelson, Cody Faust and Coffee County, move for summary judgment [Doc. 67] in this action brought by Plaintiff Blake Cretacci pursuant to 42 U.S.C. § 1983 for alleged constitutional violations while Plaintiff was a pretrial detainee in the Coffee County jail. For the reasons stated herein, Defendants' Motion for Summary Judgment shall be **GRANTED**.

II. Background

A. Facts

When reviewing a motion for summary judgment, the Court must consider the facts in the light most favorable to the nonmoving party who is, in this case,

Plaintiff Cretacci. *See Morris v. Crete Carrier Corp.*, 105 F.3d 279, 280-81 (6th Cir. 1997). This case arises from incidents occurring on three separate days—September 29, 2015, October 11, 2015, and January 14, 2017—while Plaintiff was incarcerated at the Coffee County Jail as a pretrial detainee.

1. September 29, 2015, Incident

On September 29, 2015, while Plaintiff was incarcerated in BC pod at the Coffee County jail, some inmates decided to hold a "peaceful riot" to protest conditions at the jail. Defendants have submitted two videos of this incident which provide a view of the pod. Based on that video, the Court makes the following observations about the pod:

- The pod is one large room, referred to as the dayroom, with a two-story ceiling.
- Round tables with fixed seats are situated in the dayroom. The rear area of the pod consists of two stories of individual cells running the length of the room (the cell wall).
- The cells have solid doors except for a long, very narrow rectangular window in each cell door.
- On the first floor, the cell doors open into the dayroom where the tables are located.
- On the upper level, the cell doors open onto a concrete balcony with a metal railing running the length of the second story cell wall. An inmate standing on the second story balcony can look down into the dayroom.

[*See* DVD videos of riot—Notice of Manual Filing, Doc. 47]

The "riot" involved the inmates' refusal to return to their cells for lockdown when instructed. [Doc. 68-7, Cretacci Dep. at 41]. There were three ring leaders of this "riot": Jeremy Mathis, BJ Murray, and Josh Byford. [*Id.* at 47]. They told the other inmates that, if they refused to participate in the riot, they would get beaten-up later. [*Id.* at 54-56]. Because Plaintiff took this threat seriously, he did not return to his cell when the guards instructed them it was time for lock up. [*Id.*]. Some of the inmates (not Plaintiff) put soap, clothes and other items on the floor in front of the main entrance door to the pod to impede the officers when they attempted to enter the pod. [*See* DVD videos]. Some inmates hung sheets on the railing of the second-floor balcony to stop pepperballs that the guards might fire at the inmates [*Id.*]. For the approximate two hour duration of the "riot," Plaintiff sat at a table or walked slowly around the dayroom. [*Id.*]. Because he had closed his cell door earlier, he needed a guard's assistance to reopen it. [Doc. 68-7, Cretacci Dep. at 52]. At some point, he attempted unsuccessfully to signal surreptitiously to the guards to unlock his cell so that he could return to it. [*Id.* at 52, 55-56]. After about two hours, guards burst into the dayroom from doors on either side of the dayroom. [*See* DVD videos]. Some were carrying pepperball launchers. [*Id.*]. The guards ordered the inmates to lie on the floor, and the inmates complied within a minute or two. [*Id.*]. Plaintiff asserts that he did not resist, but that he was struck point-blank multiple times with pepperballs containing mace. [Doc. 68-7, Cretacci dep.

at 42]. He further alleges that the guards beat other non-resisting inmates. [*Id.* at 42, 44-45, 73].

According to Plaintiff, after the inmates returned to their cells following the incident, the water in the sinks and toilets was turned off for two days and the toilets backed up. [Doc. 68-7, Cretacci dep. at 68-71]. The inmates were made to eat in their cells while being exposed to the fumes from human waste. [*Id.*]. They were also denied toilet paper. [*Id.* at 45-6]. They were not allowed to shower, and mace burned Cretacci's skin for at least a day. [*Id.* at 69-70].

2. October 11, 2015, Incident

In his deposition testimony, Plaintiff stated that, following the riot on September 29, 2015, he notified the guards multiple times that he needed to be moved from BC pod; however, he made no written request and he could not remember names of specific guards whom he notified. [*Id.* at 48]. He also testified that he told guards that the rioting inmates were going to do bad things to people who did not participate in the riot, but he could not remember whom he told. [*Id.* at 117]. In response to a question about whether he had specifically told a Coffee County employee that he was concerned for his safety due to threats by Mathis, Murray, or Byford, Plaintiff answered,

> I wouldn't say that I'm afraid of these three people not knowing that they was [sic] out to get me, not knowing that they was—a fight was going to happen in the future. But I would have told these officers that this pod is crazy is what I kept saying. These people are nuts. I need to get out

> of this pod. You guys need to move me into another pod. These people are nuts. You've got to understand.

[*Id.* at 165].

Very early on the morning of October 11, 2015—before breakfast—the three ringleaders of the riot on September 29, 2015, Mathis, Murray, and Byford, were in the dayroom. Plaintiff left his cell to ask them to be quiet and then returned to his cell. [*Id.* at 79]. Plaintiff testified that the following event then occurred:

> Jeremy Mathis came into my cell and assaulted me, tried to swing, and I hit him out the door. And when I did that, the other two, Josh Byford and BJ Murray, were on the—helped him try to hit me. They—all three of them tried to push me back into the room, and I had fought my way out into the dayroom.
>
> And once we got out into the open area, I started to have more words with them, and the door opened up and officers came in. I immediately turned around and walked back to my cell. The officers came into the cell, secured me, locked the door, then left out in the dayroom, and they left the pod.

[*Id.* at 78-9].

When asked if he had spoken to the guards before going into his cell, Plaintiff testified that the guards asked him what was going on and he replied, "'I don't know what the **** is going on.' I remember saying that. I don't really know what—you know, it was pretty

obvious what was happening, but I don't know why things were happening. I was confused about being hit." [*Id.* at 92]. Jesse Harden and Jared Nelson were two of the guards who came into the pod. [*Id.* at 91]. Plaintiff testified that the fighting had stopped before the guards came into the pod. [*Id.* at 92]. The guards then talked to Mathis, Murray, and Byford in the dayroom, but Plaintiff could not hear what they were saying. [*Id.* at 92-3]. Then the guards left the dayroom, and Mathis, Murray, and Byford threatened to kill Plaintiff. [*Id.* at 93]. Plaintiff did not call the guards on the intercom to tell the guards about the threats. [*Id.* at 94].

About a half hour later, breakfast was served. [*Id.* at 79]. Plaintiff testified:

> I walked from my cell and got in line. I grabbed my tray and walked to a table and set my tray down. I walked back to the cell to grab my spoon to eat breakfast. When I walked into the cell, Jeremy Mathis was walking behind me. And when I walked into my cell and grabbed my spoon and my cup that was on the table, I turned around and he hit me, and I fell to the ground. He kept hitting me. And then he had his hands on my face and just started punching me more. He punched me for probably four or five times maybe, I would guess. After the first hit, I was out of it, because he hit me hard and I'm seeing black, that's why I fell.
>
> When he left the room, I had gotten back up, but I was disoriented. And when I got out of the cell and went back to the table, I walked back to the table and I went to sit down, and I guess the

> officer had come up behind me, grabbed me, and put me up against the wall, 'cause I'm guessing that somebody was about to hit me again, which I didn't see. Then they took me out of the pod . . . .

[*Id.* at 79-80]. Officers Nelson, Keith, and Call were in the pod at that time. [*Id.* at 96; Call's Incident Report, Doc. 68-3, Page ID # 1089]. Officer Keith grabbed him and put him against the wall to keep him from being assaulted. [Cretacci dep. at 104-05]. Keith and Call then escorted Plaintiff "to medical" for evaluation. [Call's Incident Report, Doc. 68-3, Page ID # 1089]. In his incident report, Call described the commencement of the incident in the dayroom at breakfast as follows:

> At approximately 0715, I, Deputy Joseph Call, was in BC pod serving breakfast with CO Nelson. As we completed and were leaving, CO Keith entered the pod. At this point, a verbal altercation began with inmates Mathis, Byford, Murray and Cretacci, regarding a conflict that started this morning around 0600.

[Call's Incident Report, Doc. 68-3, Page ID # 1089]. After Plaintiff was taken to medical for evaluation, he was permanently transferred to another pod for his protection and was not returned to BC pod. [Doc. 68-1, Gentry Aff. ¶ 16]. In his deposition, Officer Call explained that he learned Plaintiff, Mathis, Murray, and Byford had had a conflict at 6:00 a.m. by questioning Cretacci after they removed him from BC pod. [Doc. 68-10, Call dep. at 19].

3. January 14, 2017, Incident

Plaintiff asserts that, on January 14, 2017, he was sitting in the dayroom when Officer Cody Faust and several other officers rushed into the room. Then, without provocation, Faust shot him two or three times with a pepperball launcher before he could comply with Faust's orders to get on the ground. According to Defendants, officers had heard over the intercom a discussion among the inmates about a plan to stab an unidentified inmate in the dayroom. [See Doc. 68-3, Incident Reports]. Faust initiated a search of the pod to prevent serious bodily injury or death. [Id.]. He ordered Officer Dubicki in the tower to make an announcement over the speakers in the dayroom instructing the inmates to lie on the ground on their stomachs. [Doc. 68-3, Incident Report, Page ID # 1085]. Faust heard Dubicki give the order. Then Dubicki notified Faust that some of the inmates were refusing the order. [*Id.*] At that point Faust and two other officers entered the pod with pepperball launchers.

> In his deposition, Plaintiff described his view of the incident
>
> I'm sitting at the table. I had my chess board out. I had my legs crossed. I'm waiting for the other player to come down to play. The pod door opens up and officers enter the pod, and the officers have pepperball guns and they stop at the front table, and everybody is looking around. The officers are looking around. The inmates are looking around, and everybody is questioning like, what the **** is going on, and why do you guys have guns? And there is [sic] two guys on

the front table, sitting there, talking. And I'm just sitting there, and I'm looking, and they're talking to the guys at the front table. And Officer Faust breaks off and screams, "get on the ground." And he aimed his launcher right at me. (descriptive sound) shoots me, (descriptive sound) while I'm sitting there. And he's yelling, "get on the ground," and I don't know, but I believe he shoots another inmate.

And as I get up, I get up off the stool that I'm sitting on, I get up, I turn around and I go to get down on the ground. I put my hands in front of me and I start to bend over, and he shoots me again, (descriptive sound). And I turn around and I said, quote don't ******* shoot me. Quit that ******* ****. There is nothing—I'm not even doing nothing."

And then I jump down on the ground. They go around and they search everybody. And everybody is, like, what the **** is going on? And then they go upstairs. They unlocked a room upstairs and grab them in and out, and they searched them. And then I believe they leave the pod . . . .

And then I asked for—I believe it was the other guy that got shot. I think he asked for the medical attention, to have somebody come down and look at us. And I don't believe we were actually looked at till the next day or the day after. It could have been one or two days. But we did go to medical after a day or two, and they looked at our injuries,

> and put a graph on them to find out how big they were.
>
> And then I don't know if they gave me Ibuprofen or not. And then that was the end of that.

[Cretacci dep. at 121-123].

Plaintiff clarified that Faust shot him once or twice in the arm with a pepperball when he was seated at a table while Faust was saying, "get on the ground" [*Id.* at 124-25]. After he was shot, he stood up and said, "dude, what are you doing, man? Why are you shooting me?" [*Id.* at 125]. Then he took off the poncho he was wearing because it made it difficult to get on the ground and turned around to get down when Faust shot him again in the back. [*Id.* at 125]. Plaintiff stood up again and said, "don't ******* shoot me again." [*Id.* at 126-27]. Then he hit the ground. [*Id.* at 127].

He did not hear the guard tower order the inmates to get on the ground before Faust entered the dayroom. [*Id.* at 128]. Nobody got on the ground until the guards entered the dayroom and started ordering them to get on the ground. [*Id.* at 128]. Plaintiff stated in his declaration that the "dayroom does not have a loudspeaker." [Doc. 70-2, Cretacci Decl. ¶ 5]. However, that statement was made in relation to the dayroom in BC pod where the October 11, 2015, incident occurred. [*See* Doc. 70-2, Cretacci Decl. ¶ 4 referencing the dayroom on October 11, 2015]. Plaintiff was moved out of that pod after the October 11, 2015, incident. [Doc. 68-1, Gentry Aff. ¶ 16]. The January 14, 2017, incident occurred in a different pod from the one referenced in Plaintiff's declaration.

B. Procedural History

1. Plaintiff Mailed the Complaint to Be Filed

The original complaint in this case was mailed from the Coffee County jail and received by the United States District Court for the Eastern District of Tennessee on October 3, 2016. [Doc. 1]. At that time, Plaintiff's counsel, Drew Justice, was admitted to practice in the United States District Court for the Middle District of Tennessee; however, he was not admitted to practice in the Eastern District of Tennessee. [Doc. 70-1, Justice Aff. ¶ 3]. He mistakenly thought that Coffee County was in the Middle District and learned late on September 28, 2016, that it is in the Eastern District of Tennessee, Winchester Division. [*Id.* ¶ 4]. On September 29, he reviewed the rules to be admitted either permanently or pro hac vice but determined it would take more than one day to do either. [Id. ¶ 5]. Because he was not admitted to practice in the Eastern District, he could not file the complaint electronically. [Id. ¶ 8]. He then took the complaint to Plaintiff at the Coffee County Jail to sign. [*Id.* ¶ 6]. After getting the complaint signed, Mr. Justice took the signed complaint to the courthouse in Winchester, Tennessee, to file it manually, but there was no Clerk's Office located in the building. [*Id.* ¶ 10]. At that point, it was too late to take the complaint to Chattanooga to be filed because the Clerk's Office in Chattanooga would be closed by the time he arrived there. [*Id.* ¶ 10]. Mr. Justice then returned to the Coffee County Jail; gave Plaintiff an addressed envelope and postage; explained the prison mailbox rule; and told Plaintiff to mail the complaint. [*Id.* ¶ 11]. Mr. Justice assured him that "I would sign on to the case soon, once

I got admitted to practice in East Tennessee." [*Id.* ¶ 6]. The Clerk's Office in Chattanooga received the complaint by mail on October 3, 2016. [Doc. 1]. Mr. Justice moved to be admitted to practice in this Court pro hac vice on November 22, 2016 [Doc. 3], and was admitted the following day [Doc. 4]. On March 11, 2017, Plaintiff amended his complaint to add Count IV which arises from the January 14, 2017, incident.

2. The District Court Dismissed QCHC, the Medical Provider at the Coffee County Jail

Plaintiff also sued QCHC, Inc., ("QCHC") a private medical provider with which Coffee County had contracted to provide medical services to the inmates at the Coffee County jail. In the Amended Complaint, Plaintiff alleged that Coffee County delegated responsibility for all medical decisions to QCHC. [Doc. 18, Am. Compl. ¶ 4]. In Count I, Plaintiff brought a claim under 42 U.S.C. § 1983 against QCHC alleging that QCHC had acted with deliberate indifference to his serious medical needs in violation of the Fourteenth Amendment by the following conduct:

- During the September 29, 2015 riot, Plaintiff was shot twice in the face with two pepperballs filled with mace, and he was denied treatment.
- On October 11, 2015, Plaintiff was hit in the mouth by an inmate known to have HIV and some of the inmate's blood got into Plaintiff's mouth. He also sustained injuries to his face causing it to become swollen. QCHC refused to x-ray his face for three months to determine if it had been fractured and only gave him Ibuprofen.

- QCHC refused to provide him with any prophylactic treatment to prevent him from becoming infected with HIV despite knowledge of the attacker's HIV status. Further, QCHC did not perform an HIV test on Plaintiff until a week after the attack. Although the test was negative, the nurse who performed the test told Plaintiff the test was inconclusive because it had been performed so early. Plaintiff was finally given a second test after multiple requests ten months later and was told it was negative, but he was not given the test results.

Upon review of QCHC's Motion to Dismiss, the District Court found that QCHC's alleged conduct, assuming it to be true for purposes of the motion to dismiss, did not rise to the level of a constitutional violation, and the Court dismissed all claims against QCHC.[1] [Doc. 33, June 19, 2017, Memorandum and Order].

3. Plaintiff's Amended Complaint

Plaintiff asserts four counts in his Amended Complaint. All counts are brought under 42 U.S.C. § 1983 alleging various constitutional deprivations.

[1] Plaintiff did not bring a negligence claim against QCHC.

i. **Count I "Violation of the Right to be Free of Punishment Without Due Process of Law."**

In Count I, Plaintiff brings claims arising from the October 11, 2015 assaults against Defendants Call, Keith, Nelson, Harden and Coffee County asserting:

- Defendants failed to protect Plaintiff from violent assaults by other inmates on October 11, 2015, and were therefore "deliberately indifferent to the Plaintiff's health and safety" thereby violating his "Fourteenth Amendment right to be free of punishment without due process of law." [Am. Compl. 50].
- Coffee County is responsible for the acts of the individual defendants because they were acting according to "common jail custom." [Am. Compl. ¶ 51].
- Coffee County, as well as QCHC, acted with deliberate indifference to Plaintiff's serious medical needs in violation of the Fourteenth Amendment. The factual basis for this claim against Coffee County is the same as the factual basis for this claim against QCHC which the District Court dismissed.

ii. **Count II "Excessive Force."**

In Count II, Plaintiffs brings claims arising from the September 29, 2015 riot against Coffee County only, alleging that Coffee County violated his Fourteenth Amendment rights to be free of excessive force and "to

be free of punishment without due process of law" for the following reasons:

- Coffee County engaged in "collective punishment against inmates." [Am. Compl. ¶ 62]. Collective punishment would include denying water and toilet paper for two days after the September 29, 2015, riot. [*Id.* ¶ 11].
- Coffee County officers assaulted Plaintiff with pepperballs and mace even though he was not resisting the officers when they entered the pod during the September 29, 2015 riot. [Am. Compl. ¶ 62].
- Coffee County is liable for its officer's conduct because Coffee County failed to properly train or supervise the officers, or the officers acted according to "improper policies." [Am. Compl. ¶ 62].

iii. **Count III—"Violation of the Right to be Free of Punishment without Due Process of Law."**

In Count III, Plaintiff brings claims arising from the September 29, 2015, riot against only Coffee County asserting that:

- [b]y failing to distribute essential supplies . . such as toilet paper and by disabling their water supply as a form of collective punishment, [after the September 29, 2015 riot] . . . Coffee County violated Plaintiff Cretacci's Eighth Amendment right to be free of cruel and unusual punishment." [Am. Compl. ¶ 64].

- Coffee County is a liable for its officers' conduct because the officers were acting according to a custom and "improper policies" and/or Coffee County failed to properly train or supervise the officers. [*Id.*].

iv. Count IV—"First Amendment Retaliation and Excessive Force"

In Count IV, Plaintiff brings claims arising from the January 14, 2017, incident Officer Cody Faust and Coffee County alleging that:

- Faust used excessive force in violation of the Fourteenth Amendment by shooting Plaintiff with a riot gun containing pepperballs without cause on January 14, 2017. [Am. Compl. ¶ 66].
- Coffee County is liable for Faust's conduct because he was acting according to Coffee County's custom or policy and Coffee County failed to properly train and/or supervise Faust.
- Faust shot Plaintiff with the pepperball launcher in retaliation for this pending lawsuit thereby violating Plaintiff's First Amendment rights.

In his response to Defendant's Motion for Summary Judgment, Plaintiff conceded he had no proof supporting his First Amendment retaliation claim and withdrew it. [Doc. 69, Pl.'s br. at 18].

III. Discussion

A. Standard of Review

Fed. R. Civ. P. 56(c) provides that summary judgment will be rendered if there is no genuine issue as

to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show that no genuine issue of material fact exists, and the Court must view the facts and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Morris v. Crete Carrier Corp.*, 105 F.3d 279, 280-81 (6th Cir. 1997); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). The moving party may satisfy its burden by presenting affirmative evidence that negates an element of the nonmoving party's claim or by demonstrating an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-35 (1985); *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003). There are "no express or implied requirements in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim;" it is enough for the movant to "point[ ] out" an absence of evidence on an essential element of the non-movant's claim. *Celotex*, 477 U.S. at 323-25; *see also Harvey v. Campbell Cnty, Tenn.*, 453 Fed. Appx. 557, 560 (May 10, 2011).

Once the moving party has fulfilled his initial burden under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party is required to "go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324-25; *see also 60 Ivy Street*, 822 F.2d at 1435. The moving party is entitled to

summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996).

The judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street*, 822 F.2d at 1435-36.

B. Analysis

Section 1983 is a remedial statute which does not itself create independent, substantive legal rights. To make out a claim under 42 U.S.C. § 1983, the plaintiff is required to show that he has been deprived of a right, privilege, or immunity secured to him by the United States Constitution or other federal law and that the defendants caused the deprivation while they were acting under color of state law. *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 441 (6th Cir. 2000); *Baker v. Hadley*, 167 F.3d 1014, 1017 (6th Cir. 1999); *Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1225 (6th Cir. 1997). In each of the Counts in his Amended Complaint, Plaintiff has alleged constitutional deprivations caused by state actors. There is no dispute that the defendants are state actors. The question before the Court is whether a constitutional deprivation occurred and, as to those claims arising from the riot on September 29, 2015, whether Plaintiff's claims are barred by the applicable statute of limitations. The

Court will proceed in chronological order with respect to the events giving rise to the claims in this action rather than in numerical order of the Counts in the Amended Complaint.

1. Counts II & III: Claims Arising from the September 29, 2015 Riot

Count II ("Excessive Force") and Count III ("Violation of the Right to be Free of Punishment without Due Process of Law") both arise out of the riot on September 29, 2015, and include conduct allegedly occurring for two days after September 29, 2015—possibly until October 1, 2015—i.e., shutting off water in the cells and denying inmates toilet paper.

Defendant seeks summary judgment as to Counts II and III on substantive and statute of limitations grounds. The Court will not reach the merits of Plaintiff's claims asserted in these Counts because they are barred by the applicable statute of limitations.

In an action under 42 U.S.C. § 1983, the Court applies the statute of limitations for a personal injury action under the law of the state in which the claim arises. *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). In Tennessee, the limitations period is one year. Tenn. Code Ann § 28-3-104(a); *Eidson*, 510 F.3d at 634-35. Though the statute of limitations is borrowed from state law, "[t]he date on which the statute of limitations begins to run in a § 1983 action is a question of federal law." *Id.* at 635. "Ordinarily, the limitation period starts to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.*

Plaintiff signed and delivered his complaint to prison officials for mailing on September 29, 2016, and it was filed by the Clerk of Court on October 3, 2016. [Doc. 2]. The Clerk's Office received the complaint on October 3, 2016. [Doc. 1].

The parties dispute what steps Plaintiff was required to take for the complaint to be deemed "filed" by September 29, 2016. Plaintiff contends he was an unrepresented prisoner and thus entitled to avail himself of the prison mailbox rule announced in *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379 (1988), making his Complaint timely because it was delivered to prison officials on September 29, 2016. Defendant argues Plaintiff was represented by his present counsel and thus required to file his complaint with the Clerk by September 29, 2016.

Initially, Defendant devotes significant attention to the "egregious fraud" allegedly perpetrated on the Court by Plaintiff's filing the Complaint "*pro se*" when he was in fact represented by counsel. Defendant insists this conduct was a misrepresentation to the Court, arguing that ghostwriting is "universally condemned" and worthy of sanctions. [Doc. 68 at 13]. Defendant suggests Justice delayed filing a notice of appearance to distance himself from Plaintiff's filing, noting the more lenient standard of review afforded to *pro se* litigants. [Doc. 68 at 14]. In the course of this *ad hominem* attack on Justice, Defendant mischaracterizes case law, cites inaccurately to an ethics opinion of the Tennessee Board of Professional Responsibility, and construes other

authority quite liberally in its favor.[2] But Defendant's strenuous opposition misses the point. The question before the Court is simply whether Plaintiff was represented when he filed the Complaint and, if so, whether he was nonetheless permitted to file his Complaint by delivering it to a prison official for mailing.

Plaintiff argues he was unrepresented at the time of filing because his attorney was unable to represent him in the appropriate federal court. [Doc. 69 at 10]. Justice avers that he believed the appropriate district for filing was the United States District Court for the Middle

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[2] Defendant cites the fact section of Formal Ethics Opinion 2005-F-151 as though it were the guidance of the opinion itself. [Doc. 71 at 5]. The brief cites *Cook v. Stegall*, 295 F.3d 517 (6th Cir. 2002) and *Duhon v. Kemper*, 19 F. App'x 353 (6th Cir. 2001) for the proposition that "[a]pplication of the prison mailbox rule is narrow, and it does not serve to protect an incarcerated inmate from the negligence of his counsel." *Duhon* makes no such holding, finding only that the defendant waived his mailbox rule argument by failing to raise it at the trial level. Similarly, *Cook v. Stegall*, has nothing to do with negligence of counsel, relating instead to whether a complaint mailed to a third party can be deemed filed as of the date of mailing. Defendant cites *Redmond v. United States*, Case No. 4:13-cv-16, 2016 WL 9330497 (E.D. Tenn. Mar. 7, 2016) as holding that the prisoner could not use the mailbox rule because his declaration "failed to establish in any meaningful way how he had timely and properly used the prison mailing system." [Doc. 71 at 2]. In *Redmond*, the Court was applying Rule 3(d) of the Section 2255 Rules, which requires timely filing to be shown by a declaration or notarized statement that sets forth the date of deposit and states that first-class postage has been prepaid. *Redmond*, 2016 WL 9330497 at *4. In a § 1983 action, the Sixth Circuit has held that the "absent contrary evidence," courts assume the prisoner handed the complaint to prison officials for mailing on the date he or she signed the complaint. *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008).

District of Tennessee, in which he was admitted to practice. [Doc. 70-1 at ¶ 3]. He learned of his mistake the night before the statute of limitations expired but did not believe he could fulfill the requirements for *pro hac vice* or permanent admission on time. [Id. at ¶ 5]. Knowing he could not file electronically, he drove to the courthouse for the Winchester Division of the United States District Court for the Eastern District of Tennessee to attempt to file the Complaint in person. [*Id.* at 10]. When he arrived in Winchester, he discovered there is not a staffed Clerk's office at the courthouse. [*Id.* at ¶ 10]. He did not believe he could make it to the Chattanooga Clerk's office before it closed, so he returned to the jail and instructed Plaintiff on how to file the Complaint. [*Id.* at ¶ 10, 11].

Justice's admission status and electronic filing capabilities in this District do not determine whether Plaintiff was represented at the time of filing. His legal representation of Plaintiff is clear from the fact that he drafted the Complaint, attempted to file it himself, and instructed Plaintiff on how to file it. [Doc. 70-1 at ¶¶ 4, 11]. When Plaintiff delivered the Complaint for mailing, he did so on the advice of his counsel. Plaintiff thus had the same benefit of counsel as any other represented litigant.

The Court finds that Plaintiff was represented by counsel. And, because Plaintiff was represented at the time of filing, the prisoner mailbox rule does not apply. Consequently, the Court finds that the Complaint was filed on October 3, 2015. In *Houston v. Lack*, the Supreme Court of the United States ruled that a *pro se* petitioner's notice of appeal on habeas corpus review

would be deemed filed as of the date it was delivered to prison officials for mailing to the court. 487 U.S. 266 (1988). The Court observed that "[t]he situation of prisoners seeking to appeal without the aid of counsel is unique." *Id.* at 270. They are unable to monitor their notices of appeal to ensure they are timely filed and are instead forced "to entrust their appeals to the vagaries of the mail." *Id.* at 271. Incarcerated litigants can never really be sure that their filings will be filed on time, relying on prison officials "who may have every incentive to delay." *Id.* Accordingly, the Court held the appeal was timely "because the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." *Id.* at 276.

The United States Court of Appeals for the Sixth Circuit has extended this holding to, *inter alia*, "civil complaints filed by *pro se* petitioners incarcerated at the time of filing." *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002); *see also Aldridge v. Gill*, 24 F. App'x 428 (6th Cir. 2001) (mailbox rule of *Houston v. Lack* applies to § 1983 suits under applicable state statute of limitations). In *Richard v. Ray*, the Sixth Circuit reasoned that all of the circumstances cited by the Supreme Court in *Houston v. Lack* are also present when a *pro se* prisoner files a civil complaint. *Id.* The court has declined, however, to extend the rule to instances where the prisoner mails a pleading to a third party for filing. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). "The rationale for the rule is that the date the prisoner gives the petition to the prison can be readily ascertained, and any delays in receipt by the court can be attributed to the prison, and *pro se* litigants should

not be penalized for a prison's failure to act promptly on their behalf." *Id.* at 521. In contrast, when a prisoner mails a complaint to a third party, the certainty facilitated by the rule is undermined. *Id.*

There is a circuit split as to whether the prison mailbox rule can be utilized by represented prisoners. The United States Court of Appeals for both the Fourth and Seventh Circuits have extended the rule to represented prisoners. *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004) (represented prisoners may use the mailbox rule to file a notice of appeal that otherwise complies with Federal Rule of Appellate Procedure 4(c)); *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) ("[T]here is little justification for limiting *Houston's* applicability to situations where the prisoner is not represented by counsel."). The United States Court of Appeals for the Eight Circuit and the Ninth Circuit have each held that a represented prisoner may not take advantage of the rule. *Burgs v. Johnson County*, 79 F.3d 701 (8th Cir. 1996) (incarcerated plaintiff not entitled to benefit of *Houston* because he was represented by counsel); *Stillman v. LaMarque*, 319 F.3d 1199 (9th Cir. 2003) ("[T]o benefit from the mailbox rule, a prisoner must . . . be proceeding without assistance of counsel.").

The Sixth Circuit has not directly addressed this issue, but the court's prior holdings suggest it would restrict the rule's applicability to unrepresented prisoners. As announced in *Houston v. Lack*, the mailbox rule was not expressly restricted to prisoners proceeding *pro se*. Yet when the Sixth Circuit broadened the reach of the rule to include civil

complaints, it limited that extension to prisoners without counsel. The court held: "*Houston v. Lack* applies to civil complaints filed by *pro se* petitioners incarcerated at the time of filing." *Richard v. Ray*, 290 F.3d at 813. To the extent *Richard v. Ray* reflects an extension of *Houston*, that extension was a narrow one and should be so construed.

The Sixth Circuit has also consistently focused on an inmate's lack of representation when discussing whether the prison mailbox rule applies in different contexts. *See Richard v. Ray*, 290 F.3d at 812-13 (*Houston* Court considered "several concerns particular to the incarcerated prisoner without counsel"); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002) (mailbox rule exists because" *pro se* litigants should not be penalized for a prison's failure to act promptly on their behalf"); *Brand v. Motley*, 526 F.3d 921, 925 (2008) (mailbox rule creates a relaxed filing standard for" *pro se* prisoner's complaint"). The Sixth Circuit recently observed that the "mailbox rule exception is supported by important public policy considerations that are unique to unrepresented, incarcerated individuals . . . ." *United States v. Smotherman*, 838 F.3d 736, 737 (6th Cir. 2016). In *Smotherman*, the court wrote: "The prison mailbox rule has been long established, and we have recognized the typical rule that a *pro se* prisoner's notice of appeal is 'filed at the time [the *pro se* prisoner] delivered it to the prison authorities for forwarding to the clerk." *Id.* (*quoting Houston*, 487 U.S. at 276) (alteration in original). The Sixth Circuit's limited extension of *Houston v. Lack* to civil complaints filed by *pro se* prisoners, combined with its consistent articulation of

the rule as available to unrepresented inmates, suggests the court would decline to further extend the rule to a represented prisoner plaintiff.

It appears to the Court that Justice tried to find a practical solution to his mistake of venue, but that a confluence of obstacles prevented the timely filing of the Complaint. He could not file electronically in the Eastern District because he was not admitted to practice in this District and so could not register as an electronic filer. *See* United States District Court for the Eastern District of Tennessee Electronic Case Filing Rules and Procedures, Rule 5, *available at* https://www.tned.uscourts.gov/sites/tned/files/ecf_rules_procedures.pdf (last accessed March 20, 2020). He could have filed the Complaint in person at the Clerk's office for the Chattanooga Division of Eastern District, contemporaneously with an application for *pro hac vice* admission. Unfortunately, he instead tried to file in the Winchester Division, which does not have a staffed clerk's office and does not accept in-person, paper filings.[3]

Such a routine attorney error does not permit the Court to extend the statute of limitations. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000) ("Absent compelling equitable considerations, a court should not extend

[3] The Court's public website provides the following information regarding the Winchester Division under a link entitled, "Location and Information", "NOTICE: Any court filings in the Winchester Division should be mailed to the Chattanooga Divisional Office". *See* https://www.tned.uscourts.gov/winchester.

limitations by even a single day."). As ever, an attorney is not required to wait until the final day of a limitations period to file pleadings. Because Plaintiff's Count II excessive force claim arose on September 29, 2015, and his Count III due process claims arose, at the latest, on October 1, 2015, his October 3, 2016, filing was untimely as to these claims. Consequently, Plaintiff's claims brought under Counts II and III are barred by the applicable statute of limitations.

2. Count I: Claims Arising from the October 11, 2015 Assaults (Failure to Protect) and Deliberate Indifference to Serious Medical Needs

i. Failure to Protect

Plaintiff alleges in Count I of his Amended Complaint that Defendants Call, Keith, Nelson, and Harden failed to protect him from assaults by other inmates on October 11, 2015, and that this failure violated his "Fourteenth Amendment right to be free of punishment without due process of law." [Am. Compl. ¶ 50]. Plaintiff contends that Coffee County is liable for the individual defendants' failure because they were acting according to "common jail custom." [*Id.* ¶ 51].

"'[P]rison officials have a duty to protect prisoners from violence at the hands of other prisoners because corrections officers have 'stripped them of virtually every means of self-protection and foreclosed their access to outside aid.'" *Richko v. Wayne County, Michigan*, 819 F.3d 907, 915 (6th Cir. 2016) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)). A pretrial detainee's claim for failure to protect is recognized under

the Fourteenth Amendment and is analyzed using the same standard as the Eighth Amendment. *Richko*, 819 F.3d at 915; *see also Dickerson v. Ky Corr. Psychiatric Ctr.*, No. 17-5412, 2017 WL 8792665, at * 2 (Oct. 12, 2017). The plaintiff bears the burden "to present[ ] evidence from which a reasonable juror could conclude that the individual defendants were deliberately indifferent to a substantial risk of serious harm to [the plaintiff] and that they disregarded that risk by failing to take reasonable measures to protect him." *Richko*, 819 F.3d at 916; (citing Farmer, 511 U.S. at 842). This rubric has both an objective and subjective component. *Richko*, 819 F.3d at 915, (citing *Farmer*, 511 U.S. at 835-38).

> [A plaintiff] can satisfy the objective component by showing that, absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm. The subjective component requires [the plaintiff] to show that (1) "the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner," (2) the official "did in fact draw the inference," and (3) the official then disregarded that risk. Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence.

Richko, 819 F.3d at 915-16 (citations omitted).

Defendants assert Plaintiff cannot prove the elements of a failure to protect claim because he can prove neither the objective nor the subjective components of the failure-to-protect analysis. [Doc. 68, Defs' br. at 22]. Since Plaintiff must present evidence to

satisfy *both* components to defeat Defendants' motion for summary judgment, the Court will focus on Defendants' stronger argument, i.e., that Plaintiff has no evidence to support the subjective component. Plaintiff contends he does have evidence to show that the individual Defendants knew Mathis, Murray and Byford presented a substantial risk of serious harm to him:

- "Plaintiff asserts that records show Mathis, who committed the assaults on October 11, 2015, has shown a pattern of predatory behavior against other inmates, and has been brought up on disciplinary charges six times." [Doc. 69, Pl.'s br. at 15]. In support of this last contention regarding disciplinary charges, Plaintiff refers to Defendants' Response to Request for Production No. 5.

Defendants' Response to Request for Production No. 5 states, "[a]ttached is a DVD containing all responsive documents to this Request up to the date of June 7, 2017." [Doc. 70-6]. Insofar as it can tell, the Court does not have these documents. There is an exhibit attached to Plaintiff's brief entitled, "Case of Geremy Mathis: Disciplinary hearings" with a list of six "cases." [Doc. 70-5]. But this list provides no information regarding the type of disciplinary charges against Geremy Mathis. The list indicates one case was dismissed because Mathis was released from jail prior to the hearing. The remaining cases were dismissed because, "[f]ailed to follow policy—Did not have hearing in policy time frame." [Doc. 70-5]. Only two of the "cases" occurred before the October 15, 2015 assaults. [*Id.*] This information is not evidence that the Defendants would

have known Mathis presented a substantial risk of serious harm to other inmates.

- Plaintiff stated in his deposition that he told guards that Mathis had threatened to beat up others who did not participate in the riot.

Plaintiff could not identify the guards, so it is unknown whether the guards he told were the individual Defendants in this case. Also, Plaintiff was a participant in the riot so he would not have been targeted by Mathis. Moreover, Plaintiff explicitly denied telling any guard prior to either of the assaults on October 11, 2015, that he was afraid of Mathis, Murray, and Byford. Rather, he told unidentified guards that the pod "was crazy" and he wanted to be moved. This information does not convey concern about one's safety.

- Plaintiff asserts Defendants knew Plaintiff and Mathis had been in an altercation on the morning of October 11, 2015.

The first assault on October 11, 2015, took place inside the cell. As previously mentioned, the cell has a solid door except for a very narrow window. There is no evidence that the officers could see inside the cell when the first assault happened. Plaintiff was able to push the attackers out of his cell where they continued to "have words." Call's incident report, which states he saw a verbal altercation, supports Plaintiff's own deposition testimony that once outside the cell, the altercation was verbal—not physical. The guards took reasonable action by asking Plaintiff what was going on, but Plaintiff did not tell them he had been assaulted or that he was afraid. He said he did not know what was going on. This

interaction was not enough to apprise Defendants that Plaintiff was at substantial risk of serious harm. After the guards left the dayroom, Plaintiff did not use the intercom inside his cell to report his assault, not even after he heard Mathis, Murray, and Byford say they were going to kill him.

- Plaintiff was assaulted a second time on October 11, 2015.

As with the first assault, the second assault took place inside Plaintiff's cell and would not have been witnessed by guards outside the pod. Further, Plaintiff did not say he yelled for help while it was occurring, and he did not report the assault when he exited the cell and sat down at the table. Moments later, before he could be hit again, Officer Keith grabbed him and placed him against the wall to protect him. At that point he was taken for a medical evaluation and removed to another pod.

Based on the evidence presented by Plaintiff, the Court concludes that Plaintiff cannot meet the subjective component of the applicable rubric. Plaintiff has presented no evidence that, prior to each assault on October 11, 2015: (1) the individual Defendants knew facts from which to infer Mathis, Murray, and Byford presented a substantial risk of serious harm to the Plaintiff; (2) the individuals Defendants did in fact draw the inference; and (3) the individual Defendants then disregarded that risk. Rather, the evidence presented by Plaintiff demonstrates that, when the officers finally understood that Mathis presented a physical threat to Plaintiff, they intervened, took Plaintiff for medical care, and removed him permanently from that pod.

Because there was no underlying constitutional violation, Plaintiff has no constitutional claim against Coffee County. *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 367 (6th Cir. 2017) ("Because no constitutional violations occurred, the district court properly granted summary judgment on Mr. Thomas's failure-to-train claim against the city and Chief Jacobs. For a municipality to be liable under 42 U.S.C. § 1983, a plaintiff must show harm 'caused by a constitutional violation.'"); *see also Murray v. Harriman City*, No. 3:07–CV–482, 2010 WL 546590, at *7 (E.D. Tenn., Feb. 10, 2010) ("the court has found that the arresting officers did not violate the plaintiff's civil rights; therefore, plaintiffs have not stated a viable claim for a § 1983 violation against the City of Harriman.") Therefore, Defendants are entitled to judgment as to Plaintiff's failure to protect claim asserted in Count I.

ii. Deliberate Indifference to Serious Medical Needs

Plaintiff also alleged in Count I of the Amended Complaint that Coffee County, as well as QCHC, had acted with deliberate indifference to his serious medical needs in violation of the Fourteenth Amendment. The factual basis for this claim against Coffee County is the same as the factual basis for this claim against QCHC which was dismissed by the District Court. It is not clear to the Court that Plaintiff concedes he no longer has such a claim against Coffee County. Since the same factual conducts underpins both claims and the standard of constitutional analysis is the same for Coffee County as it was for QCHC, the District Court's decision dismissing Plaintiff's claim against QCHC applies

equally to the medical needs claim against Coffee County. *See e.g.*, *Whiteside v. Duke*, 2019 WL 2578260, at *4 (W.D. Tenn. 2019) (the court applied the same constitutional standard for a medical care claim to a private entity providing health care in a prison as it would to a municipality.) *See also Johnson v. Corr. Corp. of Am.*, 26 F. App'x 386, 388 (6th Cir. 2001); *Eads v. State of Tenn.*, No. 1:18-cv-00042, 2018 WL 4283030, at *9 (M.D. Tenn. Sept. 7, 2018). Consequently, to the extent Plaintiff continues to assert it, the Court concludes the Fourteenth Amendment claim against Coffee County for deliberate indifference to serious medical needs lacks merit and shall be dismissed.

3. Count IV—Claim Arising from the Event on January 14, 2017

Plaintiff alleges Cody Faust used excessive force when shooting him with a pepperball launcher on January 14, 2017. The Due Process Clause of the Fourteenth Amendment protects a pretrial detainee from the use of excessive force that amounts to punishment. *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015). To prevail on a Fourteenth Amendment excessive force claim, "a pretrial detainee must show only that the force purposefully or knowingly used against him was objectively unreasonable. *Id.* The "objective reasonableness turns on the facts and circumstances of each particular case." *Id.* (citation omitted). The *Kingsley* Court articulated the factors a court must consider when evaluating such a claim:

> A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not

> with the 20/20 vision of hindsight. A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security
>
> Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. We do not consider this list to be exclusive. We mention these factors only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force.

Id. (internal citations omitted) (brackets original).

On January 14, 2017, guards heard—over the intercom in the pod where Plaintiff was located—some inmates saying they were going to stab someone. Concerned that someone was about to be seriously injured or killed, the guards assembled to make entry into the pod. The Tower ordered everyone in the pod to get down on the floor. Faust was advised that some

inmates were refusing to follow the order.[4] From the perspective of a reasonable officer, use of the pepperball launcher was reasonable because:

- When Faust entered the pod, Plaintiff was still sitting at the table. A reasonable officer on the scene would have concluded that Plaintiff was refusing the prior order to get on the floor.
- Faust had a legitimate institutional interest to maintain order and protect other inmates. Someone in the pod had a shiv and intended to stab another inmate. Immediate compliance with the order to get down could prevent violence.
- Officers needed the inmates on the floor to safely search for the shiv.
- A pepperball launcher is nonlethal force. Plaintiffs injuries were relatively minor—bruises that lasted a few days.
- Use of a pepperball launcher allowed Faust to avoid dangerous direct contact with a noncompliant inmate who might have a shiv.
- Plaintiff continued to delay his compliance, standing up, talking back to Faust, turning around, trying to remove his poncho. Use of the

[4] Plaintiff stated in his declaration that the pod did not have loudspeakers, but this statement was made in relation to the pod in which he was incarcerated at the time of the October 11, 2015 assaults. [*See* Doc. 70-2, Cretacci Decl. ¶ 5]. He was moved to another pod permanently after the October 11, 2015 assaults.

pepperball launcher again was reasonable for the same reasons listed above.

- Once Plaintiff got on the ground, Faust did not shoot him again.

In other words, under the circumstances—given the information that Faust had at the time and the legitimate need to protect inmates from assault by another inmate with a deadly weapon—the force used by Faust against Plaintiff was not constitutionally excessive. Once again, because there was no underlying constitutional violation, Plaintiff has no constitutional claim against Coffee County. *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 367 (6th Cir. 2017). Faust and Coffee County are entitled to judgment as to Count IV.

IV. Conclusion

For the reasons stated herein, Defendants' Motion for Summary Judgment is **GRANTED**. Plaintiff's action shall be dismissed in its entirety and a judgment entered in favor of Defendants.

ENTER.

/s/ *Christopher H. Steger*
UNITED STATES
MAGISTRATE JUDGE

Appendix C

Case No. 20-5669

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

BLAKE CRETACCI

Plaintiff - Appellant

v.

JOE CALL, Coffee County Deputies; BRIAN KEITH, Coffee County Deputies; JARED NELSON, Coffee County Deputies; JESSE HARDEN, Coffee County Deputies; COFFEE COUNTY, TN; CODY FAUST

Defendants - Appellees

BEFORE: SUHRHEINRICH, MCKEAGUE, and READLER, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Judge Readler adheres to his concurrence.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: March 17, 2021 */s/ Deborah S. Hunt*