

No. 128077

IN THE

## SUPREME COURT OF ILLINOIS

---

|                        |   |                                      |
|------------------------|---|--------------------------------------|
| PEOPLE OF THE STATE OF | ) | Appeal from the Appellate Court of   |
| ILLINOIS,              | ) | Illinois, No. 1-20-1016.             |
|                        | ) |                                      |
| Respondent-Appellee,   | ) | There on appeal from the Circuit     |
|                        | ) | Court of Cook County, Illinois , No. |
| -vs-                   | ) | 95 CR 11734.                         |
|                        | ) |                                      |
|                        | ) | Honorable                            |
| JOHNNY ENGLISH,        | ) | Timothy Joseph Joyce,                |
|                        | ) | Judge Presiding.                     |
| Petitioner-Appellant.  | ) |                                      |

---

## BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD  
State Appellate Defender

DOUGLAS R. HOFF  
Deputy Defender

THERESE BISSELL  
Assistant Appellate Defender  
Office of the State Appellate Defender  
First Judicial District  
203 N. LaSalle St., 24th Floor  
Chicago, IL 60601  
(312) 814-5472  
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

## ORAL ARGUMENT REQUESTED

E-FILED  
8/5/2022 11:44 AM  
CYNTHIA A. GRANT  
SUPREME COURT CLERK

## TABLE OF CONTENTS AND POINTS AND AUTHORITIES

|  | Page              |
|--|-------------------|
| <b>Nature of the Case</b> .....  | 1                 |
| <b>Issues Presented for Review</b> .....   | 1                 |
| <b>Rules Involved</b> .....  | 2                 |
| <b>Statement of Facts</b> .....  | 3                 |
| <b>Argument</b> .....  | 8                 |
| <p><b>Pursuant to the prison mailbox rule, Johnny English’s <i>pro se</i> notice of appeal was timely-filed where a postage meter stamp on the envelope containing the notice of appeal indicated it was mailed prior to the requisite 30-day deadline</b> .....</p> |                   |
| Ill. Sup. Ct. R. 606(a), (b). ....   | 8, 10             |
| Fed. R. App. P. (4)(c) .....   | 8, 13, 22, 24, 25 |
| <i>People v. English</i> , 2021 IL App (1st) 201016-U .....  | 9, 28             |
| Ill. Const. 1970, art. VI, § 6 .....   | 9                 |
| <i>People v. Abdullah</i> , 2019 IL 123492 .....   | 9, 29             |
| U.S. Const. Amend. XIV .....   | 9                 |
| <i>Ross v. Moffitt</i> , 417, U.S. 600 (1974) .....  | 9, 10             |
| <i>Bounds v. Smith</i> , 430 U.S. 817 (1977) .....   | 9, 10             |
| <i>People v. Smith</i> , 228 Ill. 2d 95 (2008) .....   | 10                |
| <i>Niccum v. Botti, Marinaccio, DeSalvo &amp; Tameling, Ltd.</i> , 182 Ill. 2d 6 (1998) .....  | 10                |
| <i>People v. Lyles</i> , 217 Ill. 2d 210 (2005) .....  | 10                |
| <i>People v. Salem</i> , 2016 IL 118693 .....  | 11                |

|           |   |                |
|-----------|---|----------------|
| <b>A.</b> | <b>Both Illinois and Federal courts have prison mailbox rules that cover appeals filed by <i>pro se</i> incarcerated petitioners . . . . .</b>        | <b>11</b>      |
| 1.        | <b>Illinois Prison Mailbox Rule . . . . .</b>   | <b>11</b>      |
|           | Ill. S. Ct. R. 373 (eff. July 1, 2017) . . . . .  | 11             |
|           | Illinois Supreme Court Rule 612(b)(18) (eff. July 1, 2017) . . . . .  | 11             |
|           | <i>Secura Insurance Co. v. Illinois Farmers Insurance Co.</i> , 232 Ill. 2d 209 (2009) . . . . .  | 12, 19, 20     |
| 2.        | <b>Federal Prison Mailbox Rule . . . . .</b>  | <b>12</b>      |
|           | <i>Houston v. Lack</i> , 487 U.S. 266 (1988) . . . . .  | 12, 25         |
|           | <i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973) . . . . .  | 12             |
| <b>B.</b> | <b>The Prison Mailbox Rule covers both postmarks and postage meter stamps . . . . .</b>   | <b>13</b>      |
| 1.        | <b>Pursuant to United States Postal Service regulations, the date an item is metered is the date the item must be deposited for mailing . . . . .</b> | <b>14</b>      |
|           | <i>People v. Tolbert</i> , 2021 IL App (1st) 181654 . . . . .   | 14, 16, 28, 29 |
|           | 39 C.F.R. § 111.1 (2005) . . . . .  | 14             |
|           | <i>People v. Hanna</i> , 207 Ill. 2d 486 (2003) . . . . .   | 14, 15         |
|           | United States Postal Service, Domestic Mail Manual §604 . . . . .   | 15             |
|           | <i>Huber v. American Accounting Ass’n</i> , 2014 IL 117293 . . . . .  | <i>passim</i>  |
|           | <i>Wickman v. Illinois Property Tax Appeal Board</i> , 387 Ill. App. 3d 414 (2008) . . . . .  | 16             |
| 2.        | <b>Other states have found postage meter stamps to be equivalent to postmarks . . . . .</b>   | <b>16</b>      |
|           | <i>Chevron U.S.A., Inc. v. Department of Revenue</i> , 154 P.3d 331 (Wyo. 2007) . . . . .   | 16             |

|  |            |
|--|------------|
| <i>Lozier Corp. v. Douglas County Bd. of Equalization</i> , 285 Neb. 705 (2013) .....  | 16         |
| <i>Frandrup v. Pine Bend Warehouse</i> , 531 N.W.2d 886 (Minn. Ct. App. 1995) .....  | 17         |
| <i>Severs v. Abrahamson</i> , 255 Iowa 979 (Iowa 1963) .....   | 17         |
| <i>Abrams v. Ohio Pacific Express</i> , 819 S.W.2d 338 (Mo. 1991) .....  | 17         |
| <i>Headrick v. Jackes-Evans Mfg. Co.</i> , 108 S.W.3d 114 (Mo. Ct. App. 2003) .....  | 17         |
| <i>Haynes v. Hechler</i> , 182 W.Va. 806 (1990) .....  | 17         |
| <i>Gutierrez v. Industrial Claim Appeals Office</i> , 841 P.2d 407 (Colo. Ct. App. 1992) .....   | 17, 18     |
| <i>Bowman v. Administrator</i> , 30 Ohio. St. 3d 87 (1987) .....   | 18         |
| <i>Smith v. Idaho Dept. of Labor</i> , 148 Idaho 72 (2009) .....   | 18         |
| <i>Lin v. Unemployment Comp. Bd. of Review</i> , 558 Pa. 94 (1999) .....   | 18         |
| <i>Machado v. Florida Unemployment Appeals</i> , 48 So. 3d (Fla. App. 2010) .....  | 18         |
| <b>C. In Illinois it is an open question as to whether a postmark or postage meter stamp is sufficient evidence of the date of mailing .....</b>   | <b>19</b>  |
| <b>D. Illinois appellate courts finding postmarks to be evidence of the mailing date are consistent with the equitable policy of this Court and its rules as well as federal decisions and those in other states .....</b> | <b>20</b>  |
| <i>People v. Humphrey</i> , 2020 IL App (1st) 172837 .....   | 21, 22, 30 |
| <i>People v. Hansen</i> , 2011 IL App (2d) 081226 .....  | 21, 30     |
| <b>1. Federal courts promote access to the courts for <i>pro se</i> prisoners and consider postmarks to be evidence of mailing date. ....</b>  | <b>22</b>  |
| <i>Cobb v. Aramark Corr. Servs., LLC</i> , 937 F.3d 1037 (7th Cir. 2019) .   | 22         |

|  |           |
|--|-----------|
| <i>Sulik v. Taney County, Mo.</i> , 316 F.3d 813 (8th Cir. 2003) . . . . .   | 22, 23    |
| <i>United States v. Smotherman</i> , 838 F.3d 736 (6th Cir. 2016) . . . .  | 23, 24    |
| <i>Erickson v. Pardus</i> , 551 U.S. 89 (2007) . . . . .   | 24        |
| <i>Richardson v. Winn</i> , 2019 WL 4729830 (6th Cir. 2019) . . . . .  | 24        |
| <i>Thornton v. United States</i> , 2020 WL 1952493 (6th Cir. 2020) . . . . .   | 24        |
| <i>Kennard v. Smith</i> , 2021 WL 1602217 (6th Cir. 2021) . . . . .  | 24        |
| <b>2. Other states allow postmarks as evidence of mailing date</b> . . . . .   | <b>25</b> |
| Pa. St. Rap. Rule 121(f) . . . . .   | 25        |
| <i>Commonwealth v. Jones</i> , 700 A.2d 423 (Pa. 1997) . . . . .   | 25, 26    |
| <i>Commonwealth v. DiClaudio</i> , 210 A.3d 1070, 1074 (Pa. Super. 2019) .   | 26        |
| <i>Commonwealth v. Wilson</i> , 911 A.2d 942 (2006) . . . . .  | 26        |
| <i>McClinton v. State</i> , 2016 Ark. 461 (2016) . . . . .   | 26, 27    |
| <i>Gould v. State</i> , 2019 Ark. App. 418 (2019) . . . . .  | 27        |
| <i>Ex parte Jones</i> , 773 So.2d 989 (Ala. 1998) . . . . .  | 27        |
| <i>Setala v. J.C. Penney Co.</i> , 40 P.3d 886 (Hawaii 2002) . . . . .   | 27        |
| <b>E. The appellate court below erred in finding it did not have jurisdiction to consider English’s appeal</b> . . . . . | <b>27</b> |
| <i>People v. Lugo</i> , 391 Ill. App. 3d 995 (2d Dist. 2009) . . . . .   | 28        |
| <i>People v. Blalock</i> , 2012 IL App (4th) 110041 . . . . .  | 28        |
| <i>Harrisburg-Raleigh Airport Authority v. Department of Revenue</i> , 126 Ill. 2d 326 (1989) . . . . .                  | 29, 30    |
| <i>In re Denzel W.</i> , 237 Ill. 2d 285 (2010) . . . . .  | 29        |
| <i>People v. Hardman</i> , 2017 IL 121453 . . . . .  | 29        |

|  |               |
|--|---------------|
| <i>Hall v. Henn</i> , 208 Ill. 2d 325 (2003) .....   | 29            |
| <i>Land v. Board of Educ. of City of Chicago</i> , 202 Ill. 2d 414 (2002). .....   | 29, 30        |
| <i>People v. Laubscher</i> , 183 Ill. 2d 330 (1998).....   | 30            |
| <br><b>F. Even if this Court finds the postage meter stamp to be<br/>insufficient evidence of timely mailing, English’s “Notice of<br/>Mailing/Filing” together with the postage meter stamp is<br/>sufficient to establish he deposited his notice of appeal<br/>timely .....</b> | <br><b>30</b> |
| <i>People v. Hayes</i> , 2021 IL App (1st) 190881 .....  | 31            |
| <i>People v. Cooper</i> , 2021 IL App (1st) 190022 .....   | 31, 32        |
| <br><b>Conclusion .....</b>  | <br><b>33</b> |
| <b>Appendix to the Brief.....</b>  | <b>A-1</b>    |

### **NATURE OF THE CASE**

Johnny English, petitioner-appellant, appeals from a judgment denying his motion for leave to file a successive post-conviction petition.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

### **ISSUE PRESENTED FOR REVIEW**

Whether, pursuant to the prison mailbox rule, Johnny English's *pro se* notice of appeal was timely filed where a postage meter stamp on the envelope containing the notice of appeal indicated it was mailed prior to the requisite 30-day deadline.

## RULES INVOLVED

### **Illinois Supreme Court Rule 12**

Ill. Sup. Ct. R. 12. Proof of Service in the Trial and Reviewing Courts; Effective Date of Service

(b) Manner of Proof. Service is proved:

(6) in case of service by mail by a self-represented litigant residing in a correctional facility, by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered.

### **Illinois Supreme Court Rule 373**

Ill. Sup. Ct. R. 373. Date of Filing in Reviewing Court.

Unless received after the due date, the time of filing records, briefs or other documents required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing by an incarcerated, self-represented litigant shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12. This rule also applies to a motion directed against the judgment and to the notice of appeal filed in the trial court.

### **Illinois Supreme Court Rule 606**

Ill. Sup. Ct. R. 606. Perfection of Appeal

(a) How Perfected. Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court. The notice may be signed by the appellant or his attorney. If the defendant so requests in open court at the time he is advised of his right to appeal or subsequently in writing, the clerk of the trial court shall prepare, sign, and file forthwith a notice of appeal for the defendant. No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional.

(b) Time. Except as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion.



## STATEMENT OF FACTS

In 1995, Johnny English was charged with, *inter alia*, armed robbery, first degree murder, and attempt first degree murder in the death of Frank Klepecki and the shooting of Casey Klepecki, respectively. (C. 38-51) English was 18 years old at the time of the offense in which he and his 30-year-old friend, James Davis, attempted to rob the Klepecki brothers during a drug sale. (R. 954) English was found guilty of the charges after a bench trial at which witnesses identified him and testified that he had a gun. (R. 858)

The trial court concluded that English was eligible for the death penalty, finding that he killed Frank Klepecki beyond a reasonable doubt during the course of an armed robbery. (R. 874-75) At sentencing, in mitigation, the defense presented several witnesses including English's mother, Helen English, who testified that after his father died of cancer when he was young, he began failing in school and eventually dropped out. (R. 934) She also explained that English was "slow," required special education classes, and as a result, she applied for and received social security benefits based on his learning disability. (R. 935) Also, by way of stipulation, the defense introduced a report by Dr. Karen Smith, a forensic psychologist who had reviewed records, gave English an intelligence quotient (I.Q.) test, and performed a psychological interview and evaluation. (R. 938-39) Dr. Smith noted that there had been an early diagnosis of a learning disability, and found that English was not functioning at a level expected for his age, had previously suffered from hyperactivity, and was "slow" and "subdued." (R. 940)

The court found that the crime was "brutal and heinous" and sentenced English to an extended term sentence of 70 years' imprisonment for first degree

murder, 30 years' imprisonment for attempt first degree murder, and 30 years' imprisonment for armed robbery, to run concurrently. (R. 858, 960-62) In rendering the sentence, the trial court stated that it had "considered all the facts and circumstances of the case, how this offense was committed, and the nature in which it was committed." (R. 960)

#### Direct Appeal

On direct appeal, English contended that the trial court erred in determining the offense was "brutal and heinous," and that his sentence was excessive. (C. 83-85) The appellate court affirmed his convictions and sentence. *People v. English*, 302 Ill. App. 3d 1090 (1st Dist. 1999).

#### Post-Conviction Petition (1999)

In December 1999, English filed a *pro se* petition for post-conviction relief, asserting, *inter alia*, that trial counsel was ineffective for failing to investigate two alibi witnesses and that appellate counsel was ineffective for failing to raise this issue on appeal. (Supp. C. 7) Post-conviction counsel supplemented the *pro se* petition with an additional issue pertaining to the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), arguing that the sentence was improper. (Supp. C. 8; R. 973-81) The trial court granted the State's motion to dismiss, and the appellate court affirmed the dismissal on appeal. *People v. English*, 346 Ill. App. 3d 1174 (1st Dist. 2004).

#### Successive Post-Conviction Petition (2005)

On February 16, 2005, English filed a successive post-conviction petition that included affidavits from two people who attested to English's innocence. (C. 106-08, 116) Additional affidavits further attested that the prosecutor had forced

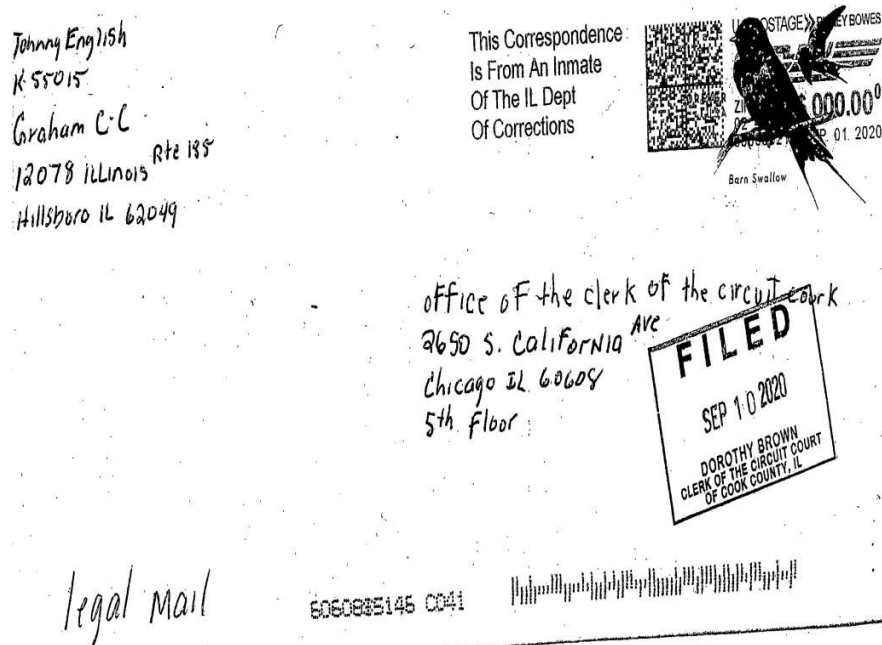
one of the witnesses to lie at trial. Also, English raised several ineffective assistance of trial counsel issues, including that counsel failed to advance an alibi defense. (C. 116) The claims advanced to an evidentiary hearing, and ultimately the trial court dismissed English's petition. (R. 1230) The dismissal was affirmed on appeal. *People v. English*, 402 Ill. App. 3d 121 (1st Dist. 2010).

Motion for Leave to File a Successive Post-Conviction Petition (2020)

On July 10, 2020, English sought leave to file a successive post-conviction petition alleging that he was entitled to a new sentencing hearing pursuant to recent changes in the law regarding the sentencing of emerging adults, citing, *inter alia*, *Miller v. Alabama*, 567 U.S. 460 (2012), and *People v. House*, 2019 IL App (1st) 110580-B. (C. 181-87) In discussing the characteristics of youth that should have been considered in rendering a just sentence as applied to him, English cited his learning disability at the time of the offense, the influence of his 30-year-old co-defendant, and the fact that the crime was committed just two months after his 18<sup>th</sup> birthday. (C. 186) English argued that his sentence of 70 years' imprisonment was a *de facto* life sentence and violated the Illinois Constitution, citing the Proportionate Penalties Clause, because it "shocks the moral sense [sic] of our modern community." (C. 186)

In a written order dated August 3, 2020, the trial court denied leave to file, finding that English did not establish cause and prejudice where his case was distinct from *Miller* and *House* due to English's culpability in the crimes for which he was convicted, because he was an adult at the time of the offense, and because he was not coerced or encouraged by any other, older individuals, notwithstanding his intellectual disability. (C. 200-05)

The upper right hand corner of the envelope containing English's *pro se* notice of appeal contains a postage stamp and a postage meter stamp dated "Sep 1 2020." (C. 219) The envelope also contains a file stamp from the clerk of the circuit court of Cook County with the date "Sep 10 2020." (C. 219)



C 219

Included with his notice of appeal is a "Notice of Mailing/Filing," indicating that "I, Johnny English, state that I have mailed the attached successive post conviction relief petition on August 20, 2020, by depositing the said [sic] in the mail drop box of Graham Correctional Center mail drop box. The same has been mailed to the parties listed below which one copy I wish file stamped and returned to me for my archives." (C. 218) At the bottom of the document, English wrote "Office of the Clerk of the Circuit Courk" [sic] and "Office of the States Attorney," with the respective addresses for each. (C. 218) The notice of appeal was not stamped

“filed” until September 10, 2020, when it was received by the clerk of the circuit court. (C. 222) On September 18, 2020, the circuit court entered an order appointing the Office of the State Appellate Defender to represent English on appeal, noting that a notice of appeal was filed on September 10, 2020, and was “timely per proof of service.” (C. 222)

On appeal from the denial of his leave to file a successive petition, English argued that he set forth the requisite showing of cause and prejudice to file a successive post-conviction petition in which he sought to develop his claim that his 70-year *de facto* life sentence was unconstitutional because it was imposed without the required consideration of his youth. The First District Appellate Court dismissed English’s appeal, concluding that it was without jurisdiction to consider the appeal, despite the timely postage meter stamp. *People v. English*, 2021 IL App (1st) 201016-U, ¶¶38, 41-42. As the notice of appeal was not file-stamped until September 18, 2020, outside the requisite 30-day period, the court reasoned that for it to have jurisdiction, the record must establish English timely mailed his petition in accordance with Illinois Supreme Court Rules 373 and 12(b)(6), which require the record to contain a proof of service of mailing prior to the expiration of the 30-day period, *i.e.*, a certification in compliance with 735 ILCS 5/1-109. *People v. English*, 2021 IL App (1st) 201016-U, ¶31. The court rejected English’s argument that his appeal was timely because the envelope containing his notice of appeal was postmarked September 1, 2020. *Id.* at ¶32. A petition for rehearing was timely filed and denied. This Court granted leave to appeal on March 30, 2022.

## ARGUMENT

**Pursuant to the prison mailbox rule, Johnny English’s *pro se* notice of appeal was timely-filed where a postage meter stamp on the envelope containing the notice of appeal indicated it was mailed prior to the requisite 30-day deadline.**

This Court should hold that the First District Appellate Court had jurisdiction to consider Johnny English’s appeal, even though his notice of appeal was file-stamped outside of the requisite 30-day period. While English, an incarcerated *pro se* petitioner, did not include the requisite certification of proof of service, there was clear evidence in the record that he placed his notice of appeal in the prison mail system before the 30-day deadline, and thus pursuant to the mailbox rule, English’s notice of appeal was filed timely. The postage meter stamp on the envelope containing the notice of appeal established that English timely mailed his notice of appeal on September 1, 2020, twenty-nine days after the circuit court denied his motion for leave to file a successive post-conviction petition. *See* Ill. Sup. Ct. R. 606(a), (b). Reliance on the date of the postage meter stamp is consistent with the liberal, pro-mailing policy of this Court’s rules, as well as the Federal Rules of Appellate Procedure, which allow evidence such as postmarks to show a notice of appeal was mailed timely. *See* Fed. R. App. P. (4)(c). Even if this Court concludes that a postage meter stamp alone is insufficient, English also included with his notice of appeal a “Notice of Mailing/Filing” indicating he placed the document in the prison mail drop box before the deadline. (C. 218) Together, the postage meter stamp on the envelope and the notice of mailing/filing provides sufficient evidence that he placed his notice of appeal in the prison mail system within the requisite 30-day time period. Therefore, this Court should hold that the appellate

court had jurisdiction and remand for consideration of whether English set forth the requisite showing of cause and prejudice to file a successive post-conviction petition.

This case presents a significant jurisdictional issue that this Court should decide equitably and in favor of *pro se* litigants like English. Pursuant to the liberal, pro-mailing policy of this Court and its rules, and in order to ensure incarcerated petitioners have access to the courts, this Court must find that there was sufficient evidence that English mailed his notice of appeal within the requisite 30-day period. Overlooking a postage meter stamp indicating that English mailed his notice of appeal timely, the First District Appellate Court held it did not have jurisdiction to consider English's appeal due to his failure to include a certification of proof of service. *People v. English*, 2021 IL App (1st) 201016-U, ¶31. However, by ignoring objective evidence that English timely mailed his notice of appeal, the appellate court improperly denied English, an incarcerated *pro se* petitioner, access to the courts.

Illinois courts have recognized that while a criminal defendant has no federal constitutional right to a direct appeal, under the Illinois Constitution the right to appeal a criminal conviction is fundamental. Ill. Const. 1970, art. VI, § 6; *People v. Abdullah*, 2019 IL 123492, ¶19. The equal protection clause of the Fourteenth Amendment requires that indigent defendants have an adequate opportunity to present their claims fairly within the adversary system. U.S. Const. Amend. XIV; *Ross v. Moffitt*, 417, U.S. 600, 612 (1974). It is well-established that prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *rev'd* on other grounds. Incarcerated individuals, such as English,

have a fundamental constitutional right to adequate, effective, and meaningful access to the courts to challenge violations of their constitutional rights. *Id.* at 822. As the United States Supreme Court has discussed, “[m]eaningful access’ to the courts is the touchstone,” and states must “assure the indigent defendant an adequate opportunity to present his claims fairly.” *Id.* at 823 (citing *Moffitt*, 417 U.S. at 612, 616).

Illinois Supreme Court Rule 606(a) and (b) provides that to appeal a final judgment in a criminal proceeding, the defendant must file a notice of appeal with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from. Ill. Sup. Ct. R. 606(a), (b). “The filing of a notice of appeal ‘is the jurisdictional step which initiates appellate review.’” *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (quoting *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998)). Unless a notice of appeal is properly filed, a reviewing court has no jurisdiction and must dismiss the appeal. *Id.* “The appellate and circuit courts of this state *must* enforce and abide by the rules of [the supreme court]” and do not have the authority to excuse compliance with the filing requirements of the supreme court rules governing appeals. *People v. Lyles*, 217 Ill. 2d 210, 216 (2005) (emphasis in original).

The prison mailbox rule applies to the present case. After the trial court denied English leave to file a successive post-conviction petition on August 3, 2020, English was required to file a notice of appeal by September 2, 2020. The postage meter stamp indicated a mailing date of September 1, 2020, and, included with his notice of appeal, English’s “Notice of Mailing/Filing” stated that he deposited the document in the prison mail drop box on August 20, 2020. (C. 218-19) This



evidence was sufficient to establish that English placed his notice of appeal in the prison mail system within the requisite 30-day time period and thus filed a timely notice of appeal.

Whether a court has jurisdiction is a question of law, which is reviewed *de novo*. *People v. Salem*, 2016 IL 118693, ¶11.

**A. Both Illinois and Federal courts have prison mailbox rules that cover appeals filed by *pro se* incarcerated petitioners.**

**1. Illinois Prison Mailbox Rule.**

In Illinois, Supreme Court Rule 373, which is applicable in criminal cases pursuant to Illinois Supreme Court Rule 612(b)(18) (eff. July 1, 2017), sets forth the prison mailbox rule and states as follows:

Unless received after the due date, the time of filing records, briefs or other documents required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing by an incarcerated, self-represented litigant shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12. This rule also applies to a motion directed against the judgment and to the notice of appeal filed in the trial court.

Ill. S. Ct. R. 373 (eff. July 1, 2017). Illinois Supreme Court Rule 12(b)(6) (eff. July 1, 2017) provides that, in the case of service by mail by an incarcerated *pro se* litigant, service is provided by certification under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109) of the person who deposited the document in the institutional mail, “stating the time and place of deposit and the complete address to which the document was to be delivered.” Thus, when a notice of appeal is filed outside the 30-day period following the order being appealed, the notice is deemed timely if the litigant attaches a proof of service in compliance with Rule 12(b)(6) showing it was mailed to the clerk of the circuit court within the 30-day period.

*See Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 215-16 (2009) (reasoning that the proof of mailing establishes “the date the document was timely mailed to confer jurisdiction on the appellate court”).

## **2. Federal Prison Mailbox Rule.**

The United States Supreme Court in *Houston v. Lack*, established the federal prison mailbox rule, finding that the U.S. Court of Appeals had jurisdiction over the petitioner’s appeal because the notice of appeal was filed at the time he delivered it to the prison authorities for forwarding to the court clerk. 487 U.S. 266, 276 (1988). At the heart of the prison mailbox rule are the constitutional notions of due process and fundamental fairness. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (stating that fundamental fairness is the touchstone of due process). As *Houston v. Lack* explained, the prison mailbox rule is supported by important public policy considerations that are unique to unrepresented, incarcerated individuals:

The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline.

487 U.S. at 270-71. In addition, the Supreme Court reasoned that “*pro se* prisoners have no control over delays between the prison authorities’ receipt of the notice and its filing, and their lack of freedom bars them from delivering the notice to the court clerk personally.” *Id.* at 273-74. Furthermore:

[T]he *pro se* prisoner does not anonymously drop his notice of appeal in a public mailbox – he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner’s assertions that he delivered the paper on a different date.

*Id.* at 275.

Rule 4(c) of the Federal Rules of Appellate Procedure codifies the federal prison mailbox rule. Fed. R. App. P. (4)(c). Specifically, Rule 4(c) which covers appeals by an inmate confined in an institution states:

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) It is accompanied by:

(I) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being pre-paid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(I).

Fed. R. App. P. 4(c) (2020). Section (A)(ii), which includes the postmark language, was added by amendment in 2016.

**B. The Prison Mailbox Rule covers both postmarks and postage meter stamps.**

English's motion for leave to file a successive post-conviction petition was denied by the trial court in a written order dated August 3, 2020. (C. 200-05) He then mailed a *pro se* notice of appeal, which was not stamped "filed" by the circuit court clerk until September 10, 2020. (C. 222) However, in the upper right hand corner of the envelope containing English's *pro se* notice of appeal is a postage meter stamp dated "Sep 1 2020." (C. 219) This postage meter stamp establishes that English mailed his notice of appeal on a timely date.

The postage meter stamp is the only postal service date mark on the envelope. (C. 219) There is no other postmark cancelling out the postage meter stamp date

of September 1, 2020. The only other date on the envelope is the file stamp from the clerk of the circuit court with the date “Sep 10 2020,” apparently the date the envelope was received and stamped filed by the clerk. (C. 219) Postage meter stamps like the one on English’s envelope are evidence of the mailing date.

1. **Pursuant to United States Postal Service regulations, the date an item is metered is the date the item must be deposited for mailing.**

Under the United States Postal Service (USPS) regulations governing postage meters, mail bearing a date on the postage meter stamp must be deposited or presented on that date. Thus, given that Postal Service regulations require mail with a postage meter stamp to be deposited in the mail on the date on the label, a postage meter stamp should be treated as a postmark. Indeed, the First District Appellate Court, in *People v. Tolbert*, 2021 IL App (1st) 181654, ¶14, concluded that postmarks and postage meters were similar and a determination regarding the sufficiency of postmarks would support a similar finding with respect to postage meters. Here the postage meter stamp bearing the date of September 1, 2020, indicates that English’s notice of appeal was timely mailed.

The governing regulations for postage meters are contained in the USPS Domestic Mail Manual (Postal Serv., Mailing Standards of the United States Postal Service , Domestic Mail Manual <https://pe.usps.com/cpim/ftp/manuals/dmm300/full/MailingStandards.pdf> [<https://perma.cc/G5LE-TPKA>] (hereinafter DMM)). As the DMM has been incorporated by reference into the Code of Federal Regulations, it has the force of law. 39 C.F.R. § 111.1 (2005); see *People v. Hanna*, 207 Ill. 2d 486, 497 (2003) (“Administrative regulations have the force and effect of law”).

The DMM identifies a postage meter as a “postage evidencing system,” and is defined as “a device or system of components a customer uses to print evidence [“indicia”] that postage required for mailing has been paid.” DMM § 604.4.6.1. In addition to identifying the amount of postage paid, the indicia may also identify the postage meter provider, as well as the date of mailing. *Id.* § 604.4.3.3(c); § 604.4.6.1. According to the DMM, there are a limited number of authorized postage meter providers, one of which is Pitney Bowles, Inc., the provider in this case. *Id.* § 604.2. (C. 219) When a provider leases a postage meter, the provider enters into an agreement with USPS in which the provider “agrees to abide by all rules and regulations governing its use.” *Id.* § 604.4.2.1.

Specifically as to the mailing date, the DMM provides:

The date or period when mailers may deposit or present metered mail for mailing is controlled by the mailing date in the indicia under the following conditions:

a. Complete Date. *Mailpieces bearing a complete date in the indicia must be deposited or presented on that date*, except for pieces entered after the day’s last scheduled collection from the Post Office or collection box. Those may bear the actual date of entry or the date of the next scheduled collection from the Post Office or collection box. When authorized by the USPS, presort mail accepted after midnight may bear the previous day’s date. If the mailer knows that the mail is not to be deposited or presented on the date in the indicia, the mailer must use a date correction indicium under 4.5.1.

*Id.* § 604.4.6.2 (emphasis added). Further, a provider’s usage of a postage meter may be denied for failure to comply with mailing standards, submission of false or incomplete information, or entering mailpieces for which there is a postage discrepancy into the mailstream. *Id.* § 604.4.2.4.

Therefore, as the regulations state, with a few exceptions, the date an item is metered is the date the item must be deposited or presented for mailing. Thus,

the postage metering system, which is regulated by the USPS, is similar to a postmark. In *Huber v. American Accounting Ass’n*, 2014 IL 117293, this Court defined a postmark as “an official postal marking on a piece of mail; specif: a mark showing the name of the post office and the date and sometimes the hour of mailing and often serving as the actual and only cancellation.” 2014 IL 117293, ¶16 (quoting *Wickman v. Illinois Property Tax Appeal Board*, 387 Ill. App. 3d 414, 417 (2008), quoting Webster’s Third New International Dictionary 1772-73 (1993)). Given the similarities between postmarks and postage meters, a determination regarding the evidentiary sufficiency of postmarks should support to a similar finding with respect to postage meters.

**2. Other states have found postage meter stamps to be equivalent to postmarks.**

Like the Illinois appellate court found in *People v. Tolbert*, 2021 IL App (1st) 181654, courts in other jurisdictions have concluded that postage meter stamps are equivalent to postmarks. Courts have reasoned that postage meter stamps are tantamount to postmarks given that the regulatory scheme governing the meters gives them the same effect and assures their reliability. For instance, the Supreme Court of Wyoming concluded that a postage meter stamp constitutes a postmark. *Chevron U.S.A., Inc. v. Department of Revenue*, 154 P.3d 331, 337 (Wyo. 2007). In *Chevron*, the court discussed the USPS regulations on metered mail and held that “postmark,” for purposes of providing a date for the start of a 30-day period to appeal an order, included a postage meter stamp. *Id.* at 334-35, 337. It also reviewed other jurisdictions and found that such reasoning was consistent with the majority of courts that considered whether postmarks and postage meter stamps could be treated as the same. *Id.* at 337-38; *see, e.g., Lozier*

*Corp. v. Douglas County Bd. of Equalization*, 285 Neb. 705 (2013) (deciding that a postage meter stamp satisfied the state statute’s purpose of being evidence of the mailing date and that it is a “postmark”); *Frandrup v. Pine Bend Warehouse*, 531 N.W.2d 886 (Minn. Ct. App. 1995) (holding a statute requiring a postal service “cancellation mark” includes both postal service cancellation and postage meter stamp because both show the item passed through the postal system on the day indicated and common sense suggests both are postmarks); *Severs v. Abrahamson*, 255 Iowa 979 (Iowa 1963) (concluding legislature intended “postmark” to include both USPS and private meter stamps); *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. 1991) (concluding that a postage meter stamp was sufficient when statute required mail to be “endorsed by U.S. Post Office”); *Headrick v. Jackes-Evans Mfg. Co.*, 108 S.W.3d 114 (Mo. Ct. App. 2003) (reasoning that metered mail postmarks inscribed on an envelope by a postage meter licensed by the USPS were sufficient to satisfy the statutory requirement of a date endorsed by the United States post office); *Haynes v. Hechler*, 182 W.Va. 806 (1990) (holding a postage meter stamp was presumptively valid and accurate for the purposes of state statute).

Similarly, the Colorado Supreme Court, in considering a statute establishing the deadline for an employer to file objections to unemployment benefits, concluded that a postage meter stamp constituted a postmark. *Gutierrez v. Industrial Claim Appeals Office*, 841 P.2d 407, 408 (Colo. Ct. App. 1992). Specifically, the court stated that “under United States Postal Service regulations, private postage meter marks are official postmarks imprinted under license from the Postal Service. Privately metered mail is entitled to all the privileges applying to the various classes of mail, and such mail is not canceled or postmarked by the Postal Service

unless incorrectly dated.” *Id.* (internal citations omitted).

Likewise, the Ohio Supreme Court found that postage meter stamps were presumed to be reliable because they were subject to Postal Service regulations and guidelines. *Bowman v. Administrator*, 30 Ohio. St. 3d 87 (1987). The court in *Bowman* stated that:

Private meter postmarks are official postmarks imprinted under license from the United States Postal Service (DMM Section 144.2, and metered mail is entitled to all privileges applying to the various classes of mail. (DMM Section 144.111.) The United States Postal Service requires the date shown on private meter postmarks to be the actual date of deposit of mail (or the next scheduled collection day). (DMM Section 144.471.) . . . *If the wrong date appears, a .00 postage meter impression with the correct date is stamped on the envelope by the post office. Otherwise, metered mail is not canceled or postmarked by the Postal Service.* (DMM Section 144.534.)

*Id.* at 90 (footnotes in original omitted) (emphasis added).

A few courts have decided differently, but many differentiated postmarks and postage meter stamps without discussing the Postal Service regulations or emphasized concerns with manipulation or mismarking of the date. *See e.g., Smith v. Idaho Dept. of Labor*, 148 Idaho 72 (2009); *Lin v. Unemployment Comp. Bd. of Review*, 558 Pa. 94 (1999); *Machado v. Florida Unemployment Appeals*, 48 So. 3d 1004 (Fla. App. 2010). However, such concerns about mismarking the date are not likely to apply to the Illinois Department of Corrections as it is unlikely to deliberately disregard Postal Service regulations. Thus, as a review of these cases demonstrate, the majority of jurisdictions considering this issue have found postage meter stamps to be equivalent to postmarks.

Following the well-reasoned decisions of these other jurisdictions, this Court should treat postage meter stamps as equivalent to postmarks. The Postal Service regulations governing postage meter stamps require the date shown on private



meter postmarks to be the actual date of deposit of mail. Therefore, as English's envelope bears a postage meter stamp of September 1, 2020, his notice of appeal should be considered mailed on that timely date.

**C. In Illinois it is an open question as to whether a postmark or postage meter stamp is sufficient evidence of the date of mailing.**

Whether a legible postmark or postage meter stamp can supply adequate proof of the date of mailing is an open question in Illinois. While they did not involve postmarks, two of this Court's decisions, *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209 (2009), and *Huber v. American Accounting Ass'n*, 2014 IL 117293, are relevant. In *Secura*, this Court held that the absence of proof of mailing rendered the notice of appeal untimely where the notice of appeal was received four days after the deadline. Lacking a certified proof of mailing and with no postmark on the envelope, the appellant in *Secura* argued that a cover letter bearing the same date as the notice of appeal's due date, established timely mailing. *Secura*, 232 Ill. 2d at 216.

This Court rejected that argument. Addressing the interplay between Rule 373 and Rule 12, this Court stated that "while Rule 373 relaxes the requirement of timely filing where a party takes advantage of the convenience of mailing a document, a party can only take advantage of Rule 373 if it files proper proof of mailing as required by Rule 12[]." *Id.* This Court then explained that the cover letter was neither sworn nor certified and that it "contain[ed] only a date, which, at best, indicates that it may have been mailed on that date." *Id.* A notice of filing indicating that the notice of appeal had been sent to opposing counsel before the deadline was also found to be inadequate because it did not disclose the date that the notice of appeal was mailed to the clerk. *Id.* 216-17. Due to the absence of

evidence of timely mailing, this Court concluded that the appellate court lacked jurisdiction and dismissed the appeal. *Id.* 218. Unlike the cover letter in *Secura*, on which an individual could place any date, a postage meter stamp as in English's case is objective evidence of the date of mailing. The postage meter stamp is controlled not by the *pro se* petitioner, but by the Illinois Department of Corrections. Thus, the decision in *Secura* is not controlling on the issue here.

In *Huber*, this Court considered whether a postage label from an Automated Postal Center (APC) could serve as adequate proof of time of mailing where the notice of appeal had not been file-stamped until after the deadline. 2014 IL 117293, ¶¶5, 17. In concluding that jurisdiction could not be founded on the APC label, this Court emphasized that the label was not a postmark. *Id.* ¶17. In contrast to a postmark, this Court explained, the date borne by an APC postage label shows the date of sale, not the date of mailing. *Id.* ¶18. Thus, like the dated cover letter in *Secura*, the APC label established only that the notice of appeal “may” have been mailed on the indicated date. *Id.* (citing *Secura*, 232 Ill. 2d at 216). Consequently, the notice of appeal was untimely, and the appellate court had properly dismissed the appeal for want of jurisdiction. *Id.* ¶19. In so holding, this Court expressly declined to decide whether “other methods of proof of mailing” could satisfy Rule 12. *Id.* ¶18. Therefore, the question remains whether a legible postmark or postage meter stamp can supply adequate proof of the date of mailing.

**D. Illinois appellate courts finding postmarks to be evidence of the mailing date are consistent with the equitable policy of this Court and its rules as well as federal decisions and those in other states.**

This Court should find that a notice of appeal is mailed timely and courts have jurisdiction where a postmark or postage meter stamp indicates the notice

of appeal was mailed on a timely date. The First District Appellate Court in *People v. Humphrey*, 2020 IL App (1st) 172837, and the Second District Appellate Court in *People v. Hansen*, 2011 IL App (2d) 081226, held that the appellate court has jurisdiction based on a postmark that established a notice of appeal was timely mailed.

As the courts in *Humphrey* and *Hansen* explain, a legible postmark or postage meter stamp establishes the date of mailing in an objective manner and is sufficient to give courts jurisdiction when the notice of appeal was file-stamped outside of the requisite 30-day period. In *Humphrey*, the First District Appellate Court held that it had jurisdiction based on a postmark that established the time of mailing. 2020 IL App (1st) 172837. The record did not contain a section 1-109 certification pursuant to Rule 12(b)(6), however the envelope containing the notice of appeal was postmarked before the due date. *Id.* ¶14. The *Humphrey* court reasoned that to hold that the postmark was inadequate would be to ignore incontrovertible evidence that the notice of appeal was, in fact, mailed in a timely fashion: “Requiring a court to overlook a clearly legible postmark showing that a document was processed by a disinterested third party, such as the post office, on or before the date by which the document was required to be mailed is to disregard the best, most competent evidence of the latest date of mailing consistent with the pro-mailing policy of Rule 373.” *Id.* ¶18 (quoting *People v. Hansen*, 2011 IL App (2d) 081226, ¶14) (internal quotation marks omitted). Thus, *Humphrey* held that because the postmark reflected the notice of appeal had been timely mailed, the appellate court had jurisdiction over the appeal. 2020 IL App (1st) 172837, ¶21; accord *Hansen*, 2011 IL App (2d) 081226, ¶¶14-15.

Like the postmark in *Humphrey*, the postage meter stamp here was the best, most competent evidence of the date of mailing. Even more compelling than a date on a certificate of service, which the petitioner controls, the postage meter stamp is completely controlled by the Illinois Department of Corrections. Thus, as with the postmark in *Humphrey*, the postage meter stamp constitutes objective proof of the date of mailing.

**1. Federal courts promote access to the courts for *pro se* prisoners and consider postmarks to be evidence of mailing date.**

A liberal, pro-mailing policy is also consistent with the federal courts. The Federal Rules of Appellate Procedure consider postmarks to be evidence of mailing. As Federal Rule of Appellate Procedure Rule 4(c), amended in 2016, states, a prisoner invoking the mailbox rule must prove the date that he deposited his filing with the prison's legal-mail system in one of two ways: he must submit either (1) a declaration or a notarized statement under penalty of perjury setting out the date of deposit and with proper postage, or (2) “**evidence (such as a postmark or date stamp)** showing that the notice was so deposited and that postage was prepaid.” Fed. R. App. P. (4)(c)(1) (emphasis added); *Cobb v. Aramark Corr. Servs., LLC*, 937 F.3d 1037, 1040 (7th Cir. 2019). As the rule specifically states, evidence such as a postmark is sufficient to establish the date of mailing.

Pursuant to Rule 4(c), federal courts of appeal have found that a postmark is evidence of the time of filing of a notice of appeal. For example, even under the earlier version of Rule 4(c), which did not include the postmark language, the Eighth Circuit concluded it had jurisdiction where an envelope containing the notice of appeal had a timely postmark. *Sulik v. Taney County, Mo.*, 316 F.3d 813,

814 (8th Cir. 2003). In *Sulik*, after the district court dismissed Sulik’s 1983 complaint on October 26, 2001, he appealed but the district court did not receive his notice of appeal until November 27, 2001, one day late. *Id.* at 814. The envelope containing the notice of appeal was postmarked November 21. *Id.* While the reviewing court noted that Sulik did not submit an affidavit as required under Rule 4(c)(1) at that time, it determined that “it is clear Sulik deposited his notice of appeal in the prison mail system before the November 26 deadline because the envelope containing the notice bore a November 21 postmark and the notice was received by the clerk’s office on November 27.” *Id.* Thus, the Eighth Circuit concluded it had jurisdiction and the dismissal of the appeal as untimely was not warranted. *Id.*

More recently, the Sixth Circuit in *United States v. Smotherman*, 838 F.3d 736, 738-39 (6th Cir. 2016), discussed the amended version of Rule 4(c) and that the “newly enumerated method of proving timeliness under the post-amendment version is ‘evidence.’” *Smotherman* noted that while the *pro se* prisoner’s notice of appeal included a declaration, there were some technical problems with the declaration as it was not on the same page or under the title of “Notice of Appeal.” *Id.* at 739. However, the Sixth Circuit rejected the government’s argument that the *pro se* prisoner did not make a declaration or notarized statement in compliance with the rule, reasoning that, “[t]o read a *pro se* document so strictly as to dismiss an appeal merely because a technical filing requirement like a required declaration appeared above the wrong page number, or under the wrong header, would defy the dictates of law. Further, it would impress upon *pro se* appellants that access to justice is denied to those behind prison doors.” *Id.* at 739. As *Smotherman* reasoned, *pro se* documents are to be liberally construed and postmark evidence

should not be ignored. *Id.* (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (a document filed *pro se* should be liberally construed)).

Following *Smotherman* and the amended Rule 4(c), additional Sixth Circuit decisions have found the court lacks jurisdiction in situations where the postmark on the envelope indicates the notice of appeal was late. For example, in *Richardson v. Winn*, 2019 WL 4729830 (6th Cir. 2019), a notice of appeal from the dismissal of a *habeas corpus* petition was due on June 17, 2019. While the notice of appeal was dated June 12, 2019, the postmark on the envelope in which the notice of appeal was mailed was dated June 19, 2019. The court dismissed the appeal for lack of jurisdiction where “[t]he June 19, 2019, postmark on the envelope in which the notice of appeal was mailed is more indicative of the date the document was given to prison authorities.” *Id.*; see also *Thornton v. United States*, 2020 WL 1952493 (6th Cir. 2020) (same); *Kennard v. Smith*, 2021 WL 1602217 (6th Cir. 2021) (same).

Moreover, the language of Rule 4(c) is broad and does not limit evidence of mailing to postmarks solely. The rule states “*evidence (such as a postmark or date stamp)*” showing that the document was deposited timely is sufficient for the prison mailbox rule to apply. Fed. R. App. P (4)(c)(1)(A)(ii) (emphasis added). This language, “evidence (such as a postmark . . .),” indicates a liberal, pro-mailing policy to ensure access to the courts for prisoners. Under the language of the federal rule, a postage meter stamp would be considered evidence sufficient to show a notice of appeal was deposited timely for the prison mailbox rule to apply.

Furthermore, Rule 4(c) provides the federal courts of appeals with the authority to exercise discretion. Specifically, under Rule 4(c)(1)(B), the notice of appeal is timely if deposited in the prison mail system and is accompanied by

a declaration or notarized statement or evidence, such as a postmark, or “(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(I).” Fed. R. App. P. 4(c). Thus, the court of appeals has discretion to allow a later filing if there is some question or problem with a declaration or notarized statement. This indicates the federal rules insistence on ensuring access to the courts for incarcerated individuals.

The language of Rule 4(c) acknowledges the unique challenges facing incarcerated individuals. A *pro se* incarcerated individual has limited control and is not in a position to make sure that his notice of appeal is timely filed. *See Houston v. Lack*, 487 U.S. at 270-71, 273-75. Thus, by giving courts discretion and allowing evidence such as postmarks to show a document was deposited timely, the federal rule ensures *pro se* prisoners, like English, are not denied access to the courts.

## **2. Other states allow postmarks as evidence of mailing date.**

In addition to the Federal Rules of Appellate Procedure stating that postmarks are evidence of timely filing, other states follow a liberal pro-mailing policy and allow postmarks as evidence of mailing date as well. For example, in Pennsylvania, the Rules of Appellate Procedure state, “[a] *pro se* filing submitted by a person incarcerated in a correctional facility is deemed filed *as of the date of the prison postmark* or the date the filing was delivered to the prison authorities for purposes of mailing as documented by a properly executed prisoner cash slip *or other reasonably verifiable evidence*.” Pa. St. Rap. Rule 121(f) (emphasis added).

Pennsylvania courts have consistently held that the postmark on an envelope is considered the filing date. For instance, in *Commonwealth v. Jones*, 700 A.2d 423 (Pa. 1997), the Supreme Court of Pennsylvania discussed the type of evidence

a *pro se* prisoner may use to prove he mailed his appeal timely and concluded that a “United States Postal date stamp” on the envelope used to mail the appeal bearing a timely date was sufficient to establish that it was timely filed. *Id.* at 426. The court noted that an affidavit attesting to the date of deposit with prison officials, a cash slip from prison authorities noting the date of mailing and the deduction from the prisoner’s account for the mailing, and evidence of internal operating procedures regarding mail delivery in the prison were all examples of evidence a *pro se* prisoner could present but that proof was not limited to these examples and the court was “inclined to accept any reasonably verifiable evidence of the date that the prisoner deposits the appeal with the prison authorities.” *Id.* at 426. More recently, in *Commonwealth v. DiClaudio*, the *pro se* prisoner filed a notice of appeal, and although the record did not indicate when he delivered the document to prison authorities for mailing, the court used the postmark date on the envelope as the filing date and found the notice of appeal was timely filed. 210 A.3d 1070, 1074 (Pa. Super. 2019); *see also Commonwealth v. Wilson*, 911 A.2d 942 (2006) (concluding that, pursuant to the prisoner mailbox rule, a postmark on an envelope indicated the notice of appeal was timely filed).

Similarly, Arkansas courts have held that a postmark on an envelope shows the date of mailing. The Arkansas Supreme Court in *McClinton v. State*, 2016 Ark. 461 (2016), found a postmark to be evidence of a timely mailing date. In that case a *pro se* prisoner failed to provide a required notarized statement under the court rule, so the supreme court found he did not get the benefit of the prison mailbox rule. *Id.* at \*3. However, the envelope containing the petition was postmarked five days before the due date. *Id.* Finding the postmark significant, the court stated



that under the unique facts of the case, the *pro se* prisoner's petition should have been filed prior to the deadline and remanded for the circuit clerk to file-mark the petition with a timely date. *Id.* \*4; *see also, Gould v. State*, 2019 Ark. App. 418 (2019) (following *McClinton* and concluding the petition was timely filed given the postmark on the envelope indicated it was timely mailed).

Likewise, the Alabama Supreme Court found a *pro se* notice of appeal timely filed based on the postmark on the envelope containing the notice of appeal and the date on the certificate of service. *Ex parte Jones*, 773 So.2d 989, 990 (Ala. 1998). Also, the Supreme Court of Hawaii indicated that a postmark on an envelope would prove the date of filing. *Setala v. J.C. Penney Co.*, 40 P.3d 886, 892 (Hawaii 2002) (noting that a *pro se* inmate "should not be penalized for the absence of a postmarked and initiated envelope, which would prove his filing date").

This Court should follow the examples of these states, as well as the federal cases and federal Rule 4(c), and find that postmarks and postage meter stamps are sufficient evidence of the mailing date. As the postage meter stamp on English's envelope indicates, he mailed his *pro se* notice of appeal timely on September 1, 2020, and thus, pursuant to the mailbox rule, the notice of appeal was filed timely.

**E. The appellate court below erred in finding it did not have jurisdiction to consider English's appeal.**

In contrast, some Illinois appellate court decisions have found that jurisdiction in such cases as the present case is proper where the record contained a certification of proof of service of mailing only, and a postmark is insufficient to give the court jurisdiction. However, these cases were wrongly decided and ignore the equitable pro-mailing policy of this Court's rules.

In English's case, the First District Appellate Court held that it did not

have jurisdiction despite the postage meter stamp indicating that English timely mailed his notice of appeal. *English*, 2021 IL App (1st) 201016-U, ¶38. *English* relied on *Tolbert*, which, as previously discussed, found postage meter stamps to be consistent with postmarks. *Tolbert*, 2021 IL App (1st) 181654, ¶14. However, *Tolbert* concluded that the appellate court did not have jurisdiction despite the existence of a postage meter stamp indicating that the notice of appeal had been mailed before the due date. *Id.* ¶23. *Tolbert* noted that as originally written, Rule 373 expressly “permitted proof of mailing to be evidenced by a postmark,” but that due to problems with illegible postmarks, the rule was amended in 1981 to require proof of mailing by an attorney’s certificate or a nonattorney’s affidavit. *Id.* ¶16. (citing *Huber*, 2014 IL 117293, ¶13). A later amendment to the rule incorporated Rule 12’s requirement for proof of service. *Tolbert*, 2021 IL App (1st) 181654, ¶16. Finding the amendment removing postmarks as proof to be “significant” and reasoning that the text of the rule required proof of the time of mailing by certification, *Tolbert* held that a legible postmark or postal meter stamp could not be used as proof of the date of mailing. *Id.* ¶¶20-22; accord *People v. Lugo*, 391 Ill. App. 3d 995, 998-99 (2d Dist. 2009); *People v. Blalock*, 2012 IL App (4th) 110041 (same). Following the reasoning in *Tolbert*, the appellate court in English’s case found it did not have jurisdiction to consider his appeal. *English*, 2021 IL App (1st) 201016-U, ¶¶41-42.

The *English* and *Tolbert* line of cases are wrongly decided in that they deny incarcerated *pro se* litigants access to the courts and ignore the intent of the amendments. The amendments to the rules that *Tolbert* relies on were not intended to limit *pro se* litigants’ access to the courts, which is what happened in English’s

case. Rather, the purpose of the amendments was to help protect the rights of *pro se* litigants and ensure access to the courts by prompting *pro se* litigants to supply proof of mailing that could withstand problems with a postmark, of which a litigant has no control. *Huber*, 2014 IL 117293, ¶13. Consistent with a liberal, pro-mailing policy, the purpose of the amendments was to help protect the rights of *pro se* litigants. *See Huber*, 2014 IL 117293, ¶13; *see also Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill. 2d 326, 341-42 (1989) (discussing the “pro-mailing policy of Rule 373” and how “a liberal pro-mailing policy is more equitable”). Following the rules in a way that leads to ignoring a postmark or postage meter stamp, which indicate the date of mailing, contrasts with the intent of the rules of this Court and its liberal, pro-mailing policy. Thus, the *English* and *Tolbert* line of cases are wrongly decided because they improperly deny incarcerated *pro se* litigants access to the courts.

As the rules of this Court have the force of law, when construing a supreme court rule the same principles apply as when construing a statute. *People v. Abdullah*, 2019 IL 123492, ¶25; *In re Denzel W.*, 237 Ill. 2d 285, 294 (2010). The cardinal rule of statutory construction is to give effect to the legislature’s intent, and the best indication of legislative intent “is the statutory language, given its plain and ordinary meaning.” *People v. Hardman*, 2017 IL 121453, ¶19 (quoting *Hall v. Henn*, 208 Ill. 2d 325, 330 (2003)). Words and phrases should not be considered in isolation, but interpreted in light of other relevant portions of a statute, so that no term is rendered superfluous or meaningless. *Land v. Board of Educ. of City of Chicago*, 202 Ill. 2d 414, 422 (2002). This Court will presume that the legislature, when enacting the statute, did not intend absurdity, inconvenience,

or injustice. *Id.* If the plain language of the statute is clear and unambiguous, that plain language must prevail, and no resort to other tools of statutory construction is necessary. *Id.* at 421-22. Criminal statutes must also be strictly construed in favor of the defendant. *People v. Laubscher*, 183 Ill. 2d 330, 337 (1998).

The purpose of Rule 373 is to establish that a notice of appeal was, in fact, placed in the mail on or before the 30-day deadline date. A postmark and a postage meter stamp, as in this case, more than adequately serve the purpose of Rule 373. The decisions in *Humphrey* and *Hansen* are consistent with the equitable pro-mailing policy of this Court and its rules. As this Court acknowledged in *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, Rule 373 has a “pro-mailing policy” and “a liberal pro-mailing policy is more equitable.” 126 Ill. 2d at 341-42. Further, as this Court discussed in *Huber*, the purpose of the amendments to the rules that dropped postmarks in favor of certifications was not to limit a *pro se* litigant’s access to the courts. *Huber*, 2014 IL 117293, ¶13. Instead, the change was made to prompt litigants to supply proof of mailing that could withstand an illegible or delayed postmark, factors over which a litigant has no control. *Huber*, 2014 IL 117293, ¶13. In other words, the change was to help protect the rights of *pro se* litigants. If the date of mailing *can* be established using a postmark or postage meter stamp, there is no reason to insist upon proof of mailing in an additional form.

**F. Even if this Court finds the postage meter stamp to be insufficient evidence of timely mailing, English’s “Notice of Mailing/Filing” together with the postage meter stamp is sufficient to establish he deposited his notice of appeal timely.**

This Court should not overlook that English included with his notice of appeal a “Notice of Mailing/Filing,” indicating that he deposited the document

in the prison mail drop box on August 20, 2020. (C. 218) If this Court decides the postage meter stamp is not adequate evidence that English mailed his notice of appeal on a timely date, the postage meter stamp combined with the “Notice of Mailing/Filing” is sufficient to establish that the notice of appeal was deposited in the prison mail system prior to the 30-day deadline.

As discussed throughout this brief, this Court’s rules set forth an equitable, pro-mailing policy. Considering the postage meter stamp along with the “Notice of Mailing/Filing” to find English deposited his notice appeal in the prison mail system in a timely fashion ensures access to the courts for *pro se* prisoners.

In two recent cases, the First District Appellate Court has recognized the importance of providing *pro se* litigants with access to the courts. In *People v. Hayes*, 2021 IL App (1st) 190881, the *pro se* notice of appeal was file-stamped by the circuit court clerk more than 30 days after the trial court’s denial of the petitioner’s post-conviction petition. In *Hayes*, the petitioner did include a certificate of service indicating that he placed his notice in the prison mail system on a timely date. *Id.* ¶18. Yet, despite the certification, the court continued to emphasize that any doubt that he timely mailed his notice of appeal was dispelled by the envelope which shows postal service processing on a timely date. *Id.* ¶19.

Also, in *People v. Cooper*, 2021 IL App (1st) 190022, the incarcerated defendant filed a *pro se* motion to withdraw his guilty plea, but it was file-stamped one day after the 30-day deadline. While the appellate court declined to extend the mailbox rule to this situation, it found there was strong circumstantial evidence indicating that Cooper did place his motion to withdraw guilty plea in the prison mail system before the deadline. *Id.* ¶¶2, 20-21, 24. Thus, the court reasoned that it was improper

for the circuit court to refuse Cooper an opportunity to supplement the record with the requisite certification. *Id.* The appellate court remanded the matter to the circuit court for the limited purpose of inquiring of Cooper when his motion was mailed, noting that if it was mailed timely, he should be allowed to supply a certification complying with Rule 12(b)(6). *Id.* ¶¶22, 24.

While English did not include the requisite certification, he did include a “Notice of Mailing/Filing” indicating he placed his notice of appeal in the correctional center’s mail drop box on August 20, 2020. (C. 218) This, along with the postage meter stamp on the envelope provide clear evidence that English placed his notice of appeal in the prison mail system before the 30-day deadline, and thus, it was timely-filed.

In sum, evidence in the record indicates that English, a *pro se* prisoner, deposited his notice of appeal in the prison mail system on a timely date. A timely postage meter stamp on the envelope containing English’s notice of appeal is sufficient evidence of the date of mailing. Such a finding is in line with the equitable, pro-mailing policy of this Court’s rules, as well as other jurisdictions, and ensures *pro se* incarcerated litigants have access to the courts. Therefore, even though English did not include the requisite certification of proof of service, pursuant to the mailbox rule his notice of appeal was filed timely, and this Court should vacate the appellate court’s order dismissing his appeal for lack of jurisdiction and remand the matter for consideration of whether the circuit court erred in denying English leave to file a successive post-conviction petition.

**CONCLUSION**

For the foregoing reasons, Johnny English, petitioner-appellant, respectfully requests that this Court find the evidence sufficient to establish English mailed his notice of appeal on a timely date and remand to the appellate court for consideration of whether English set forth the requisite showing of cause and prejudice to file a successive post-conviction petition.

Respectfully submitted,

DOUGLAS R. HOFF  
Deputy Defender

THERESE BISSELL  
Assistant Appellate Defender  
Office of the State Appellate Defender  
First Judicial District  
203 N. LaSalle St., 24th Floor  
Chicago, IL 60601  
(312) 814-5472  
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 33 pages.

/s/Therese Bissell  
THERESE BISSELL  
Assistant Appellate Defender



**APPENDIX TO THE BRIEF****Johnny English No. 128077**

|                                |      |
|--------------------------------|------|
| Index to the Record .....      | A-1  |
| Appellate Court Decision ..... | A-6  |
| Notice of Appeal .....         | A-18 |

## INDEX TO THE RECORD

| <u>Common Law Record ("C")</u>  | <u>Page</u> |
|---|-------------|
| Case Summary .....  | 4           |
| Information .....   | 37          |
| Indictment .....  | 39          |
| Motion for a New Trial (April 11, 1997) .....   | 57          |
| Motion to Reduce Sentence (May 14, 1997) .....  | 60          |
| Notice of Appeal (June 5, 1997) .....   | 65          |
| Impounding Order .....  | 66          |
| Motion for Extension of Time to File Complete Record (November 24, 1997) ....   | 69          |
| Mandate from Appellate Court No. 1-97-2365 (July 8, 1999) .....   | 77          |
| Rule 23 Order from the Appellate Court No. 1-97-2365 (July 8, 1999) .....   | 79          |
| Appellate Court allowing Motion to Extend Time to File a Record .....   | 87          |
| Motion for Extension of Time to File Complete Record (May 22, 2002) .....   | 90          |
| Rule 23 Order from the Appellate Court No. 1-02-0280 (November 4, 2004) .....   | 95          |
| Notice of Filing Successive Petition for Post-Conviction Relief (February 15, 2005) .....   | 116         |
| State's Motion to Dismiss <i>Pro Se</i> Petition for Post-Conviction Relief (October 18, 2007) .....                                | 158         |
| Reply to State's Motion to Dismiss (December 20, 2007) .....  | 169         |
| Letter from Petitioner English to Clerk of the Circuit Court regarding two copies of his Successive Petitions (July 10, 2020) ..... | 179         |
| <i>Pro Se</i> Successive Post-Conviction Petition (July 10, 2020) .....   | 181         |
| Circuit Court's Order Denying <i>Pro Se</i> Petition for Post-Conviction Relief (August 3, 2020) .....                              | 198         |
| Certified Report of Disposition (August 3, 2020) .....  | 207         |
| Notice of Appeal (September 10, 2020) .....   | 217         |

| <b><u>Common Law Record ("C")</u></b>   | <b><u>Page</u></b> |
|---|--------------------|
| Circuit Court's Order Denying <i>Pro Se</i> Petition for Post-Conviction Relief<br>(September 18, 2020) . . . . .   | 222                |
| <b>Secured Record</b>   |                    |
| Memorandum of Orders ("Half Sheet") . . . . .   | Sec C 4            |
| Indictment . . . . .  | Sec C 11           |
| Arrest Report . . . . .   | Sec C 27           |
| Complaint for Preliminary Examination . . . . .   | Sec C 29           |
| Appearance . . . . .  | Sec C 33           |
| State's Motion for Discovery (May 22, 1994) . . . . .   | Sec C 35           |
| Defendant's Motion for Discovery (May 3, 1995) . . . . .  | Sec C 42           |
| State's Answer to Discovery . . . . .   | Sec C 50           |
| Motion to Quash Arrest and Suppress Evidence (February 15, 1996) . . . . .  | Sec C 60           |
| Motion to Suppress Statements (February 15, 1996) . . . . .   | Sec C 62           |
| Petition to Declare Isaac Wallace a Material Witness (January 17, 1997) . . . . .   | Sec C 67           |
| Certificate Adjudging Named Person Be a Material Witness . . . . .  | Sec C 69           |
| Jury Waiver (March 5, 1997) . . . . .   | Sec C 70           |
| Jury Instructions . . . . .   | Sec C 71           |
| Motion for a New Trial . . . . .  | Sec C 102          |
| Motion to Allow the Jury to Determine That Defendant is Eligible for the Death<br>Penalty or in the Alternative, Motion to the Court for a Finding as to Defendant's<br>Eligibility for Death . . . . . | Sec C 104          |
| Victim Impact Statement . . . . .   | Sec C 108          |
| Presentence Investigation Report . . . . .  | Sec C 111          |
| Sentencing Order . . . . .  | Sec C 125          |
| Motion to Reduce Sentence . . . . .   | Sec C 126          |
| Notice of Appeal (June 5, 1997) . . . . .   | Sec C 128          |

**Common Law Record ("C")****Page**

|  |           |
|--|-----------|
| Presentence Investigation Report (April 17, 1997) . . . . .                | Sec C 392 |
| Partial Supplemental Post Conviction Petition / Additional Issue . . . . . | Sec C 418 |
| Attorney's 651 (c) certificate (January 7, 2002) . . . . .                 | Sec C 421 |
| Notice of Appeal (January 7, 2002) . . . . .                               | Sec C 422 |
| Notice of Appeal (July 1, 2008) . . . . .                                  | Sec C 569 |

**Supplemental Common Law Record ("Sup C")**

|   |         |
|---|---------|
| Corrected Copy of Rule 23 Order from the Appellate Court No. 1-08-1868 (July 9, 2010) . . . . . | Sup C 4 |
|---|---------|

**Report of Proceedings ("R")**

|  | <b><u>Direct</u></b> | <b><u>Cross</u></b> | <b><u>Redir.</u></b> | <b><u>Recr.</u></b> |
|--|----------------------|---------------------|----------------------|---------------------|
| August 3, 2020   |                      |                     |                      |                     |
| Motion for Leave to File Successive<br>Post-Conviction Petition - Denied |                      |                     |                      | R1324               |

**Direct Appeal****Report of Proceedings ("SR")**

|               | <b><u>Direct</u></b> | <b><u>Cross</u></b> | <b><u>Redir.</u></b> | <b><u>Recr.</u></b> |
|---------------|----------------------|---------------------|----------------------|---------------------|
| March 6, 1997 |                      |                     |                      |                     |

**Bench Trial**

## State Witnesses

|                           |      |              |      |
|---------------------------|------|--------------|------|
| Officer Timothy<br>Thomas | R348 | R365         | R368 |
| Dr. James Filkins         | R373 | R386         |      |
| June Presberry            | R389 | R400         |      |
| William Hughes            | R411 | R435<br>R439 |      |

|                                       | <u>Direct</u> | <u>Cross</u> | <u>Redir.</u> | <u>Recr.</u> |
|---------------------------------------|---------------|--------------|---------------|--------------|
| William Wilson                        | R448<br>R462  | R455<br>R463 | R458<br>R470  | R459         |
| March 10, 1997                        |               |              |               |              |
| Bonnie Melone                         | R477          | R487<br>R490 |               |              |
| Thomas Lyons                          | R492<br>R529  | R511<br>R547 |               |              |
| State Rests                           |               |              |               | R559         |
| Motion for Directed Finding - Denied  |               |              |               | R559         |
| Stipulation                           |               |              |               | R560         |
| Defense Rests                         |               |              |               | R561         |
| January 7, 2002                       |               |              |               |              |
| Supplemental Petition                 |               |              |               |              |
| State's Motion to Dismiss - Sustained |               |              |               | R981         |
| March 18, 2008                        |               |              |               |              |
| Evidentiary Hearing                   |               |              |               |              |
| Petitioner's Witnesses                |               |              |               |              |
| Ronald Streeter                       | R1141         | R1147        | R1159         | R1160        |
| Ferris Skinner                        | R1163         | R1171        | R1188         |              |
| Charles Streeter                      | R1193         | R1207        | R1226         |              |
| Charlotte English                     | R1232         | R1237        | R1243         | R1243        |
| Johnny English                        | R1245         | R1246        |               |              |
| May 6, 2008                           |               |              |               |              |
| Respondent's Witness                  |               |              |               |              |
| Crystal Marchigiani                   | R1273         | R1281        |               |              |
| State Rests                           |               |              |               | R1287        |

**Direct****Cross****Redir.****Recr.**

July 1, 2008

Petition for Post-Conviction Relief -  
Denied

R1319

2021 IL App (1st) 201016-U

SECOND DIVISION  
November 23, 2021

No. 1-20-1016

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

|                                      |   |                       |
|--------------------------------------|---|-----------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) |                       |
|                                      | ) |                       |
| Respondent-Appellee,                 | ) | Appeal from the       |
|                                      | ) | Circuit Court of      |
|                                      | ) | Cook County.          |
| v.                                   | ) |                       |
|                                      | ) | No. 95 CR 11734       |
| JOHNNY ENGLISH,                      | ) |                       |
|                                      | ) | Honorable             |
| Petitioner-Appellant.                | ) | Timothy Joseph Joyce, |
|                                      | ) | Judge Presiding.      |
|                                      | ) |                       |

---

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* We dismiss the petitioner's appeal where the record does not establish this court's jurisdiction.

¶ 2 The petitioner, Johnny English, appeals from the circuit court's denial of his *pro se* request for leave to file his second successive postconviction petition pursuant to the Postconviction Hearing Act (725 ILCS 5/122-1 et seq. (West 2018)). On appeal, the petitioner contends that he

No. 1-20-1016

sufficiently established cause and prejudice with respect to his constitutional challenge to his 70-year *de facto* life sentence, imposed for a crime he committed when he was 18 years old, under both the eighth amendment (U.S. Const., amend. VIII) and the Illinois proportionate penalties clause (Ill. Const. 1970, art I, § 11). For the following reasons, we find that we lack jurisdiction to consider the petitioner's appeal.

¶ 3

## I. BACKGROUND

¶ 4 Because the record before us is voluminous and the facts of the offense are fully set out in our order affirming the petitioner's conviction and sentence on direct appeal (*People v. English*, No. 97-2365 (unpublished order pursuant to Illinois Supreme Court Rule 23) (Feb. 19, 1999) (*English I*)), we set forth only those facts and procedural history relevant to the resolution of the issues here.

¶ 5 In 1995, together with codefendant James Davis, the 18-year-old petitioner was charged with, *inter alia*, armed robbery, first degree murder and attempted first degree murder for his involvement in the death of Frank Klepacki and the shooting of Casey Klepacki. The petitioner proceeded with a bench trial, which was held concurrently with codefendant Davis's severed jury trial.

¶ 6 The following relevant evidence was adduced from the petitioner's pre-trial confession and the eyewitness testimony of the surviving victim, Casey Klepacki. At approximately 9:30 p.m. on March 19, 1995, the petitioner and codefendant Davis were selling drugs outside of a house on the west side of Chicago. Codefendant approached the petitioner, informing him he had just sold drugs inside the house to "two white dudes" who would be "sweet victims" because they had a lot of money and would be easy to rob. The petitioner and codefendant then determined that they would rob the two victims, Casey and Frank, by stationing themselves outside of a gangway on either



No. 1-20-1016

side of the exit. When Casey and Frank exited the building, Casey waved at the petitioner, whom he knew from prior encounters.

¶ 7 The petitioner and codefendant then drew their guns, beat the victims about their heads with the guns, and pulled them towards a porch at the back of the building. The petitioner pulled Frank up onto the porch, forcing him to lie down. Meanwhile, codefendant, put his gun to Casey's head, ripped a necklace from Casey's neck and forced him to remove his shoes and socks to look for money. When he found none, the petitioner told Casey to remove his pants. Casey complied, after which he said, "If you're going to kill us, why don't \*\*\* you just do it?" The petitioner apparently tried to shoot Frank, but the gun misfired. Casey stated that after he heard the shot, he saw the petitioner holding Frank in a headlock with a smoking gun in his hand.

¶ 8 The petitioner next pointed the gun at Casey while the codefendant patted him down. Afterwards, the petitioner shot Casey in the back. Casey ran but fell and pretended to be dead while codefendant, still holding his gun, approached to check on him. After codefendant left, Casey fled. As he did so, he heard two more gunshots.

¶ 9 Evidence at trial further established that Frank's body was discovered in the gangway with a trail of blood leading from the porch. The autopsy revealed that he was shot at close range and in the chest.

¶ 10 In his statement to the police, the petitioner admitted to the robbery but claimed that codefendant was the shooter.

¶ 11 William Wilson, who had two prior convictions for unlawful use of a weapon and one for possession of a controlled substance with intent to deliver, also testified at the petitioner's trial. He stated that on the day of the incident, he heard gunshots and saw the petitioner run past him. Wilson followed the petitioner and watched as the petitioner attempted to unjam a handgun. When Wilson

No. 1-20-1016

eventually caught up with the petitioner, the petitioner told him that he and codefendant had tried to rob two men and that he had killed one and shot the other.

¶ 12 The petitioner was found guilty of first-degree murder, attempted first degree murder and armed robbery.

¶ 13 The trial court found that the petitioner was eligible for the death penalty because he had committed the murder during an armed robbery. A hearing was then held to determine whether the petitioner should receive the death penalty. At this hearing, a Cook County jail guard testified that while the petitioner was awaiting trial, he and another inmate beat a third inmate who had allegedly sexually assaulted them. The beating inflicted a broken nose and broken eye socket on the inmate. The attack left blood splattered on the walls and pools of blood on the floor of the cell. A second guard testified that on another occasion the petitioner refused to leave a visiting area when told his time had expired. When guards attempted to forcibly remove him, he struck two of them in the face. To counter this testimony, the petitioner presented the testimony of the woman who was visiting him that day and who asserted that a guard had struck the petitioner first and that the petitioner had only struck him back in defense. Evidence was also introduced that on a third occasion the petitioner refused to follow an order to leave an area of the jail and swore at and threatened a prison guard. In addition, the State submitted several victims' impact statements.

¶ 14 In mitigation, the petitioner's mother testified that the petitioner had a learning disability and dropped out of high school because he was teased by other students and because he could not deal with his father's death from cancer. Through stipulated testimony, the petitioner introduced the opinion of a clinical psychologist that his I.Q. was around 70, which was "borderline intellectual functioning." The psychologist further opined that the petitioner had a learning disability, dyslexia, and was immature and hyperactive. Defense counsel further argued that the

No. 1-20-1016

death penalty should not be imposed because of the petitioner's young age, and the fact that he was probably induced into committing the crime by his much older codefendant (who was 30 years old).

¶ 15 After hearing all the evidence, the circuit court elected not to impose the death penalty. Instead, the court found that the crimes were "brutal and heinous" and imposed an extended term sentence of 70 years' imprisonment for first-degree murder, to be served concurrently with a 30-year sentence for attempt first-degree murder and another 30-year sentence for armed robbery.

¶ 16 The petitioner appealed contending that the circuit court's finding that the crimes were "brutal and heinous" was improper and that the sentences were excessive. We rejected the petitioner's arguments and affirmed his conviction and sentence on appeal. See *English I*, No. 97-2365 (unpublished order pursuant to Illinois Supreme Court Rule 23) (Feb. 19, 1999).

¶ 17 On December 10, 1999, the petitioner filed a *pro se* postconviction petition alleging, *inter alia*, that his trial counsel was ineffective for failing to investigate two alibi witnesses and that appellate counsel was ineffective for failing to raise this issue on direct appeal. After the State filed a motion to dismiss, postconviction counsel supplemented the petitioner's *pro se* petition with an additional claim, *i.e.*, that his sentence was improper under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court dismissed the petition and this court subsequently affirmed that dismissal. See *People v. English*, No. 1-02-0280 (unpublished order pursuant to Illinois Supreme Court Rule 23) (March 19, 2004).

¶ 18 On February 16, 2005, the petitioner filed his first successive postconviction petition, alleging, *inter alia*, that his trial counsel was ineffective for failing to: (1) advance an alibi defense; and (2) call two witnesses who would have challenged the testimony of Wilson and shown that he had perjured himself. In support, the petitioner attached affidavits from Farris Skinner and Charles

No. 1-20-1016

Streeter, who alleged his innocence and explained that on the night of the murder the petitioner was with them at his mother's house. The petitioner further attached his own affidavit and affidavits from his sister Charlotte English and Tomaine Davis attesting that Wilson had told them that the prosecutor had forced him to lie at the petitioner's trial.

¶ 19 The State filed a motion to dismiss, but the circuit court found that the two claims should be advanced to an evidentiary hearing. The hearing was held on March 18, 2008, after which the circuit court dismissed the petition, finding that the petitioner's allegations were "not supported by credible evidence."

¶ 20 On July 10, 2020, the petitioner filed the instant *pro se* motion for leave to file his second successive postconviction petition. Therein, citing to *Miller v. Alabama*, 567 U.S. 460 (2012), *People v. House*, 2019 IL App. (1st) 110580-B, and *People v. Buffer*, 2019 IL 122327, he argued that he was entitled to a new sentencing hearing based on the changes in the law regarding the sentencing of juvenile offenders and emerging adults. The petitioner asserted that his sentence of 70 years' imprisonment was a *de facto* life sentence and that it violated both the eighth amendment (U.S. Const., amend. VIII) and the Illinois proportionate penalties clause (Ill. Const. 1970, art I, § 11). In discussing the characteristics of youth that should have been considered in rendering a just sentence as applied to him, the petitioner cited to his learning disability at the time of the offense, the influence of his 30-year-old codefendant, and the fact that he committed the crime just two months after his 18th birthday.

¶ 21 On August 3, 2020, the circuit court denied the petitioner's motion for leave to file his successive postconviction petition. In its written order, the circuit court explained that the petitioner had failed to meet the cause and prejudice test. The court found that the petitioner's sentence did not violate the eighth amendment (U.S. Const., amend. VIII) because he was 18 years

No. 1-20-1016

old at the time of the offense and the protections outlined in *Miller* extend only to juvenile offenders. The court further found that the petitioner’s sentence did not shock the moral sense of our community under the proportionate penalties clause (Ill. Const. 1970, art I, § 11) because the petitioner was an active participant in the crime and was not coerced or encouraged by any other, older individuals, notwithstanding his intellectual disability.

¶ 22 The petitioner now appeals.

¶ 23 III. ANALYSIS

¶ 24 On appeal, the petitioner contends that the circuit court erred in denying him leave to file his second successive postconviction petition, where he sufficiently stated cause and prejudice with respect to his claims that his 70-year sentence is unconstitutional as applied to him under the Illinois proportionate penalties clause (Ill. Const. 1970, art I, § 11).

¶ 25 Before addressing the petitioner’s argument, however, we must first address the State’s contention that we are without jurisdiction to consider this appeal because it was untimely filed.

¶ 26 For the following reasons, we agree with the State and find that we are without jurisdiction to consider this appeal.

¶ 27 It is axiomatic that “the filing of a notice of appeal ‘is the jurisdictional step which initiates appellate review.’ ” *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (quoting *Niccum v. Botti*,

---

<sup>1</sup> We note that in his opening brief the petitioner initially argued that his 70-year sentence was unconstitutional as applied to him both under the eighth amendment (U.S. Const., amend. VIII) and the Illinois proportionate penalties clause (Ill. Const. 1970, art I, § 11). Both arguments were premised on the fact that the sentence was an unconstitutional *de facto* life sentence and that it was improperly imposed without any consideration of his age and youthful characteristics. However, in his reply brief the petitioner subsequently conceded that under the recent decision of our supreme court in *People v. Dorsey*, 2021 IL 123010, ¶¶50-65, his eligibility for day-for-day good conduct credit negates any argument that his sentence is an unconstitutional *de facto* life sentence. Accordingly, the petitioner acknowledged that he has no argument under the eighth amendment (U.S. Const., amend. VIII). Nonetheless, he asks us to permit him to proceed with his as-applied proportionate penalties challenge to his sentence, because that sentence “shocks the moral sense of our community.” See Ill. Const. 1970, art I, § 11.

No. 1-20-1016

*Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998). Accordingly, unless a notice of appeal is properly filed, the reviewing court has no jurisdiction and is obligated to dismiss the appeal. *Id.* Indeed, our supreme court has held that “the appellate and circuit courts of this state *must* enforce and abide by” the supreme court rules, and that they do not have the authority to excuse compliance with the filing requirements of the supreme court rules governing appeals. (Emphasis in original.) *People v. Lyles*, 217 Ill. 2d 210, 216 (2005). Whether a court has jurisdiction is a question of law and is reviewed *de novo*. *People v. Salem*, 2016 IL 118693, ¶ 11.

¶ 28 Pursuant to Illinois Supreme Court Rule 606(b) “the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgement appealed from.” Ill. S. Ct. R. 606 (b) (eff. July 1, 2017). According to Illinois Supreme Court Rule 373 (Ill. S. Ct. R. 373 (eff. July 1, 2017)), “briefs or other documents required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court.” However, “[i]f received after the due date, the time of mailing by an incarcerated, self-represented litigant shall be deemed the time of filing” and “[p]roof of mailing shall be as provided in Rule 12.” *Id.* This rule also applies to the notice of appeal filed in the trial court. *Id.*

¶ 29 Illinois Supreme Court Rule 12(b)(6) (eff. July 1, 2017) provides that in the case of service by mail by an incarcerated *pro se* litigant, service is proved by certification under section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2018)) of the person who deposited the document in the institutional mail, “*stating the time and place of deposit and the complete address to which the document was to be delivered.*” (Emphasis added.)

¶ 30 Thus, when a notice of appeal is filed outside the 30-day period following the order being appealed, the notice is deemed timely if the petitioner attaches a proof of service in compliance with Rule 12(b)(6) (eff. July 1, 2017) showing that it was mailed to the clerk of the circuit court

No. 1-20-1016

within the 30-day period. See *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 215-16 (2009) (reasoning that the proof of mailing establishes “the date the document was timely mailed to confer jurisdiction on the appellate court”).

¶ 31 In the present case, the petitioner is appealing from the final judgment of the circuit court entered on August 30, 2020. As such, he was required to file his appeal by September 2, 2020. The notice of appeal, however, is file-stamped September 18, 2020, which is outside of the requisite 30-day period. Accordingly, for this court to have jurisdiction, the record must establish the petitioner timely mailed his petition in accordance with Rules 373 and 12(b)(6) regarding proof of service. Specifically, the record must contain a proof of service of mailing prior to the expiration of the 30-day period, *i.e.*, a certification in compliance with section 1-109 of the Code (735 ILCS 5/1-109 (West 2018)).

¶ 32 The petitioner here concedes that he did not file a proper certification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2018)). Nonetheless, he argues that his appeal was timely because the postmark on the envelope for his notice of appeal indicates that he mailed that notice on September 1, 2020, prior to the expiration of the 30 days. In doing so, the petitioner relies on the decision in *People v. Humphrey*, 2020 IL App (1st) 172837, arguing that a postmark may serve as sufficient certification of a timely filing by a self-represented litigant residing in prison. For the following reasons, we disagree and find that case inapposite.

¶ 33 In *Humphrey*, the defendant did not file a section 1-109 certification proof of service with his notice of appeal. *Humphrey*, 2020 IL App (1st) 172837, ¶18. Instead, he relied solely on the envelope containing his notice of appeal, which was postmarked before the 30-day due date. *Id.* The appellate court found that it had jurisdiction based solely on that postmark. *Id.* The court held that because the postmark reflected that the notice of appeal had been timely mailed, it had

No. 1-20-1016

jurisdiction over the appeal. *Id.* at ¶21. The court reasoned that to hold the postmark inadequate would be to ignore the fact that the notice of appeal had, in fact, been mailed in a timely fashion.

*Id.* As the court explained:

“Requiring a court to overlook a clearly legible postmark showing that a document was processed by a disinterested third party, such as the post office, on or before the date by which the document was required to be mailed is to disregard the best, most competent evidence of the latest date of mailing consistent with the pro-mailing policy of Rule 373.”

*Id.* at ¶18 (quoting *People v. Hansen*, 2011 IL App (2d) 081226, ¶14) (internal quotation marks omitted).

¶ 34 We acknowledge the holding in *Humphrey*, but note that after it was decided, in *People v. Tolbert*, 2021 IL App (1st) 181654, ¶ 11, another division of this appellate court found that under the same circumstances we lacked jurisdiction to consider a defendant’s appeal despite the existence of a postage meter stamp indicating that the defendant had mailed the notice of appeal before the expiration of the 30-days.

¶ 35 In determining whether a postmark or a postage meter stamp could be used in lieu of a section 1-109 certification, in *Tolbert*, we looked to the plain language of Rule 373 and the history of its amendments. We explained that, as originally written, Rule 373 expressly “permitted proof of mailing to be evidenced by a postmark.” *Id.* ¶ 16 (citing *Huber v. American Accounting Ass’n*, 2014 IL 117293, ¶ 13). However, because of problems with “illegible postmarks, and in some cases, delays in affixing the postmarks” Rule 373 was amended in 1981, to eliminate postmarks as a method of proof, and instead to “require proof of mailing by an attorney’s certificate or a nonattorney’s affidavit.” *Id.* ¶ 16 (citing Ill. S. Ct. R. 373, Committee Comments (rev. Jan. 5, 1981)). We further noted that a subsequent amendment to the rule in 1993, further incorporated



No. 1-20-1016

the requirements of proof of service under Rule 12. *Id.*

¶ 36 Noting as “significant” the fact that the amendments to Rule 373 eliminated postmarks as proof of mailing “entirely, even legible ones,” we held that under the plain language of Rule 373, jurisdiction was proper only where the record contains a certification verifying the date, time, and address for delivery. *Id.* ¶¶ 20-21. As we explained:

“The clearest indication that the rule intended to avoid any kind or quality of postmarks is its complete absence in the rules, with or without a qualifier. At the time of the rule’s amendment, the goal was to eliminate the need to debate the question of timeliness on those occasions when the postmark was not legible. It was not the case that all postmarks were illegible. To read into the rule an exception for ‘legible postmarks’ is to revert to a time when that method of proof was discarded in exchange for the certainty that Rule 12(b)(6) now provides.” *Id.* ¶ 20.

¶ 37 Considering the history and express purpose of Rule 373, we found that the potential availability of other “objective proof of timely mailing” was irrelevant in establishing jurisdiction. *Id.* ¶ 21. As we explained, “a determination as to whether such other proof satisfies the requirements of Rule 373 is a task which lies exclusively within the scope of our supreme court’s rulemaking authority. See Ill. S. Ct. R. 3 (eff. July 1, 2017).” *Id.* Where “the word ‘postmark’ and its indicia as a method of proof have long since been abandoned” and our supreme court has not “seen fit to amend the rule to permit any form of mail system generated verification absent an accompanying certification,” we are not at liberty to determine which methods of proof could be presumptively or implicitly included in the court’s rules. *Id.* Accordingly, we concluded that a postmark alone is insufficient to confer jurisdiction on this court. *Id.*

¶ 38 We agree with the well-reasoned analysis of *Tolbert* and find that it adequately negates the

No. 1-20-1016

holding in *Humphrey*. Accordingly, we reject the petitioner's invitation to follow *Humphrey* instead of *Tolbert*. Based on the plain language of Rule 373, we find that absent the certification of proof of service in the record before us, we are without jurisdiction to consider the petitioner's appeal and must dismiss it.

¶ 39 In reaching this conclusion, we reiterate that the petitioner himself concedes that he has failed to provide this court with the proper certification. Moreover, proof of service to establish the timely filing of a notice of appeal is not a task with which the petitioner lacks familiarity. Such is demonstrated by the record, which is replete with copies of past certifications, properly completed and submitted by the petitioner in compliance with our supreme court's rules.

¶ 40 III. CONCLUSION

¶ 41 Accordingly, because the record before us does not establish this court has jurisdiction over the petitioner's appeal, we must dismiss it.

¶ 42 Appeal dismissed.

IN THE  
CIRCUIT COURT  
COOK COUNTY ILLINOIS

JOHNNY ENGLISH  
PETITIONER,

V.

PEOPLE OF THE STATE OF ILLINOIS  
RESPONDENT,

CASE NO. 95CR1173401

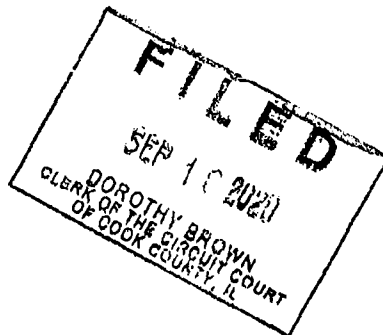
NOTICE OF APPEAL

OFFENSE: MURDER, ATTEMPT MURDER, ARMED ROBBERY  
DATE OF PROCEEDING: SUCCESSIVE POST PETITION DENIED AUG 03 2020  
ATTORNEY FOR APPEALANT: FIRST DISTRICT APPELLATE COURT  
SENTENCE: 70 YEARS I.D.O.C.

PETITIONER JOHNNY ENGLISH BRINGS THIS APPEAL AS A PRO SE AND INDIGENT PETITIONER. PETITIONER HAS NOT INCURRED FUNDS TO HIRE AN ATTORNEY FOR REPRESENTATION IN THE APPEALED POST CONVICTION PROCEEDING NOR DOES PETITIONER ENGLISH HAVE FUNDS TO APPOINT AN ATTORNEY TO REPRESENT HIM IN THE INSTANT APPEAL.

PETITIONER ENGLISH STATES THAT HE REQUEST THAT THE CIRCUIT COURT PROVIDE THE APPELLATE COURT WITH THE COMMON LAW RECORD FOR THE DATES OF AUGUST 03, 2020.

THE PETITIONER ALSO REQUEST THAT APPOINTMENT OF COUNSEL BE PROVIDED TO REPRESENT HIM IN THE APPEAL OF THE SAID PROCEEDINGS.



*Johnny English*  
JOHNNY ENGLISH  
12078 Illinois Route 185  
Hillsboro IL, 62049  
Reg No. K55015

No. 128077

IN THE

## SUPREME COURT OF ILLINOIS

---

|                        |   |                                      |
|------------------------|---|--------------------------------------|
| PEOPLE OF THE STATE OF | ) | Appeal from the Appellate Court of   |
| ILLINOIS,              | ) | Illinois, No. 1-20-1016.             |
|                        | ) |                                      |
| Respondent-Appellee,   | ) | There on appeal from the Circuit     |
|                        | ) | Court of Cook County, Illinois , No. |
| -vs-                   | ) | 95 CR 11734.                         |
|                        | ) |                                      |
|                        | ) | Honorable                            |
| JOHNNY ENGLISH,        | ) | Timothy Joseph Joyce,                |
|                        | ) | Judge Presiding.                     |
| Petitioner-Appellant.  | ) |                                      |

---

**NOTICE AND PROOF OF SERVICE**

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, [eserve.criminalappeals@ilag.gov](mailto:eserve.criminalappeals@ilag.gov);

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, [eserve.criminalappeals@cookcountyil.gov](mailto:eserve.criminalappeals@cookcountyil.gov);

Mr. Johnny English, Register No. K55015, Graham Correctional Center, 12078 Illinois Route 185, Hillsboro, IL 62049

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 5, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kelly Kuhtic

LEGAL SECRETARY

Office of the State Appellate Defender

203 N. LaSalle St., 24th Floor

Chicago, IL 60601

(312) 814-5472

Service via email is accepted at

[1stdistrict.eserve@osad.state.il.us](mailto:1stdistrict.eserve@osad.state.il.us)