No. 129244

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHAR M. SHUNICK, Petitioner-Appellant.	Appeal from the Appellate Court of Illinois, No. 4-22-0019. There on appeal from the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois, No. 16-CF-27. Honorable Raymond Cavanaugh, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

I.

Char Shunick, a self-represented litigant residing in a correctional facility, substantially complied with the proof-of-mailing requirements established in Rule 12(b)(6) such that the Illinois mailbox rule applied to render his reconsideration motion timely filed.

In his opening brief, Char Shunick first argued he substantially complied with Rule 12(b)(6) and that the Fourth District erroneously applied a strict compliance standard. (Op. Br., pgs. 9-30) Echoing the Fourth District below, the State responds that compliance with the rule cannot be established where references to criminal liability and a street address are absent from the face of the proof of mailing. (St. Br., pgs. 6-20)

This Court should hold that substantial compliance with Rule 12(b)(6) was established in this case because Char Shunick's proof of mailing established the essence of what the rule requires.

The appellate court has consistently articulated a standard of substantial compliance when reviewing compliance with Rule 12. *E.g.*, *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (2d Dist. 1987). So, Char argued in his opening brief that his proof of mailing substantially complied because it set forth the essence of the rule's three requirements and, thereby, fulfilled its purpose. (Op. Br., pgs. 9-30) The State responds by mischaracterizing Char's argument. Citing this Court's opinions in *People v. English*, and *Secura Ins. Co. v. Illinois Farmers Ins. Co.,* the State claims Char wants this Court "to disregard his failure to follow Rule 12(b)(6)." (St. Br., pg. 15) However, neither case supports this inaccurate characterization.

In *English*, the "[p]etitioner concede[d] that he did not file a certificate as required by [this Court's] Rules 373 and 12(b)(6)[,]" thus "[t]he sole issue [was] whether a dated postage meter stamp is sufficient[.]" *People v. English*, 2023 IL 128077, ¶ 11, *as modified on denial of reh'g*, (Nov. 27, 2023). Indeed, the petitioner

had to concede that his certificate did not substantially comply with Rule 12(b)(6) where it referenced "the attached successive postconviction petition," not the notice of appeal it had been filed with, and did not include any words used in the model language found in section 1-109 of the Code of Civil Procedure, such as "certifies" or "true and correct." *English*, 2023 IL 128077, ¶ 7; see 735 ILCS 5/1-109 (2021). Perhaps unsurprisingly, then, this Court held "that the sole means of establishing 'time of mailing' under Rule 373 in the case of a *pro se* incarcerated litigant is by certification as described in Rule 12(b)(6)." *Id*. ¶ 2.

In *Secura*, the circuit court received notice of appeal after the 30-day time limit established by this Court's rules had expired. *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 212 (2009). That notice was not accompanied by Rule 12 proof of mailing, but the appellate court allowed the record to be supplemented with a cover letter that indicated timely mailing. *Secura*, 232 Ill. 2d at 212. On review, this Court determined the cover letter did not "provide proof of mailing such that it is competent under [Rule 12]." *Id*. at 216 (internal quotation marks omitted). This Court explained that, rather than involve a minor issue concerning the form of the proof of mailing, "this case concerns Secura's failure to prove by certificate or affidavit that it complied with the jurisdictional 30-day notice requirement[.]" *Id*. at 217.

Unlike *English* and *Secura*, Char concedes neither that his proof of mailing did not substantially comply nor that he completely failed to file a certificate. Quite the opposite is true; Char claims his proof of mailing substantially complied with Rule 12 and fulfilled its purpose "to establish the date the document was timely mailed to confer jurisdiction on the appellate court." *Secura*, 232 Ill. 2d at 216. Plainly, Char does not ask this Court to disregard a failure to follow Rule 12(b)(6).

1. The proof of mailing substantially complied with the certification requirement of Rule 12(b)(6).

Concerning the certification requirement, the State argues proof of mailing "that does not include language that the statements in the document are 'true and correct' and 'made under penalty of perjury' or 'under penalties as provided by law pursuant to Section 1-109," cannot be considered a "[v]erification by certification[.]" (St. Br., pgs. 12-13), quoting 735 ILCS 5/1-109. However, the State's analysis is misfocused and misreads Char's proof of mailing.

Although the State correctly points out that "the intent of the statute ultimately controls in determining what constitutes statutory compliance[.]" (St. Br., pg. 11), quoting *Samour, Inc. v. Bd. Of Election Comm'rs of City of Chicago*, 224 Ill. 2d 530, 541 (2007), it fails to appreciate the true significance of the fact that "[t]he appellate court's jurisdiction turns on litigants' compliance with [this Court's] rules[.]'" *People v. Salem*, 2016 IL 118693, ¶ 11, quoting *People v. Lyles*, 217 Ill. 2d 210, 217 (2005). This means the purpose of Rule 12 "ultimately controls" the question of certification compliance, not that of section 1-109, and a reference to perjury is not necessarily required.

Rule 12's requirements were designed to "establish the date the document was timely mailed to confer jurisdiction[,]" *Secura*, 232 Ill. 2d at 216, and they operate in tandem with a strong preference that parties be able to avail themselves of the Illinois mailbox rule. See *Harrisburg-Raleigh Airport Auth. v. Dep't of Revenue*, 126 Ill. 2d 326, 342 (1989) (noting how "a liberal pro-mailing policy" under Rule 373 "is more equitable"). Thus, the certification requirement must be understood as supporting these broad, liberal purposes, while still ensuring "the enforcement of truthfulness in the making of a statement." *People v. Shunick*, 2022 IL App (4th) 220019, ¶ 19, *as modified on denial of reh'g* (Dec. 7, 2022). Within this framework, the language used in Char's proof of mailing sufficed to substantially establish the required certification. (Op. Br., pgs. 14-20)

On this point, the State mistakenly claims Char's proof of mailing did not certify that the statements made therein were "true and correct." Again, Char stated: "This is to certify that I have served true and correct copies of the foregoing *** via U.S. Mail postage fully prepaid on this 26th day of Oct 2021 by depositing the same in the institutional mailbox at Dixon C.C." (C 174) The State laments the draftsmanship, saying this represented that Char served "true and correct copies of his motion to reconsider" not that the statements in the proof of mailing were true and correct. (St. Br., pg. 14) But, as the State itself notes, context is key. The model language contained in section 1-109 calls for the inclusion of the "true and correct" language, as well as the word certify, both of which Char included in his proof of mailing. See 735 ILCS 5/1-109. Thus, when the full context is considered, the inescapable conclusion is that Char meant to "certify" that everything he mailed was "true and correct," including his assertion of timely mailing.

To be sure, the State's discussion of the words "substantially" and "substance" demonstrates that the wording used in Char's proof of mailing was at least substantially in the form required. (St. Br., pgs. 10-15) In *Samour*, this Court noted that " the ballot used in the election must comply substantially with the statutory mandate or the election is void." 224 Ill. 2d at 533. This Court then explained that a substantially compliant ballot "contains the essence of the form in the statute[,]" meaning it is "one giving the correct idea but not necessarily the exact expressions in the statutory form." *Id*. (internal quotations omitted). Put differently, "if enough of the words found in the statutory form, coupled with other apt words, are printed on the ballot furnished to the voter that will mean the same thing to all of the voters as the words used in the statutory form, the statute will be substantially complied with." *Id*. Here, Char's proof of mailing included enough of the words found in section 1-109 to convey the same thing as would a verbatim

recitation of the model language. That is, the words he did use conveyed his intention to certify as true and correct his representation that the motion to reconsider was mailed within the time allowed by Rules 373 and 12(b)(6). (Op. Br., pgs. 14-20)

But even accepting the State's position that the purpose of section 1-109 controls, none of the cases it cites stand for the proposition that a reference to "perjury" or other "penalties as provided by law" is unfailingly required to establish the essence of the model language. (St. Br., pgs. 9-16)

In *People v. Badoud*, this Court examined "whether there ha[d] been *strict compliance* with the 'sworn report' provision of section 11-501.1(d) [of the Illinois Vehicle Code]." 122 Ill. 2d 50, 55 (1988) (emphasis added). Each of the at-issue reports had been signed by a police officer below a notation stating that the officer "solemnly, sincerely, and truly declare[d] and affirm[ed]" that certain statutory requirements had been met. *Badoud*, 122 Ill. 2d at 54. This Court first determined that the use of these words alone did not suffice to make the reports "sworn" given the General Assembly's enacting of "a law specifically addressing oaths and affirmations." *Id*. at 55. Then, after briefly discussing the applicability of section 1-109 to sworn reports, this Court stated that each of the at-issue reports "failed to comply with section 1-109." *Id*. at 57.

Badoud is easily distinguishable as a standard of strict compliance was applied in that case. *Id*. at 55. But even if this Court had reviewed for substantial compliance, the representation that the officers "solemnly, sincerely, and truly declare[d] and affirm[ed]" would have been insufficient because it did not include "enough of the words found in the statutory form[.]" *Samour*, 224 Ill. 2d at 533. Use of the word "truly" raised the only arguable reference to section 1-109, and reference to only a single word in the statute is not sufficient to establish substantial compliance. *Shunick*, 2022 IL App (4th) 220019, ¶ 19 (finding that the proof of

mailing in this case did not include a certification substantially in the form of section 1-109 where it "used only one word from section 1-109"). Thus, *Badoud* does not demonstrate that Char failed to provide a certification substantially in the form required by section 1-109.

Neither does the State's citation to *People v. McClain*. (St. Br., pg. 13) There, the issue was whether the statutory summary suspension of the defendant's driver's license should be rescinded because, among other things, the arresting officer failed "to swear under oath as to the truth of his reports[.]" *People v. McClain*, 128 Ill. 2d 500, 502-04 (1989). This Court pointed to its decision in *Badoud* and determined that the officer's report satisfied the requirement that it be sworn due to its inclusion of the following provision that parroted section 1-109:

> "Under penalties provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the warning to motorists and law enforcement sworn report, attached hereto and made a part hereof, are true and correct except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he verily believes the same to be true." *McClain*, 128 Ill. 2d at 505-07.

Since *McClain* involved a certification that was, in all critical respects, a word-for-word recitation of the model language contained in section 1-109, it does nothing more than demonstrate what a certification looks like when it is strictly in the statutory form. It does not, however, demonstrate that differently worded certifications cannot be considered substantially in the form of the statute.

Also misplaced is the State's citation to *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334 (2007). There, the relevant issue was whether a party's attorney was a proper signatory for the section 1-109 certification, not the form of that certification. *Vision Point of Sale*, 226 Ill. 2d at 354-56. Indeed, much like *McClain*, the certification "tracked the language set forth in section 1-109[.]" *Id.* at 338. As such, *Vision Point of Sale* is inapposite.

In sum, the State's arguments do not support a finding that Char failed to substantially comply with Rule 12(b)(6). Char further relies on the argument in his opening brief. (Op. Br., pgs. 14-20)

2. The proof of mailing substantially complied with the address requirement of Rule 12(b)(6).

Adopting the Fourth District's conclusion below, the State also argues that the absence of a street address from the face of the proof of mailing precludes a finding of substantial compliance with Rule 12(b)(6). (St. Br., pgs. 16-20)

Importantly, and contrary to the State's suggestion, Char does not ask this Court to allow him to supply proof of mailing in some form other than that allowed by the rule. *Cf. English*, 2023 IL 128077, ¶ 11 ("Petitioner argues that the postage meter stamp showing that he placed his notice of appeal in the mail prior to the due date was sufficient to prove that he filed his notice of appeal timely, thereby establishing jurisdiction in the appellate court."). Neither does he ask this Court to allow the mere "fact of delivery" to serve as proof of to where Char addressed his envelope. (St. Br., pg. 18) Rather he only asks that, in assessing substantial compliance, this Court consider the entire record. (Op. Br., pgs. 21-24)

Like Rule 12(b)(6) requires, Char certified that he mailed his reconsideration motion to the Knox County circuit clerk. (C 174) While he did not also include the clerk's street address, the record establishes that Char placed his motion in the mailbox in Dixon, Illinois, on October 26, 2021, in an envelope addressed to the circuit clerk, and the clerk undisputedly received that document in Galesburg, Illinois, about a week later. (C 170-74) Therefore, because Char does not ask this Court to permit a substituted form of proof, the State is wrong to suggest that Char's argument renders the address requirement superfluous. (St. Br., pgs. 17-18) Quite the contrary is true, as the vitality of the requirement continues where its primary purpose is satisfied. (Op. Br., pg. 24-26)

The State suggests that a less-than-strict interpretation of the address requirement would needlessly increase reliance on third-party actors, such as correctional employees, to ensure that documents are appropriately addressed. (St. Br., pgs. 18-19) But this strained analogy to *English*, and its discussion of the legibility of postmarks, is entirely misplaced. *Cf*. *English*, 2023 IL 128077, ¶ 32. Char was not reliant on anyone else; he certified that he mailed his motion to reconsider to the circuit clerk "by depositing the same in the institutional mailbox at Dixon C.C." (C 174); see also Rule 12(b)(6) (eff. July 1, 2017) (requiring certification "of the person who deposited the document in the institutional mail").

In this respect, the State's argument is just poorly reasoned speculation. It is not clear why correctional staff would review the contents of an inmate's outgoing mail to determine whether the Rule 12(b)(6) proof of mailing and the listed address on the envelope were consistent. And to the extent this mailing would have been considered privileged legal mail, it would have been largely impermissible for correctional staff to do so. See 20 Ill. Admin. Code 525.130 (2021) ("Outgoing privileged mail must be clearly marked as 'privileged' and sealed by the offender. Outgoing mail which is clearly marked as privileged and addressed to a privileged party may not be opened for inspection except as provided in subsection (d) of this Section."). But even if a staff member did spot-check the outgoing mail, the postal service would have thereafter forwarded it to the address Char listed on the face of the envelope. (C 174); see *Domestic Mail Manual, Mailing Standards of the United States Postal Service*, U.S. POSTAL SERV., § 102.1.2, https://pe.usps.com/text/dmm300/102.htm (last accessed Dec. 5, 2023) ("The delivery address specifies the location to which the USPS is to deliver a mailpiece."); see also 39 C.F.R. § 111.1(a) (2021) ("Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM) is incorporated by reference into this part

with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51."); *People v. Tolbert*, 2021 IL App (1st) 181654, ¶ 12 (taking judicial notice of the requirements outlined in the Domestic Mail Manual).

Moving on, Char does not ask this Court to rewrite Rule 12(b)(6) based on his perception of what would be the most fair and just outcome in his case. (St. Br., pgs.19-20) He only seeks logical consistency when scrutinizing pleadings and other filings drafted by *pro se* litigants. If the language used in substantive filings must be viewed with a lenient eye, there is no reason to examine procedural documents, often filed at the same time, with a jaundiced eye. (Op. Br., pgs. 26-30)

Somewhat relatedly, the State emphasizes what amounts to the strictly compliant proof of mailing accompanying Char's underlying post-conviction petition. (St. Br., pg. 20), citing (C 160) But this has no bearing on the analysis. That a prior filing happened to strictly comply with Rule 12(b)(6) does not answer the question of whether a subsequently filed document substantially complied.

Finally, the State's discussion of supposed "safety valves," which it claims minimize the "perceived harshness" of its interpretation of this Court's rules, carries no water. (St. Br., pg. 20) While the State's use of the plural "valves" suggests that multiple options are available to a petitioner in Char's position, it references only filing a motion for leave to file late notice of appeal under Rule 606(c). It is unclear what additional safety valves the State believes might exist, and the State's failure to identify them is critical because Rule 606 has no relevance in this case.

At the time Char filed notice of appeal, subsection (b) of Rule 606 provided that "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." Ill. S. Ct. R. 606(b) (eff. Mar. 12, 2021). Subsection (c) then

provided an "extension of time in certain circumstances" where notice of appeal was not filed within 30 days of the final judgment. Ill. S. Ct. R. 606(c) (eff. Mar. 12, 2021).

By the plain language of subsections (b) and (c), the extension of time is available only where a party fails to timely file notice of appeal following the circuit court's entry of final judgment. See Ill. S. Ct. R. 606(b), (c). That is why this Court in *English* faulted the petitioner for not availing himself of Rule 606(c) after the circuit court received his notice of appeal more than 30 days after the summary dismissal order. See *English*, 2023 IL 128077, ¶¶ 33-34. The rule does not, however, serve to rectify jurisdictional issues stemming from an untimely post-judgment motion. Indeed, as required following the circuit court's denial of the motion to reconsider, Char filed notice of appeal "within 30 days after the entry of the order disposing of the motion." (C 170-74, 188-89); Ill. S. Ct. R. 606(b). Thus, leave to file late notice of appeal would not have been available, and, contrary to the State's suggestion, Rule 606(c) could not have served as a safety valve in this case.

In sum, the State adopts the Fourth District's position that the absence of a street address from the face of the proof of mailing is an absolute barrier to a finding of substantial compliance. However, also like the Fourth District, the State does not analyze how the absence of the street address impeded the fulfillment of Rule 12's purpose. Had it done so, it would have been apparent that no such impact existed. Char further relies on his opening brief. (Op. Br., pgs. 20-26)

II.

Even if the proof of mailing provided by Char Shunick did not substantially comply with Illinois Supreme Court Rule 12(b)(6), the Fourth District had the authority to order a limited remand to the circuit court to ascertain whether the motion to reconsider was timely.

Char next argued that, if his proof of mailing did not substantially comply with Rule 12(b)(6), the Fourth District had the authority necessary to order a limited remand. (Op. Br., pgs. 31-40) The State responds that Char's motion to reconsider

was untimely, so the Fourth District had jurisdiction only to vacate the circuit court's ruling on that motion. (St. Br., pg. 21), citing *People v. Bailey*, 2014 IL 115459. However, the State overlooks that this Court in *Bailey* distinguished between appellate jurisdiction to address the substantive merits of an underlying judgment and the appellate court's exercise of procedural authority over a pending case.

In *Bailey*, after first finding the circuit court had not been revested with jurisdiction, this Court was required to examine the proper scope of appellate review where the underlying circuit court order was void. 2014 IL 115459, ¶¶ 27-29. This Court explained:

> "Although it is true that an appellate court has no authority to address the substantive merits of a judgment entered by a trial court without jurisdiction [citations], that does not mean that the appellate court has no jurisdiction at all. If that were the case, the appellate court would have no means of exercising the authority conferred on it by law to review, recognize, and correct any action that exceeded the trial court's jurisdiction. Illinois courts have held that a trial court's lack of jurisdiction is not a complete bar to the exercise of jurisdiction by the appellate court. Rather, in those cases the appellate court is limited to considering the issue of jurisdiction below." *Id*. ¶ 29.

Thus, rather than support the position taken by the Fourth District below, and adopted by the State in this appeal, *Bailey* demonstrates that Illinois appellate courts are vested with authority to examine "the issue of jurisdiction below."And that is precisely what Char asked of the Fourth District. He asked that it examine the issue of the circuit court's jurisdiction by using Rule 615(b) as a means for resolving any question as to the timeliness of the motion to reconsider. See *People v. Cooper*, 2021 IL App (1st) 190022, ¶¶ 21-22.

Turning its sights to *Cooper*, the State levels several critiques, but none is particularly damning when applied to Char's case. First, the State says *Cooper* "rested on the First District's faulty premise that it had jurisdiction over the appeal." (St. Br. Pg. 26) But this incorrectly assumes that the appellate court's exercise of Rule 615(b) authority entirely relies, in the first instance, on an unambiguous

showing of jurisdiction over the substantive merits of the appeal. But *Bailey* teaches that this is not necessarily so. See *Bailey*, 2014 IL 115459, ¶ 29 ("Illinois courts have held that a trial court's lack of jurisdiction is not a complete bar to the exercise of jurisdiction by the appellate court."); see also Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967)(granting the appellate court in criminal cases the power to "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken"). As such, recognizing the appellate court's authority here to both identify and investigate potential jurisdictional defects would be nothing more than a consistent application of this Court's jurisprudence.

Next, the State says the appellate court in *Cooper* "wrongly faulted" the circuit court for failing to conduct further inquiry into the timeliness of the post-plea motion in that case. (St. Br., pg. 27) This is so, the State says, because the circuit court "'was limited to enforcement of the judgment or correction of clerical errors or matters of form so that the record conformed to the judgment actually rendered.'" (St. Br., pg. 27), quoting *People v. Flowers*, 208 Ill. 2d 291, 307-08 (2003).

As it applies to the issue before this Court, *Flowers* shows only that some attempt to continue the jurisdiction of the circuit court must be made within 30 days of that court's entry of final judgment. See *Flowers*, 208 Ill. 2d at 300-07 (where the operative Rule 604(d) motion was filed 16 months after final judgment). So, it seems, the State in this appeal claims that the chiding of the circuit court in *Cooper* is flawed because the defendant there failed to file *any* proof of timely mailing with his motion. See *Cooper*, 2021 IL App (1st) 190022, ¶ 18. But even assuming this is a legitimate criticism of *Cooper*, it is of no moment in the case *sub judice*. Char filed a certificate in the form contemplated by Rule 12(b)(6) that stated his motion to reconsider had timely been placed in the mail. (C 174)

Consequently, he made the necessary attempt at securing the court's continued jurisdiction within the 30-day period following judgment, and it would have been appropriate for the Fourth District to order a remand to examine the issue of jurisdiction below. See *Bailey*, 2014 IL 115459, ¶ 29.

To be sure, none of the other cases cited by the State demonstrate that the Fourth District ordering a *Cooper*-style remand would have been inappropriate. (St. Br., pgs. 21-24) Rather, those cases are just further evidence of the State conflating jurisdiction over the substantive merits of a case with exercising procedural authority. This is most apparent where it proclaims that "'the nature of judicial proceedings does not contemplate that case be sent back to the trial court for one side or the other to bolster its position by further presentations, and in the interest of finality of judgments, such remandments should not be made.'" (St. Br., pg. 24), quoting *People v. Joseph Young*, 124 Ill. 2d 147, 152 (1988).

Char is not asking to substantively "bolster" his position, and even a cursory review of *Joseph Young* demonstrates any such claim is unfounded. There, the appellate court "upheld [the defendant's] convictions but remanded the matter to the trial court to consider the sentence in view of defendant's age and because the sentence precluded any possibility of parole." 124 Ill. 2d at 151. On subsequent review, this Court noted the appellate court's authority to order remandment in a criminal case "when used in connection with other authority specifically stated in Rule 615(b)." *Id*. at 152. While it was not altogether clear that the appellate court had actually remanded the case in conjunction with its authority to vacate the defendant's sentence, this Court assumed as much for purposes of addressing the underlying merits of the appeal. See *id.* at 154 ("[W]e must consider the Rule 23 order as vacating defendant's sentence and remanding the case to the trial court

for resentencing."). Thus, the concern in *Joseph Young* about merely remanding for the defendant to present additional evidence, which went to the heart of the substantive sentencing issue in that appeal, is of no consequence in Char's case.

Similarly, the other cases cited by the State do not show that the Fourth District lacked authority to order a remand. (St. Br., pgs. 21-22) In *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, a single justice of the appellate court granted the plaintiff-appellant's motion to reinstate the appeal more than 30 days after the appeal had been dismissed under Rule 329. 402 Ill. App. 3d 961, 967 (1st Dist. 2010). On review before the full panel, the appellate court concluded that jurisdiction to reinstate had been lacking because once the appeal had been dismissed "it was as if [the plaintiff-appellant] had never filed a notice of appeal[.]" *Bernstein*, 402 Ill. App. 3d at 970. Therefore, because the plaintiff-appellant had taken no action to reinstate "within the 30-day window" following the dismissal, the appellate court could not exercise any authority otherwise granted to it by Rule 366 because it must "first have jurisdiction to exercise [those] powers." *Id.*

In *Creek v. Clark*, 88 Ill. 2d 54, 58 (1981), "no notice of appeal filed by defendant from his convictions" appeared in the record, meaning "the appellate court lacked jurisdiction to determine the propriety of that conviction and to address the merits of any of defendant's claims therein."

In *People v. Nelson Young*, the petitioner claimed that, irrespective of statutory waiver under section 5-4.5-100(b) of the Code of Corrections, the appellate court possessed authority under Rule 615(b) to award presentence custody credit on appeal from the denial of his successive petition under the Post-Conviction Hearing Act. 2018 122598, ¶28. However, this Court rejected that argument because the judgment at issue was not the circuit court's sentencing order but rather

"the dismissal of [the petitioner's] successive postconviction petition, which did not assert any claim based on the miscalculation of presentence custody credit." *Nelson Young*, 2018 122598, ¶ 28. As a result, the appellate court did not have authority under Rule 615 to modify a judgment that was not on appeal. *Id*.

In *People v. Bingham*, the defendant was convicted of a felony which required him to register as a sex offender. 2018 IL 122008, ¶ 10. On direct appeal, the defendant challenged the registration requirement. *Bingham*, 2018 IL 122008, ¶¶ 11-12. This Court later granted leave to appeal, and the State contended "that a reviewing court has no power on direct appeal of a criminal conviction to order that a defendant be relieved of his obligation to register as a sex offender[.]" *Id.*¶ 15. This Court agreed, explaining, "The requirement that defendant register as a sex offender is not encompassed within the judgment or any order of the trial court. Thus, defendant's argument did not ask a reviewing court to reverse, affirm, or modify the judgment or order from which the appeal is taken." *Id*. ¶ 17.

Unlike in *Bernstein* and *Creek*, the issue before this Court is not reviewing the substantive merits in circumstances where, functionally speaking, no notice of appeal was filed. And unlike in *Nelson Young* and *Bingham*, the issue before this Court is not whether to collaterally modify a judgment or statutory requirement separate and apart from the judgment on appeal. No, the issue is whether the Fourth District had authority to examine the issue of the circuit court's jurisdiction by ordering a remand under Rule 615(b).

The State also cites this Court's opinion in *In re J.T.*, 221 Ill. 2d 338 (2006), for the proposition that the Fourth District here could not even "consider" whether remand under Rule 615(b) was appropriate. (St. Br., pg. 23) This citation is inapt, as the relevant issue in that case involved the appellate court's lack of authority

to remand for new post-plea proceedings on appeal from the revocation of the minor's probation. *J.T.*, 221 Ill. 2d at 345-47. It has long been established that "[i]n an appeal from an order revoking a defendant's probation, the court cannot consider the correctness of the underlying judgment of conviction unless that judgment is void." *People v. Dieterman*, 243 Ill. App. 3d 838, 841 (2d Dist. 1993). And the underlying judgment in *J.T.* was not void. *J.T.*, 221 Ill. 2d at 346. Hence the lack of appellate jurisdiction there to remand for new post-plea proceedings during which the underlying conviction might be substantively altered, *i.e.*, vacated.

The State also argues a remand was not possible in this case because "this Court's rules require proof of mailing to be on file in the record[.]" (St. Br., pg. 25) It is not clear where else the State thinks such proof would be presented. Following any remand to the circuit court to address timeliness, an amended or supplemented Rule 12(b)(6) proof of mailing would be added to the record on appeal. See Ill. S. Ct. R. 329 (eff. July 1, 2017) ("Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court and the record made to conform to the truth. *** The clerk of the circuit court shall prepare a certified supplement to the record which shall be filed in the reviewing court[.]"); Ill. S. Ct. R. 612(b)(7) (eff. July 1, 2017) ("The following civil appeals rules apply to criminal appeals insofar as appropriate: *** Amendment of the record on appeal: Rule 329); Ill. S. Ct. R. 651(d) (eff. July 1, 2017) ("The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals."). Which necessarily means that a *Cooper*-style remand does not invite the appellate court to re-write any of this Court's rules. (St. Br., pg. 25); see *Cooper*, 2021 IL App (1st) 190022, ¶ 21 ("We see nothing in Rule 12(b)(6) that prohibits a litigant from supplementing his filing with a certification proving the date and manner of mailing.").

Additionally, the State's discussion of late notices of appeal filed under Rule 606(c) is misplaced because, as discussed above, the availability of Rule 615(b) in this case is not contingent on the operation of that rule. (St. Br., pg. 24), citing Ill. R . S. Ct. 606(c) (eff. Mar. 12, 2021). This is because Char's proof of mailing indicates his reconsideration motion was filed within the normal 30-day window following the circuit court's summary dismissal order. See, *supra*, pages 10-13. Moreover, as discussed in Argument I, Rule 606(c) does not apply where, as here, notice of appeal was timely filed following the circuit court's denial of a post-judgment motion. See, *supra*, pages 9-10.

In sum, the Fourth District had authority to remand this case to investigate the potential jurisdictional defect it had identified. Char relies on his opening brief as to any remaining arguments. (Op. Br., pgs. 31-40)

III.

Alternatively, this Court should exercise its supervisory authority and direct the Fourth District to treat both the motion to reconsider and notice of appeal as having been timely filed and to consider the merits of this appeal.

Should the above arguments be rejected, Char requested exercise of this Court's supervisory authority. (Op. Br., pgs. 41-43) The State is opposed to that request. (St. Br., pgs. 28-30)

First, the State claims supervisory authority is inappropriate because Char failed to follow this Court's rules. That is a poor summary of this case because Char filed proof of mailing in the form contemplated by Rule 12(b)(6). *Cf. People v. English*, 2023 IL 128077, ¶ 11, *as modified on denial of reh'g*, (Ill. Nov. 27, 2023); *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 215-17 (2009). At worst, Char made a good-faith effort at compliance that fell short. (Op. Br., pgs. 26-30)

The State then faults Char for not seeking leave to file late notice of appeal. (St. Br., pg. 28) But what reason would there have been for Char to make such a request of the appellate court? See *English*, 2023 IL 128077, ¶ 50 (O'Brien, J., dissenting) ("[W]]hy would an incarcerated, self-represented litigant file a motion for leave to file late notice of appeal when he believes his original notice of appeal was timely filed?"). Indeed, as discussed above in Arguments I and II, Rule 606(c) has application in this case. See, *supra*, pages 9-10, 17. Thus, Char not pursuing late notice of appeal under Rule 606(c) should not serve as a bar to this Court's exercise of supervisory authority.

Moving on, the State wrongly asserts this case does not involve "a matter important to the administration of justice." (St. Br., pg. 29) At the circuit court's behest, Char forewent his fundamental right to an appeal in favor of pursuing relief via a post-conviction petition. (R 562-64) But when such relief was pursued, the courthouse doors were slammed shut due, in part, to Char's direct appeal waiver. (C 168-69) Such a bait-and-switch procedure is quite troubling and warrants this Court's exercise of supervisory authority because it brings the judiciary into disrepute. *See City of Urbana v. Andrew N.B.*, 211 Ill. 2d 456, 470 (2004) (exercising supervisory where this Court had "grave concerns about the procedures employed in these cases and believe[d] that they warrant[ed] correction"). And the State's citation to *People v. Johnson*, 208 Ill. 2d 118, 128 (2003), does not show otherwise. (St. Br., pg. 29). That case involved the scope of review in an appeal taken by the State under Rule 604(a), not this Court's exercise of its supervisory authority.

Next, the State unhelpfully points out that Char "makes no argument that his postconviction challenge to his arrest and search *** was not frivolous and patently without merit." (St. Br., pg. 29) But Char raised that issue where

appropriate - in the briefing filed below in the Fourth District, of which this Court may take judicial notice. *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007), *as modified on denial of reh'g* (Apr. 23, 2008). Char did not substantively address the circuit court's summary dismissal order in his opening brief to this Court because the merits of that order went unaddressed by the Fourth District, and this Court typically remands for the appellate court to consider issues raised by the parties below but not passed upon. See *People v. Schoonover*, 2021 IL 124832, ¶¶ 51-52. Thus, by not re-arguing the merits of the summary dismissal order in his briefing to this Court, Char in no way concedes the impropriety of supervisory relief.

Last, the State claims that supervisory relief is not warranted because the Fourth District's act of effectively dismissing this appeal, along with its attendant consequences, was simply par for the course. (St. Br., pgs. 29-30) But again, this ignores the compelling circumstances present in this case. This Court should exercise its supervisory authority because it would be both unjust to allow Char's constitutional claims to go unaddressed where he simply kept his end of the bargain with the circuit court and inefficient to force him to waste judicial resources in a successive post-conviction proceeding that are unlikely to yield to relief due to procedural barriers. See *Moore v. Strayhorn*, 114 Ill. 2d 538, 540 (1986) (exercising supervisory authority where doing otherwise "would waste judicial resources as well as be unjust to Moore, because his time to appeal has now expired").

In short, this Court's exercise of supervisory authority would be appropriate because the confluence of circumstances in this case has created a unique instance in which the usual appellate process was inadequate, and the operation of justice would be better served through the exercise of such relief.

CONCLUSION

For the foregoing reasons, Char M. Shunick, respectfully requests that this Court either: (1) reverse the Fourth District's finding that he failed to substantially comply with Rule 12(b)(6) and remand to that court for it to consider the merits of this appeal; (2) reverse the Fourth's District's conclusion that it lacked authority to order the relief provided in *Cooper* and remand to the circuit court for such inquiry; or (3) enter a supervisory order directing the Fourth District to find that all necessary filings were timely and to consider the merits of this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- CHAR M. SHUNICK, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 4-22-0019. There on appeal from the Circuit Court of the Ninth Judicial Circuit, Knox County, Illinois, No. 16-CF-27. Honorable Raymond Cavanaugh, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 December 13, 2023, the Reply Brief 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 in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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