No. 129244

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

Char Shunick, petitioner-appellant, appealed from judgments summarily dismissing his petition for post-conviction relief at the first stage and denying his motion to reconsider that dismissal. (C 195) Finding the circuit court lacked jurisdiction because the motion to reconsider was not timely, the Fourth District below vacated the circuit court's denial of the motion to reconsider and dismissed that motion as untimely.

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

ISSUES PRESENTED FOR REVIEW

I.

Whether Char Shunick substantially complied with the proof-of-mailing requirements contained in Rule 12(b)(6) such that his post-judgment motion to reconsider was timely filed under the Illinois mailbox rule.

II.

Whether, if the proof of mailing provided by Char Shunick did not substantially comply with 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.

III.

Whether, if relief as requested in Arguments I and II is not granted, this Court should exercise its supervisory authority and direct the Fourth District to treat the motion to reconsider and notice of appeal as having been timely filed and to consider the merits of this appeal.

STATUTES AND RULES INVOLVED

Ill. S. Ct. R. 373 (eff. July 1, 2017), 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.

Ill. S. Ct. R. 12 (eff. July 1, 2017), Proof of Service in the Trial and Reviewing Courts; Effective Date of Service:

> (a) Filing. When service of a document is required, proof of service shall be filed with the clerk.
>
> (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.

735 ILCS 5/1-109 (2021), Verification by certification:

> § 1-109.Verification by certification. Unless otherwise expressly provided by rule of the Supreme Court, whenever in this Code any complaint, petition, answer, reply, bill of particulars, answer to interrogatories, affidavit, return or proof of service, or other document or pleading filed in any court of this State is required or permitted to be verified, or made, sworn to or verified under oath, such requirement or permission is hereby defined to include a certification of such pleading, affidavit or other document under penalty of perjury as provided in this Section.
>
> Whenever any such pleading, affidavit or other document is so certified, the several matters stated shall be stated positively or upon information and belief only, according to the fact. The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: 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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Any pleading, affidavit, or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath, and there is no further requirement that the pleading, affidavit, or other document be sworn before an authorized person.

Any person who makes a false statement, material to the issue or point in question, which he does not believe to be true, in any pleading, affidavit or other document certified by such person in accordance with this Section shall be guilty of a Class 3 felony.

STATEMENT OF FACTS

Following a bench trial, the circuit court found Char Shunick ("Char") guilty of unlawfully possessing a controlled substance and possessing that substance with intent to deliver. (R 146; C 18) After merging the two offenses, the court initially imposed a 16-year prison sentence. (C 151)

Char filed a motion to reconsider his sentence, arguing it was excessive. (C 153) At the hearing on this motion, the court offered Char a deal due to his having been shackled at the sentencing hearing: waive the right to a direct appeal, while retaining the right to file a post-conviction petition, in exchange for a nine-year sentence. (R 562-64) Char took the deal. (R 564)

About a year later, Char *pro se* filed a post-conviction petition raising the following claims: (1) his first attorney had a *per se* conflict of interest because she had previously been employed as an assistant state's attorney and had prosecuted a case against him; (2) counsel was ineffective for failing to object to the prosecution's concealment of the identity of a confidential informant; (3) denial of the right counsel where police officers denied Char's requests for counsel during the underlying traffic stop and at later the police station; (4) a Fourth Amendment violation occurred when the police initiated a traffic stop and searched Char without probable cause to do so; (5) denial of due process when the circuit court denied Char's newly retained attorney a pre-trial continuance; and (6) the circuit court violated Char's right to a fair trial by keeping him shackled during trial and sentencing. (C 162-65)

On September 29, 2021, nine days after it had been filed, the post-conviction judge dated an order summarily dismissing Char's petition. (C 168-69) In the order, the judge found Char's claims to be frivolous and patently without merit. (C 168)

The alleged *per se* conflict was "immaterial" because that attorney only represented Char during pre-trial proceedings, not during the trial itself. (C 168) As to the remaining claims, the judge found that Char "received the benefit of the bargain with the reduction of his sentence[,]" thus the direct-appeal waiver operated as a bar to post-conviction relief. (C 169) The judge's order was file-stamped on Thursday, September 30, 2021. (C 169) A docket entry dated the same day states, "Order generated on 9/30/2021., Memo: DISM POST CONV. C/C TO DEFT[.]" (C 16) The record does not include a copy of any notice of this adverse decision that was sent by the clerk to Char pursuant to Rule 651(b). See Ill. S. Ct. R. 651(b) (eff. July 1, 2017).

However, Char filed a "motion to reconsider and leave to amend petition for post conviction relief under 725 ILCS 5/122-1," along with several attachments, that was file-stamped on Wednesday, November 3, 2021. (C 170-87) Included with this motion was a "certificate of service." (C 173) That certificate is reproduced below:

CERTIFICATE OF SERVICE

This is to certify That I have on this date served true and correct copies of the foregoing to:

Clerk of the Circuit Court of Knox County and;

Knox County States Attorney

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.

/s/ Char Shunick

CHAR SHUNICK Y43017
Dixon .C.C.
2600 N Brinton ave
Dixon,IL,61021

In a written order entered December 14, 2021, the post-conviction judge denied the motion to reconsider. (C 188) Char filed an initial notice of appeal on January 5, 2022, and the Office of the State Appellate Defender filed an amended notice on January 11, 2022. (C 189, 195)

On appeal, Char argued: (1) the summary dismissal was erroneous because he stated the gist of a claim that his Fourth Amendment rights were violated; and (2) the post-conviction judge abused his discretion by denying the motion to reconsider or for leave to file an amended petition. (Op. Br., pgs. 15-31) However, rather than address the merits, the Fourth District dismissed the appeal because it determined it lacked jurisdiction. *People v. Shunick*, 2022 IL App (4th) 220019-U, ¶ 22. The Fourth District reached this conclusion because "[t]he proof of service at the end of [Shunick's] motion for reconsideration suffers from three deficiencies." *Shunick*, 2022 IL App (4th) 220019-U, ¶ 19. First, the court found it did not contain a certification under section 1-109 of the Code of Civil Procedure. *Id*. Second, it did not state the time of deposit. *Id*. Third, it did not state the complete address to which the motion was mailed. *Id*.

Char timely filed a petition for rehearing, suggesting the Fourth District overlooked that his proof of mailing substantially complied with Rule 12(b)(6), thus his motion to reconsider was timely under the Illinois mailbox rule. (A 48-50) But were the Fourth District to persist in its determination of insubstantial compliance, Char also requested a limited remand to determine timeliness as the First District did in *People v. Cooper*, 2021 IL App (1st) 190022. (A 46-47)

On December 7, 2022, the Fourth District denied rehearing and published a modified opinion. *People v. Shunick*, 2022 IL App (4th) 220019, *as modified on denial of reh'g* (Dec. 7, 2022). In that opinion, the Fourth District found only

"two deficiencies" in the form of the proof of service, those being a lack of a certification under section 1-109 of the Code of Civil Procedure and the absence of the complete address to which the motion to reconsider was mailed. *Shunick*, 2022 IL App (4th) 220019, ¶ 18. But the court otherwise adopted its prior finding of non-compliance with Rule 12(b)(6) as stated in the Rule 23 decision. *Id.* ¶¶ 19-21.

After re-reaching this conclusion, the Fourth District rejected the request for a remand, noting its "difficulty squaring *Cooper* with precedent." *Id.* ¶ 23. First, the court believed a remand in this case would be contrary to its prior conclusion that a file-stamp date is conclusive in the absence of clear compliance with Rule 12. *Id.* ¶ 23. Second, circuit courts lack jurisdiction to rule on untimely post-judgment motions. *Id.* Third, when presented with the first two circumstances, the only ruling available to the appellate court is "vacating the [circuit] court's ruling on the motion and [ ] dismissing the motion." *Id.* (internal quotation marks and citations omitted). Thus, the Fourth District stated it was obligated to effectively dismiss Shunick's appeal rather than remand for additional compliance with Rule 12(b)(6) under *Cooper*. *Id.*

This Court granted leave to appeal on March 29, 2023.

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.

Once the judge summarily dismissed his post-conviction petition, Char Shunick, a self-represented litigant residing in a correctional facility, mailed a motion to reconsider that was file-stamped by the clerk 34 days after entry of the dismissal order. To demonstrate the motion was timely mailed within 30 days, Char included proof of mailing in which he attempted to certify that he placed the motion in the institutional mailbox 26 days after judgment addressed to both the circuit clerk and state's attorney of Knox County. But this proof of mailing included neither the corresponding street addresses nor a reference to section 1-109 of the Code of Civil Procedure. Nevertheless, this Court should hold that the proof of mailing substantially complied with Rule 12(b)(6) because the information that was included sufficed to convey the essence of what the rule requires and, thereby, fulfilled its purpose.

A.

Standard of Review

Whether there was compliance with the timeliness requirements mandated by this Court's rules is a question of law this Court reviews *de novo*. *People v. Salem*, 2016 IL 118693, ¶ 11; *Huber v. Am. Accounting Ass'n*, 2014 IL 117293, ¶ 9.

B.

General Authorities

Under Rule 606, appeals in post-conviction cases must be perfected by the filing of a notice of appeal "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(a), (b) (eff. March 12, 2021); see also 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.").

Resultantly, though doing so is not required, a post-conviction petitioner may file a motion to reconsider a summary dismissal order within 30 days of that order without first filing a notice of appeal. See Ill. S. Ct. R. 606(b) (eff. March 12, 2021); *People v. Rivera*, 198 Ill. 2d 364, 371 (2001) (citation and quotation omitted) ("[F]irst stage dismissals are final and appealable judgments."); *People v. Blair*, 215 Ill. 2d 427, 451 (2005) ("A defendant may file a motion to reconsider which may claim exceptions to *res judicata* and forfeiture."). Where such a motion is not received by the circuit clerk within 30 days, Rule 373 allows that "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." Ill. S. Ct. R. 373 (eff. July 1, 2017); see also Ill. S. Ct. R. 612(b)(18) (eff. July 1, 2017) (applying Rule 373 to "criminal appeals insofar as appropriate").

Rule 12, in pertinent part, provides that mailing is proved:

> "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." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017).

"[P]roof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12." *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (2d Dist. 1987); see also *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957)

(finding the defendant's affidavit of service was "certainly in substantial compliance with Rule 7 of this court[.]"). The primary purpose of the proof of mailing is "to establish the date the document was timely mailed to confer jurisdiction[.]" *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 216 (2009).

C.

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.

Rule 12(b)(6) can be distilled into three requirements:

1) "certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail";

2) "the time and place of deposit"; and

3) "the complete address to which the document was to be delivered." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017).

And the appellate court, typically citing *Ingrassia*, regularly notes that *pro se* incarcerated litigants must substantially comply with these requirements. *E.g.*, *People v. Scott*, 2019 IL App (2d) 160439, ¶ 21. This Court has not yet addressed substantial compliance under Rule 12(b)(6) or the minimum it requires, but examples abound of the application of that standard to this Court's rules.

For example, in *People v. Dominguez*, 2012 IL 111336, ¶ 19, this Court held that substantial compliance with Rule 605(c) "[did] not require a strict verbatim reading of the rule[.]" Rather it only required the court to"impart largely that which is specified in the rule, or the rule's 'essence,' as opposed to 'wholly' what is specified in the rule." *Dominguez*, 2012 IL 111336, ¶ 19. The appellate court has since interpreted this holding as allowing semantic deviations from Rule 605

so long as the circuit court's appeal admonishments to the defendant convey the essence of each subsection of the rule. See *People v. Perry*, 2014 IL App (1st) 122584, ¶ 16 ("While the trial court need not recite the rule word-for-word, the admonishments in this case lacked any reference to certain portions of Rule 605(c) altogether.").

Here, this Court should similarly construe Rule 12(b)(6) such that proof of mailing which does not parrot the requirements of the rule verbatim is nonetheless substantially compliant so long as it imparts "largely that which is specified" by supplying the "essence" of those requirements. *Dominguez*, 2012 IL 111336, ¶ 19. Applying Rule 12(b)(6) in this manner would be consistent with the historic treatment of certificates of service and other similar documents, which shows that substantial compliance exists on a spectrum.

At one end are those cases where there "was certainly substantial compliance[.]" *Bernier*, 11 Ill. 2d at 529. For example, the "affidavit of mailing" in *Bernier* stated:

> "Douglas F. Stevenson, being first duly sworn, on oath deposes and says that on the 26th day of July, 1955, he served the notice and the motion attached thereto on the Defendant, Carl D. Schaefer, by placing a copy of the same in the United States Mail, postage prepaid and addressed to Carl D. Schaefer, 2338 Belmont Avenue, Chicago, Illinois." *Id*.

At the other end are cases such as *Ingrassia*, where the appellate court stated, "[N]o proof of service whatsoever appears in the record. There was therefore no compliance with the requirements of Rule 12." *Ingrassia*, 156 Ill. App. 3d at 509. In between these two poles lie infinite permutations, some of which would be substantially compliant and some not.

In this case, the proof of mailing Char attached to his motion to reconsider was substantially compliant because it falls much closer to *Bernier* than it does to *Ingrassia*. Included in that document were the date of mailing, Char's signature, and other factual representations designed to establish the remaining requirements of Rule 12(b)(6). *Cf. People v. Arriaga*, 2023 IL App (5th) 220076, ¶ 21 (emphasis added) ("Defendant's failure to file *anything resembling proper service* pursuant to Rules 373 and 12(b)(6) is therefore fatal."). Importantly, finding substantial compliance in this case would still allow Rule 12(b)(6) to fulfill its main purpose, which is "to establish the date the document was timely mailed to confer jurisdiction[.]" *Secura*, 232 Ill. 2d at 216.

Char supplied the below proof of mailing:

CERTIFICATE OF SERVICE

This is to certify That I have on this date served true and correct copies of the foregoing to:

Clerk of the Circuit Court of Knox County and;

Knox County States Attorney

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.

/s/ Char Shunick

CHAR SHUNICK Y43017
Dixon .C.C.
2600 N Brinton ave
Dixon,IL,61021

In its modified opinion, the Fourth District concluded this document "suffers from two deficiencies." *People v. Shunick*, 2022 IL App (4th) 220019, ¶ 18, *as modified on denial of reh'g* (Dec. 7, 2022). First, it supposedly lacks the substantial equivalent of a certification under section 1-109 of the Code of Civil Procedure. *Shunick*, 2022 IL App (4th) 220019, ¶¶ 18-19. Second, it does not contain the complete address to which Char mailed the motion to reconsider. *Id.* ¶ 20. The Fourth District, in the modified opinion, did not find a lack of compliance with the "time and place of deposit" requirement. *Id.* ¶¶ 18-21.

Because the Fourth District correctly determined that the proof mailing sufficiently stated the time and place of deposit, that requirement will not be discussed below. See *Bernier*, 11 Ill. 2d at 529 (finding compliance with a predecessor rule where "[t]he hour is not stated"). However, as will be discussed below, this Court should reject the Fourth District's remaining conclusions because they impose strict compliance where only substantial compliance is required.

1.

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

Rule 12 provides that proof of mailing should include a "certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail[.]" Ill. S. Ct. R 12(b)(6) (eff. July 1, 2017). Section 1-109, in turn, requires that the person signing a document:

> "shall subscribe to a certification in *substantially the following form*: 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*, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true." 735 ILCS 5/1-109 (2021) (emphasis added).

Notably, by its terms, section 1-109 only requires that the certification "substantially" track the model language. 735 ILCS 5/1-109.

Here, Char substantially complied with the certification requirement where he stated in the proof of mailing, "This is to certify [t]hat I have on this date [(October 26)] served true and correct copies of the foregoing *** by depositing the same in the institutional mailbox at Dixon C.C." (C 174) Plainly, this averment " 'contains the substance or main features' " of section 1-109. *Shunick*, 2022 IL App (4th) 220019, ¶ 19, quoting *People ex rel. Davis v. Chicago, B. & Q. R. Co.*, 48 Ill. 2d 176, 183 (1971). One might even say it "contains the essence of the form in [section 1-109]." *Davis*, 48 Ill. 2d at 183; see *Dominguez*, 2012 IL 111336, ¶ 19. The remaining verbiage appearing in section 1-109 that is absent from Char's certification, relating to matters stated "on information and belief," does not alter this conclusion because Char had personal knowledge of his mailing of the motion.

The Fourth District's contrary conclusion appears to be based upon a misreading of section 1-109 and the proof of mailing. In its modified opinion, the Fourth District determined there was not substantial compliance because Char "used only one word from section 1-109: 'certify' " *Shunick*, 2022 IL App (4th) 220019, ¶ 19, quoting 735 ILCS 5/1-109. But this is not accurate. Again, Char stated in the proof of mailing: "This is to *certify* [t]hat I have on this date [(October 26)] served *true and correct* copies of the foregoing[.]" (C 174) (emphasis added) This statement substantially tracks the model language in section 1-109 that "*the undersigned certifies* that the statements set forth in this instrument are *true and correct*[.]" 735 ILCS 5/1-109 (emphasis added).

The Fourth District's overlooking of this matching language is significant. The court noted the purpose of the certification requirement "is the enforcement of truthfulness in the making of a statement." *Shunick*, 2022 IL App (4th) 220019, ¶ 19. And the phrase "true and correct," which is a well-worn legal doublet, means something is "[a]uthentic; accurate; unaltered[.]" *True and Correct*, Black's Law Dictionary (11th ed. 2019). Thus, by not acknowledging the "true and correct" portion of the proof of mailing, the Fourth District failed to appreciate that, in addition to his use of the word "certify," Char substantially conveyed the accuracy, *i.e.*, truthfulness, of his attestation that he timely placed the motion to reconsider "in the institutional mailbox at Dixon C.C." on October 26, 2021. (C 174)

Setting aside the language that was included in the proof of mailing, the Fourth District also pointed out that "section 1-109 calls for the express self-subjection of the certifier to criminal liability should the statement contain a deliberate falsehood[,]" and concluded the absence of such language in this case necessitated a finding of insubstantial compliance. *Shunick*, 2022 IL App (4th) 220019, ¶ 19.[1] But finding insubstantial compliance due to the absence of such a "self-subjection" in this case would amount to requiring an exacting standard

[1] Another district of the appellate court, albeit in an unpublished decision, reached a somewhat conflicting conclusion regarding the need for a reference to criminal liability. See *Wells Fargo Bank, Nat. Ass'n v. Blue Island Plaza,* LLC, 2015 IL App (1st) 142923-U, ¶ 40 (finding substantial compliance even though the "notarized statements did not include portions of the model language set forth in section 1–109 of the Code" such as "that the statements were made 'under penalties as provided by law pursuant' to the Code"). Char does not cite *Wells Fargo* as authoritative precedent, rather he presents the appellate court's "reasoning and logic[,]" *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374 (4th Dist. 2005), simply to provide this Court with a full picture of how lower courts have handled the issue. For this Court's convenience, the full case is included in the appendix. (A 22-44)

of strict compliance. See, *e.g.*, *People v. Gorss*, 2022 IL 126464, ¶ 31 (emphasis added) ("We find that, because counsel failed to *expressly certify* that he consulted with Gorss as to his contentions of error in the entry of the guilty plea, counsel failed to strictly comply with Rule 604(d).").

Even without reference to section 1-109 or other "penalties as provided by law," Char's signature on the proof of mailing, by operation of law, gave rise to a number of other legal provisions which allow for "the enforcement of truthfulness in the making of a statement." *Shunick*, 2022 IL App (4th) 220019, ¶ 19. Indeed, "Illinois law provides various tools for circuit and appellate courts to employ to deter frivolous filings." *People v. Moore*, 2023 IL App (4th) 210245, ¶ 73.

First, proceedings under the Post-Conviction Hearing Act are civil in nature, *People v. Bailey*, 2017 IL 121450, ¶ 29, which makes Rule 137 applicable to documents filed therein. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Rule 137 provides in relevant part, "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact[.]" Ill. S. Ct. R. 137(a) (eff Jan. 1, 2018). Rule 137 "is penal in nature" and allows courts "to impose sanctions on lawyers and parties who violate its terms." *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998).

Under this Court's rules, "'Document' means a pleading, motion, photograph, recording, or other record of information or data required or permitted to be filed, either on paper or in an electronic format." Ill. S. Ct. R. 2(b)(3) (eff. Oct. 1, 2021). Therefore, by affixing his signature to the proof of mailing as a means to "certify" that he placed the motion to reconsider into the prison mail on October 26, 2021, Char subjected himself to a wide array of sanctions should a court determine that

representation was deliberately untruthful. See *McCarthy v. Taylor*, 2019 IL 123622, ¶ 19 ("In other words, the clear purpose of Rule 137 is to prevent the filing of false and frivolous lawsuits.); *People v. Bowman*, 335 Ill. App. 3d 1142, 1155 (5th Dist. 2002) ("Imposing sanctions pursuant to Illinois Supreme Court Rule 137 is within the sound discretion of the trial court[.]") see also *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1023 (1st Dist. 2004) (stating Rule 137 "allows other sanctions" in addition to the monetary penalties listed in the rule so long as they are "appropriate").

Second, Char's filings gave rise to section 22-105 of the Code of Civil Procedure, 735 ILCS 5/22-105 (2021). That provision states:

> "If a prisoner confined in an Illinois Department of Corrections facility files a pleading, motion, or other filing which purports to be a legal document in a case seeking post-conviction relief under Article 122 of the Code of Criminal Procedure of 1963 *** and the Court makes a specific finding that the pleading, motion, or other filing which purports to be a legal document filed by the prisoner is frivolous, the prisoner is responsible for the full payment of filing fees and actual court costs." 735 ILCS 5/22-105(a) (2021).

Section 22-105 defines "frivolous" as including a filing that "lacks an arguable basis either in law or in fact[.]" 735 ILCS 5/22-105(b)(1) (2021). Thus, where the requisite finding of frivolity is made, section 22-105 allows for the "assessment and collection of the filing fees and court costs from the prisoner's existing trust account." *Moore*, 2023 IL App (4th) 210245, ¶ 67. Char has been incarcerated in an IDOC facility at all relevant times during this case, which means his representations in the proof of mailing were subject to section 22-105 in the event they were not truthful.[2]

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[2] This Court can take judicial notice of IDOC records. *People v. Johnson*, 2021 IL 125738, ¶ 54. Char's status as an incarcerated inmate at all relevant times can be ascertained using the inmate-search feature on the IDOC website. See https://idoc.illinois.gov/offender/inmatesearch.html.

The above provisions "help deter defendants from filing frivolous appeals and allow state resources to be utilized more efficiently to address more meritorious claims." *Moore*, 2023 IL App (4th) 210245, ¶ 73. But courts have additional tools at their disposal, such as contempt proceedings. Contempt of court is defined "as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute." *People v. Simac*, 161 Ill. 2d 297, 305 (1994) (quotations omitted). "[A]ll courts have the inherent power to punish contempt; such power is essential to the maintenance of their authority and the administration of judicial powers." *Simac*, 161 Ill. 2d at 305.

Specifically, in this case, indirect criminal contempt proceedings would be appropriate if Char made a false representation in the proof of mailing. See *Windy City Limousine Co. LLC v. Milazzo*, 2018 IL App (1st) 162827, ¶ 55, quoting, *People v. Jashunsky*, 51 Ill. 2d 220, 224 (1972) ("What these cases illustrate is that '[t]he mere filing' in court of 'any document containing contemptuous matter is sufficient to constitute' contempt."). Moreover, contempt proceedings enable courts to impose a punishment for the filing of an untruthful proof of mailing in the event an incarcerated *pro se* litigant conscripts a non-party to place the document in the institutional mail and to sign the accompanying proof of mailing. See Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017) (requiring certification "of the person who deposited the document in the institutional mail"); *In re Melody's Estate*, 42 Ill. 2d 451, 452 (1969) ("Clearly the filing of the spurious will in the probate division of the circuit court constituted a direct contempt of the court[.]"). To be sure, the possibility of contempt proceedings ensures the truthfulness of filings because

imprisonment can be an appropriate sentence. See *People v. Geiger*, 2012 IL 113181, ¶ 24("[C]ontempt has no sentencing classification or sentencing range set by the legislature.").

In sum, self-represented litigants residing in a correctional facility must substantially comply with Rule 12(b)(6), including the certification requirement. *Scott*, 2019 IL App (2d) 160439, ¶ 21. Here, Char substantially complied where his proof of mailing included "the substance or main features" of section 1-109 and subjected him to various legal penalties for untruthfulness. *Shunick*, 2022 IL App (4th) 220019, ¶ 19, quoting *Davis*, 48 Ill. 2d at 183.

2.

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

Rule 12 also provides that proof of mailing should include "the complete address to which the document was to be delivered." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017). Here, Char substantially complied with this requirement where he certified in the proof of mailing that he sent copies of the motion to reconsider to the "Clerk of the Circuit Court of Knox County" and the "Knox County State[']s Attorney[.]" (C 174) It must be noted that the critical address is the clerk's office, not the state's attorney, because it is the clerk's receipt of the document that is jurisdictional. See Ill. S. Ct. R. 606(a) (eff. Mar. 12, 2021) ("Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court."). Therefore, Char will focus his analysis on substantial compliance as it relates to the clerk's address.

To start, Char does not dispute that the proof of mailing lacks a street address for the clerk. (C 174) But, when evaluating the sufficiency of proof of mailing,

courts should not be required to ignore competent circumstantial evidence that the document was mailed to the correct address. See *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 14 ("Requiring a court to overlook a clearly legible postmark *** is to disregard the best, most competent evidence of the latest date of mailing[.]"); see also *People v. Humphrey*, 2020 IL App (1st) 172837, ¶ 19 ("We think the rationale and holding of *Hansen* remains persuasive[.]"). Rather, substantial compliance with Rule 12(b)(6) should be found where the proof of mailing indicates a document was sent to the clerk and there is no dispute the clerk received that document. See *Scott*, 2019 IL App (2d) 160439, ¶ 24 ("There is also no dispute that the petition was delivered to the clerk and filed."); see also *People v. Johnson*, 232 Ill. App. 3d 882, 883 (4th Dist. 1992) (finding the mailbox rule applied where the "certificate of service" stated an inmate's post-conviction petition was placed in the institutional mailbox "to be processed as per procedure, delivered to the addressee via United States Mail").

Concluding otherwise would punish Char for the clerk's opting not to retain the envelope for inclusion in the record. See *People v. Hayes*, 2022 IL App (1st) 190881-B, ¶ 19 ("Were we to have any doubt that Hayes timely mailed his notice of appeal, the envelope dispels it."); *Walker v. Monreal*, 2017 IL App (3d) 150055, ¶ 20 ("Nonetheless, the envelope in which the notice of appeal was mailed was clearly postmarked January 16, 2015."); *People v. Maiden*, 2013 IL App (2d) 120016, ¶ 16 ("Although this case would have been made easier had the clerk of the court kept the mailing envelope in the record, and we ask that clerks do so in the future, we find defendant's actions to be sufficient."); see also *People v. Payne*, 2015 IL App (2d) 120856, ¶ 36 (" However, the record is devoid of any indication that the

mailing was actually delivered to the clerk. Given these circumstances *** we cannot determine when the 180–day speedy-trial period began to run.").

Examining compliance with the address requirement with an eye toward available record evidence is consistent with how Rule 12 would operate in other circumstances. Consider the following hypothetical scenario. A self-represented complainant files a charge with the Illinois Department of Human Rights alleging a civil rights violation committed by her employer. See 775 ILCS 5/6-101 (2023); 775 ILCS 5/7A-102(A)(1) (2023). Thereafter, the Department conducts "an investigation sufficient to determine whether the allegations set forth in the charge are supported by substantial evidence[,]" after which it issues a report dismissing the charge for lack of such evidence. 775 ILCS 5/7A-102(C)(1), (D)(3) (2023).

The Department then serves the complainant via U.S. mail with notice of the adverse decision, attaching to the decision a corresponding proof of mailing that listed a patently incorrect street address for the complainant. See 775 ILCS 5/7A-102(D)(3); 56 Ill. Admin. Code 2520.560 (2023) ("The Department shall serve upon the parties a written notice of dismissal of all or part of a charge."); Ill. S. Ct. R. 11(c)(2)(iii) (eff. July 1, 2021) (allowing for service by U.S. mail where "a self-represented party does not have an e-mail address, or if service other than electronic service is specified by rule or order of court").

Upon the Department's mailing notice of the dismissal, the complainant has 90 days from the effective date of service to file a civil action in the circuit court. 775 ILCS 5/7A-102(D)(3). Rule 12 provides that service by U.S. mail is proved by a certification of the person who deposited the document in the mail, under section 1-109 of the Code of Civil Procedure, stating, among other things, "the

complete address that appeared on the envelope or package[.]" Ill. S. Ct. R. 12(b)(5) (eff. July 1, 2017). And that service "is complete four days after mailing." Ill. S. Ct. R. 12(c) (eff. July 1, 2017). Therefore, in this scenario, the complainant has 94 days from the date the Department mailed the notice of dismissal to initiate a civil action.

Assume that after learning of the adverse decision, the complainant seeks to initiate a civil action on day 95, and that her employer files a motion to dismiss based on untimeliness. The complainant is not without recourse despite what would appear, based on the presence of a street address within its four corners, to be facially compliant proof of mailing under Rule 12. No, she would be able to respond by pointing out that the Department served the wrong address. This is because there is only "a presumption of delivery if sent by regular mail directed to a *proper* address." *In re Marriage of Betts*, 159 Ill. App. 3d 327, 332 (4th Dist. 1987) (emphasis added). Thus, because the record disclosed the Department's service of an incorrect address, the complainant would be able to overcome timeliness hurdles and pursue her civil action. *Cf. CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 41 ("The proof of service further stated that the attorney mailed a copy to defendant at the property address. The record indicates that this address was the same as the one provided in her answer to the complaint."); *Bernier*, 11 Ill. 2d at 529 (" If the proper giving of the notice can now be frustrated by the mere allegation of the defendant that he did not receive it, then the giving of notice by mail cannot be relied upon even though the rules specify such a method.").

Similarly, here, this Court should not limit the relevant inquiry to just the four corners of the proof of mailing. Rather this Court should account for both Char's

statement that he mailed the motion to reconsider to the clerk and the clerk's clear receipt of the motion. (C 174) This would suffice to establish the essence of the address requirement. See *Dominguez*, 2012 IL 111336, ¶ 19 (stating that substantial compliance requires conveying "largely that which is specified in the rule").

Concluding otherwise, the Fourth District below stated the "'failure to include any address to which his motion was sent'" is not a defect that can be overlooked. *Shunick*, 2022 IL App (4th) 220019, ¶ 20, quoting *People v. Liner*, 2015 IL App (3d) 140167, ¶ 17. But again, this analysis is akin to strict compliance. The Fourth District did not analyze how the absence of a street address in the proof of mailing inhibited the fulfillment of Rule 12's purpose, which is to "establish the date the document was timely mailed to confer jurisdiction[.]" *Secura*, 232 Ill. 2d at 216. Had the Fourth District done so, it would have become apparent that no such impact exists.

Furthermore, construing Rule 12(b)(6) as the Fourth District did below produces an unjust result. The clerk clearly received the motion, just as Char represented it would. So, if necessary, the fact that a street address does not appear on the face of the proof of mailing should be remedied by resort to a well-worn legal tool: judicial notice. This is appropriate where a fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b) (eff. Jan. 1, 2011).

Under this rule, Illinois courts "may take judicial notice of adjudicative facts at any stage of the proceeding" including "for the first time on appeal." *People v. Castillo*, 2022 IL 127894, ¶ 39 (taking judicial notice of an element of a charged

criminal offense). "Information on [a] municipality's public website is subject to judicial notice." *Kopnick v. JL Woode Mgmt. Co., LLC*, 2017 IL App (1st) 152054, ¶ 26. And " 'case law supports the proposition that information acquired from mainstream Internet sites such as MapQuest and Google Maps is reliable enough to support a request for judicial notice.' " *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 49, quoting *People v. Clark*, 406 Ill. App. 3d 622, 633 (2d Dist. 2010).

Here, Char specifically stated in his proof of mailing that he sent his motion to reconsider to the "Clerk of the Circuit Court of Knox County[.]" (C 174) The official Knox County website lists the clerk's address as being:

"Knox County Courthouse
200 South Cherry Street
Galesburg, IL 61401"[3]

The accuracy of that information is readily verifiable as a Google Maps search returns an image of the courthouse.[4] Moreover, the county's official website also states, "The Knox County Courthouse in Galesburg was erected in 1884-1886[.]"[5] Thus, rather than bar access to the court system based on a technical omission, this Court should fill the gap on the face of the proof of mailing by taking notice of the fact that the clerk had, at the time of mailing, been located at 200 South Cherry Street in Galesburg, Illinois, for approximately 135 years.

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[3] *Circuit Clerk*, KNOX COUNTY, ILLINOIS, https://co.knox.il.us/circuit-clerk/ (last accessed May 18, 2023).

[4] 200 South Cherry Street Galesburg, IL, GOOGLE MAPS ,https://www.google.com/maps/place/200+S+Cherry+St,+Galesburg,+IL+61401/@40.9444514,-90.3730703,17z/data=!3m1!4b1!4m6!3m5!1s0x87e1be0936cf56e1:0x6162de4ec12cd7af!8m2!3d40.9444474!4d-90.3704954!16s%2Fg%2F11b8v575dq?entry=ttu (last accessed May 25, 2023).

[5] *History of Knox County*, KNOX COUNTY, ILLINOIS, https://co.knox.il.us/history-of-knox-county/available at (last accessed May 18, 2023).

In sum, the essence of the address requirement was established when Char represented that he mailed his motion to reconsider to the circuit clerk, and that office clearly received the document. See, *supra*, pages 20-24. The Fourth District's conclusion that the address must appear on the face of the proof of mailing is akin to strict compliance and ignores the readily ascertainable nature of the omitted information. See, *supra*, pages 24-25. Thus, this Court should hold there was substantial compliance with the address requirement.

D.

Finding substantial compliance in this case would be consistent with longstanding treatment of *pro se* court filings.

Finding substantial compliance with Rule 12(b)(6) in this case would be consistent with the longstanding treatment of *pro se* filings by Illinois courts. "In reality, rare, indeed, is the legally competent *pro se* criminal defendant." *People v. Shines*, 2015 IL App (1st) 121070, ¶ 40. Hence why this Court does not apply an exacting standard to *pro se* petitions filed during the first stage of post-conviction proceedings. *E.g.*, *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) ("Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low.").

Given this treatment of *pro se* petitions, it would be illogical to demand a heightened standard of draftsmanship when the same *pro se* litigant is preparing proof of mailing to accompany their petition. Yet that is what the Fourth District required of Char. The court expected that, without any admonishments or notice whatsoever, Char would be able to navigate the intricacies of the mailbox rule and compose a strictly compliant proof of mailing to avoid the harsh result reached

in this appeal. See *Shunick*, 2022 IL App (4th) 220019, ¶¶ 18-21. This is unjust. See *Shines*, 2015 IL App (1st) 121070, ¶ 40 ("Although a *pro se* defendant must comply with the rules of procedure required of those represented by counsel [citation], we question the fairness of this outcome, particularly in cases, like here, where an incarcerated defendant is without counsel and is complaining of counsel's ineffectiveness.").

By raising this argument, Char does not ask this Court to excuse him from the procedural requirements imposed by this Court's rules. *Cf*. *Arriaga*, 2023 IL App (5th) 220076, ¶ 22, citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 528 (2001) ("Proceeding *pro se* does not excuse defendant's failure to comply with the rule[.]"). Rather he only asks that this Court view *pro se* proof of mailing through the same lens as *pro se* petitions. The distinction is significant.

For example, in *Arriaga*, the defendant pleaded guilty and subsequently sent the circuit court a string of post-plea letters. 2023 IL App (5th) 220076, ¶¶ 4-7. In a letter dated 16 days after the plea, but file-stamped 44 days after, the defendant requested leave to withdraw his plea. *Id*. ¶ 6. The court treated the letter as a timely post-plea motion, subsequently denying an amended motion on the merits. *Id*. ¶¶ 8-9. Thereafter, the appellate court vacated the circuit court's denial of the amended motion and dismissed the motion for lack of jurisdiction. *Id*. ¶ 26. The appellate court found that the "[d]efendant's failure to file anything resembling proper service pursuant to Rule 373 and Rule 12(b)(6) [was] therefore fatal" to his attempt to invoke the mailbox rule. *Id*. ¶ 21. The appellate court then noted the defendant's status as a *pro se* litigant at the time he mailed the letters did not excuse his failure to comply with those rules. *Id*. ¶ 22.

Similarly, in *Steinbrecher*, the circuit court entered an order confirming a judicial sale of property, after which one of the parties, who was a *pro se* litigant, filed a motion to stay the judgment. *Steinbrecher*, 197 Ill. 2d at 518. The circuit court denied the motion. *Id*. at 519. Additional proceedings were had in the circuit court, the *pro se* litigant then filed a notice of appeal, and the case eventually reached the supreme court. *Id*. at 519-20.

Under this Court's rules, the litigant was required to renew the motion for stay in the appellate court, but she never did so. *Id*. at 526-27. The *Steinbrecher* court thus concluded any issue related to the stay of judgment was moot because the *pro se* litigant "failed to perfect a stay of judgment[.]" *Id*. at 526. The court further stated her "*pro se* status does not alter this result. *Pro se* litigants are presumed to have full knowledge of applicable court rules and procedures, including procedural deadlines with respect to filing motions." *Id*. at 528.

In support of this proposition regarding *pro se* litigants, the *Steinbrecher* court cited *Domenella v. Domenella*, 159 Ill. App. 3d 862, 868 (1st Dist. 1987). In *Domenella*, the defendants-appellees filed a brief that raised issues in addition to those encompassed by the plaintiffs-appellants' notice of appeal. 159 Ill. App. 3d at 868. The appellate court noted Rule 303 required "that a notice of an additional appeal be filed within 10 days[,]" but the defendants did not file any such notice *Id*. In declining to address the additional issues raised, the court stated, "Defendants have appeared *pro se*. They must, nonetheless, comply with the same rules of procedure as would be required of litigants represented by an attorney." *Id*.

Taken together, *Arriaga*, *Steinbrecher*, and *Domenella* demonstrate that a litigant's *pro se* status generally will not excuse *a complete failure* to produce some document required by this Court's rules. But in this case, Char did not completely fail to produce proof mailing under Rule 12(b)(6). The issue is that,

at worst, his drafting of that document left a bit to be desired. However, this is quite understandable. Char is not a lawyer; he is an incarcerated layperson. This Court does not require perfection even from represented parties in drafting a jurisdictionally necessary notice of appeal, *e.g.*, *Burtell v. First Charter Serv. Corp.*, 76 Ill. 2d 427, 433 (1979), so it certainly should not do so when a self-represented, incarcerated litigant drafts proof of mailing. Instead, this Court must continue to recognize that most *pro se* post-conviction petitioners lack legal sophistication. *Hodges*, 234 Ill. 2d at 9.

Unlike other civil litigation contexts, the ability to file a post-conviction petition is determined by reference to whether "a person's liberty interest" is, at the time of filing, constricted in some meaningful way as a result of their criminal conviction. *People v. Pack*, 224 Ill. 2d 144, 150 (2007); see *People v. West*, 145 Ill. 2d 517, 519 (1991). Despite this meaning that Char, like many other petitioners, has been incarcerated during the litigation of his petition, the requirements of the Illinois mailbox rule were never communicated to him. And neither are they conveyed to similarly-situated petitioners in the notice of adverse decision required by this Court's rules. See Ill. S. Ct. R. 651(b) (eff. July 1, 2017).

Nevertheless, Char made a good-faith effort at compliance by supplying proof of mailing. (C 174) It would be the height of unfairness to now deny to Char the benefit of a full post-conviction review of his conviction and sentence because, due to his incarceration and lack of legal experience, he was unable to correctly identify the most critical components of Rule 12(b)(6). See *People v. Edwards*, 197 Ill. 2d 239, 245 (2001) ("In many cases, the *pro se* defendant will be unaware that certain facts, which in his mind are tangential or secondary, are, in fact, critical parts of a complete and valid constitutional claim.").

In sum, finding substantial compliance in this case, where Char provided proof of mailing that supplied the essence of each of Rule 12(b)(6)'s requirements, would be consistent with the longstanding treatment of *pro se* filings in this state. The Fourth District's modified opinion demands an exacting standard, akin to strict compliance, that finds no basis in this Court's jurisprudence.

E.

Conclusion

To sum up, *pro se* litigants residing in correctional facilities must substantially comply with Rule 12(b)(6). *Scott*, 2019 IL App (2d) 160439, ¶ 21; see *Ingrassia*, 156 Ill. App. 3d at 502. But this standard should not require a verbatim recitation of the rule, only its essence or largely that which is required. See *Dominguez*, 2012 IL 111336, ¶ 19. This enables proof of mailing to fulfill its purpose of establishing "the date the document was timely mailed to confer jurisdiction[,]" *Secura*, 232 Ill. 2d at 216, while still affording the necessary liberal construction of *pro se* filings. See *Hodges*, 234 Ill. 2d at 9. Applying that standard to this case, Char substantially complied because he set forth the essence of each of Rule 12(b)(6)'s three requirements. See, *supra*, pages 12-26. Thus, this Court should reverse and remand to the Fourth District for consideration of the merits of this appeal.

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.

Many areas of the law require courts to engage in fact-finding. And sometimes, doing so might be necessary to ascertain whether a given court has jurisdiction. Despite this reality, the Fourth District concluded it could not remand this case for an inquiry into whether Char Shunick's motion to reconsider was timely and thereby extended the circuit court's jurisdiction. This Court should reject that conclusion and hold that the appellate court has the authority, under Rule 615(b)(2), to remand where a self-represented litigant residing in a correctional facility provides proof of mailing that does not substantially comply with Rule 12(b)(6) but circumstances tend to indicate timely mailing.

A.

Standard of Review

This Court reviews "the interpretation of our supreme court rules *de novo*." *People v. Walls*, 2022 IL 127965, ¶ 16. Thus, whether the appellate court has authority to enter an order under Rule 615(b) is also reviewed *de novo*. See *People v. Bingham*, 2018 IL 122008, ¶¶ 15-18 ("We find that none of the criteria of Rule 615(b) for invoking the powers of a reviewing court have been satisfied in this case."); *People v. Jones*, 168 Ill. 2d 367, 373-78 (1995) ("The appellate court's interpretation of the scope of a reviewing court's power to reduce a criminal sentence on appeal is an overly restrictive ruling that fails to give content to the plain language of our supreme court rules and is in conflict with precedent of this court.").

B.

General Authorities

"Under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), the scope of appellate review is defined by the trial court's judgment and the proceedings and orders related to it[.]" *Bingham*, 2018 IL 122008, ¶ 16. When a lower court judgment is properly before the appellate court, *People v. Young*, 2018 IL 122598, ¶ 28, Rule 615(b) empowers the appellate court to take enumerated actions in relation to that judgment:

> "(b) Powers of the Reviewing Court. On appeal the reviewing court may:
>
> (1) reverse, affirm, or modify the judgment or order from which the appeal is taken;
>
> (2) 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;
>
> (3) reduce the degree of the offense of which the appellant was convicted;
>
> (4) reduce the punishment imposed by the trial court; or
>
> (5) order a new trial." Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967).

Rule 615(b) grants "the appellate court significant powers when reviewing criminal cases." *People v. Whitfield*, 228 Ill. 2d 502, 520 (2007), *as modified on denial of reh'g* (Apr. 23, 2008). But "the authority to enter an order of remandment in criminal cases is not specifically granted" therein. *People v. Young*, 124 Ill. 2d 147, 152 (1988). "It is obvious, however, that a reviewing court has such authority in criminal cases when used in connection with other authority specifically stated in Rule 615(b)." *Young*, 124 Ill. 2d at 152. As a result, "The appellate court is empowered under Rule 615(b) to remand a cause for a hearing on a particular matter while retaining jurisdiction." *People v. Garrett*, 139 Ill. 2d 189, 195 (1990).

C.

The appellate court has the authority to order a limited remand to the circuit court for it to determine whether the mailbox rule applies where the circumstances indicate a document was timely mailed but the record lacks a substantially compliant Rule 12(b)(6) proof of mailing.

Assuming this Court concludes Char Shunick did not substantially comply with Rule 12(b)(6), this Court should nevertheless hold that the appellate court can and should order a limited remand when confronted with circumstances such as those found in this case. Currently, the appellate court is split over the propriety of remanding where compliance with Rule 12(b)(6) is in doubt. Compare *People v. Cooper*, 2021 IL App (1st) 190022, ¶¶ 21-22, with *People v. Arriaga*, 2023 IL App (5th) 220076, ¶¶ 16-20, and *People v. Shunick*, 2022 IL App (4th) 220019, ¶¶ 22-24, *as modified on denial of reh'g* (Dec. 7, 2022). But it is evident that allowing for remand is consistent with the law and provides the most just outcome.

The first apparent remand of this kind occurred in *Cooper*. There, the defendant pleaded guilty and was sentenced on May 10, 2018. *Cooper*, 2021 IL App (1st) 190022, ¶ 4. The defendant subsequently *pro se* filed a motion to withdraw his plea that was file-stamped by the clerk 33 days later, on June 12, 2018. *Id.* ¶ 5. He did not include proof of timely mailing with the motion. *Id.* ¶ 18; see also Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017). The circuit court later held a hearing, during which it asked the defendant if June 12 had been the date his motion had been filed with the clerk's office. *Id.* ¶ 5. The defendant, who was not represented by counsel, agreed that it was. *Id.* The circuit court denied the motion, in part because it was untimely. *Id.* The defendant filed a notice of appeal from the court's decision.

On review, the appellate court questioned whether the mailbox rule operated to render the motion timely. *Id*. ¶¶ 11-18. The court answered in the negative, finding the defendant's failure to file any proof of mailing as outlined in Rule 12(b)(6) was dispositive. *Id*. ¶18. This was, the court said, because the mailbox rule applies "only where proof of the time of [ ] mailing is provided to the court in the manner specified in Rule 12." *Id*.

However, that determination did not end the appellate court's analysis. See *id*. ¶¶ 19-22. Instead, the court examined whether timeliness could be established through further factual development. The appellate court complimented the circuit court for correctly beginning the post-plea hearing by conducting "an inquiry into the timeliness of the motion[,]" but it faulted the lower court for not determining whether the defendant "could supplement his motion with the certification required by Rule 12(b)(6) and section 1-109 of the Code [of Civil Procedure]." *Id*. ¶ 20.

Seeing "nothing in Rule 12(b)(6) that prohibits a litigant from supplementing his filing with a certification proving the date and manner of mailing[,]" the appellate court chose to exercise its authority under Rule 615(b)(2) to order a remand "for the limited purpose of inquiring of [the defendant] when his motion was mailed." *Id*. ¶¶ 21, 24. The court stated that, should the defendant be able to truthfully establish timely mailing, "he should be allowed to supply a certification complying with Rule 12(b)(6) and section 1-109 of the Code that establishes the date and manner of mailing for his motion to withdraw his guilty plea." *Id*. ¶24.

Although perhaps the first of its kind, the remand ordered in *Cooper* was not a one-off suggestion. Rather it echoed a remedy proposed years ago by

Justice McLaren in dissent:

> "Unfortunately, despite the liberty interest involved, the majority has determined, *sua sponte*, without an evidentiary hearing, that the notice was not timely filed. I do not question our independent duty to inquire whether we have jurisdiction. I question why we do not give defendant an opportunity to submit a late filing of 'proper' proof of mailing by way of an evidentiary hearing or the filing of exhibits, pleadings, or affidavits. I submit that this would be timely because jurisdiction was neither contested nor questioned until this court raised the issue, *sua sponte*." *People v. Lugo*, 391 Ill. App. 3d 995, 1007 (2d Dist. 2009) (McLaren, J., dissenting).

Consistent with *Cooper* and Justice McLaren's dissent in *Lugo*, Char should be given the opportunity to supplement his proof of mailing in the event this Court affirms the Fourth District's finding of insubstantial compliance with Rule 12(b)(6). Rule 373 allows that "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." Ill. S. Ct. R. 373 (eff. July 1, 2017). Rule 12, in turn, provides that mailing is proved:

> "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." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017).

Nothing in the text of either rule imposes a temporal limitation that would stand in the way of the appellate court exercising its authority under Rule 615(b)(2) to order a remand for further factual development. See *Cooper*, 2021 IL App (1st) 190022, ¶¶ 21-22. To be sure, here, the purpose of a limited remand is connected to the appellate court's authority to "set aside" or "modify" those "proceedings" that were "dependent upon the judgment or order from which the appeal is taken[.]" Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967); see *Young*, 124 Ill. 2d at 152 (reviewing

court has the power to remand a case "when used in connection with other authority specifically stated in Rule 615(b)"). That purpose would be to "revest the trial court with jurisdiction to complete [those] proceedings [ ] found deficient before resuming consideration of the appeal." *Cooper*, 2021 IL App (1st) 190022, ¶ 22 (quotation omitted). Those proceedings being the circuit court's apparent (and understandable) determination, made off-record without inquiry, that Char's motion to reconsider was timely mailed.

In the end, the critical issue remains determining whether "the document was timely mailed to confer jurisdiction[.]" *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 216 (2009). And like many other legal issues, the existence of jurisdiction is subject to fact-finding. For example, courts routinely hold hearings in civil cases to determine whether specific personal jurisdiction exists over an out-of-state defendant. See *Knaus v. Guidry*, 389 Ill. App. 3d 804, 813 (1st Dist. 2009) ("If jurisdictional facts remain in controversy, then the court must conduct a hearing to resolve those disputes."); see also *Russell v. SNFA*, 2013 IL 113909, ¶ 28 ("When, as here, the circuit court decides a jurisdictional question solely on documentary evidence, without an evidentiary hearing, our review is *de novo*."). Thus, there is no reason in this case to erect a barrier to fact-finding or prevent a determination as to whether Char's motion to reconsider was timely such that the circuit court had jurisdiction to enter a ruling.

Furthermore, not only does allowing for remand comport with the reality of jurisdictional analysis, but it also aligns with the larger body of post-conviction jurisprudence. Decades ago, this Court permitted a post-conviction record to be supplemented with an attorney's certificate purporting to establish compliance

with Rule 651(c) in *People v. Harris*, 50 Ill. 2d 31, 34 (1971). And several published appellate court decisions in the ensuing years have relied on *Harris* in permitting similar record supplementation long after the Rule 651(c) compliance was said to have occurred. *E.g.*, *People v. Waldrop*, 353 Ill. App. 3d 244, 247-48 (2d Dist. 2004) ("Beginning in [*Harris*], reviewing courts have permitted the State to supplement the record on appeal with a Rule 651(c) certificate."). Such supplementation is analogous to the instant case.

For example, in *Waldrop* the post-conviction petitioner's appointed attorney filed an amended petition and a Rule 651(c) certificate. *Waldrop*, 353 Ill. App. 3d at 245-46. The State filed a motion to dismiss, which the circuit court granted. *Id*. at 246. On appeal, the petitioner argued his attorney's certificate was facially non-compliant with Rule 651(c). *Id*. In response, the State sought leave of the appellate court to supplement the record with an additional certificate. *Id*.

The defendant argued the State could not supplement the record because "in *Harris* and its progeny, the State was allowed to supplement the record where no Rule 651(c) certificate was ever filed." *Id*. at 247. Thus, the defendant argued, supplementing the record with an additional certificate would "effectively contradict[] the one previously filed." *Id*. The appellate court rejected that argument, concluding "that the supplemental certificate remedies a material omission from the existing record - the fact that postconviction counsel consulted with [the petitioner] about his claims that he was deprived of his constitutional rights." *Id*. at 247-48. Thus, the appellate court allowed the record to be supplemented. *Id*. at 248.

Similarly, in this case, remand would enable Char to remedy material omissions from his original proof of mailing. Namely, he would be able to clarify the alleged deficiencies identified by the Fourth District that precluded it from finding the motion to reconsider to have been timely filed. See *Shunick*, 2022 IL App (4th) 220019, ¶¶ 18-22.

The Fourth District's analysis purporting to show its lack of authority to remand is a house of cards, and it topples over upon the slightest contact being made with its shaky foundation. The court stated:

> "For three reasons, we have difficulty squaring *Cooper* with precedent. First, [*People v. Blalock*, 2012 IL App (4th) 110041,] held that because the postjudgment motion in that case lacked a sufficient certificate of service at the time the motion was filed, the date of the circuit clerk's file stamp was to be treated as the date of filing and, as a result, the defendant's motion was untimely. In other words, the file stamp was deemed, on appeal, to be definitive. Second, a circuit court lacks jurisdiction to rule upon an untimely postjudgment motion. Third, in any case in which the circuit court ruled upon an untimely postjudgment motion, the appellate court's jurisdiction is limited to vacating the trial court's ruling on the motion and to dismissing the motion." *Shunick*, 2022 IL App (4th) 220019, ¶ 23 (citations and quotations omitted).

Blalock must be examined because its holding was the foundation upon which rested the remaining analysis. There, the circuit court revoked the defendant's probation and sentenced him to prison. *Blalock*, 2012 IL App (4th) 110041, ¶ 1-2. Thirty-three days later, the defendant *pro se* filed a motion to reduce his sentence. *Id*. ¶ 3. An appointed attorney eventually filed a supplemental motion that was denied, after which the defendant appealed. *Id*. ¶ 3.

The appellate court determined the *pro se* motion had been untimely. *Id*. ¶¶ 5-11. In so doing, the court declined the defendant's request that it treat both a legible postmark that demonstrated the motion had been timely mailed,

as well as a "sheet of paper containing [a] notarized sworn statement, notice of filing, and affidavit of service[,]" as competent evidence of timely mailing. *Id.* ¶¶ 7, 9, 11. The court concluded, "Because defendant failed to comply with [Rule 12], his motion for reduction of sentence is considered filed on *** the date on which the circuit court clerk file-stamped it. As a result, the defendant's motion was untimely." *Id.* ¶ 11. The appellate court did, however, go on to address the merits of the appeal, determining the circuit court had been revested with jurisdiction over the untimely motion by the parties' active participation in related proceedings. *Id.* ¶¶ 12-25.

Clearly though, *Blalock* did not address whether the appellate court had authority under Rule 615(b)(2) to order a remand to establish compliance with Rule 12. "[A] judicial opinion must be read as applicable only to the facts involved, and it is an authority only for what is actually decided." *People v. Trimarco*, 364 Ill. App. 3d 549, 556 (2d Dist. 2006) (McLaren, J., dissenting). Put more plainly, this means "a case is important only for what it decides[.]" *Trimarco*, 364 Ill. App. 3d at 556 (McLaren, J., dissenting). As a result, because the propriety of remand was not "actually decided" in *Blalock*, that case did not impede the Fourth District's ability to order a remand in this case.

And given the demonstrated inapplicability of *Blalock*, the remainder of the Fourth District's analysis tumbles to the wayside. Since the possibility of remand was not foreclosed, there was nothing actually "definitive" about the untimeliness of Char's motion to reconsider. *Cf. Shunick*, 2022 IL App (4th) 220019, ¶ 23. And since it is not definite that the motion was untimely, this Court's guidance in *People v. Bailey*, 2014 IL 115459, ¶¶ 28-29, about vacating the circuit court's ruling on an untimely motion and dismissing, is not yet applicable. *Cf. id.* Therefore, the Fourth District's hands were not bound in the manner it professed them to be, and it could have ordered a limited remand.

D.

Conclusion

In sum, this Court's rules vest the appellate court with the authority necessary to remand a case for further factual development. See *Cooper*, 2021 IL App (1st) 190022, ¶¶ 21-22. Therefore, were this Court to find a lack of substantial compliance with Rule 12(b)(6) in this case, this Court should expressly endorse *Cooper*, overrule the Fourth District, and remand to the circuit court for additional fact-finding relative to the timeliness of Char's motion to reconsider. See Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967).

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.

If this Court rejects both Argument I and Argument II, this Court should exercise its supervisory authority by remanding the case to the Fourth District with directions for it to treat both the reconsideration motion and notice of appeal as having timely been filed and to thereafter address the merits of this appeal. The circumstances of this case demonstrate that, should Char's other arguments be rejected, this would be the most just result.

A.

Scope of this Court's supervisory authority

The Illinois Constitution grants this Court "[g]eneral administrative and supervisory authority over all courts" in this state. Ill. Const. 1970, art. VI, §16. This "supervisory authority is unlimited in extent and hampered by no specific rules or means for its exercise. It is bounded only by the exigencies which call for its exercise." *In re Estate of Funk*, 221 Ill. 2d 30, 97–98 (2006).

B.

The peculiar circumstances of this case call for exercise of this Court's supervisory authority.

Should this Court reject the arguments presented in the preceding sections of this brief, the exigencies of this case call for the exercise of supervisory authority. Upon the filing of a motion to reconsider his sentence, (C 153), the circuit court put Char on the spot, offering him a deal for a reduced sentence, the acceptance of which resulted in a waiver of the right to a direct appeal. (R 563-64) The terms

of that deal, however, expressly allowed Char to pursue post-conviction relief. (R 564) Despite such terms, the post-conviction judge summarily dismissed Char's *pro se* petition in an order entered on September 30, 2021. (C 168-69); see *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 8 ("Here, the trial court's written order was dated November 5, 2008, but it was not publicly expressed at the situs of the proceeding until it was filed with the clerk on November 10, 2008."). That ruling was based, in part, on Char having "received the benefit of the bargain with the reduction of his sentence." (C 169)

Thereafter, Char filed a motion to reconsider that was file-stamped 34 days after the summary dismissal order. (C 170-73) Attached to that motion was a good-faith attempt at compliance with Rule 373 and Rule 12(b)(6), in which Char meant to "certify" that he placed the motion in the institutional mailbox 26 days after judgment addressed to both the circuit clerk and state's attorney of Knox County. (C 174); see Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017); Ill. S. Ct. R. 373 (eff. July 1, 2017). And the record corroborates that Char, in fact, did mail his documents to the clerk as demonstrated by that office's receipt and file-stamping of the motion. (C 170) While the judge treated the motion as timely filed, the Fourth District, on appeal, vacated that ruling and dismissed the motion as untimely. *People v. Shunick*, 2022 IL App (4th) 220019, ¶¶ 23-26. The Fourth District's ruling had the effect of affirming the summary dismissal order.

Given these circumstances, Char's post-conviction claims of constitutional error infecting his conviction and sentence will be lost to the procedural ether. "[O]nly one postconviction proceeding is contemplated under the Act[,]" *People v. Robinson*, 2020 IL 123849, ¶ 42, which means Char cannot include in a successive

petition those claims raised in the initial petition. See *People v. Flores*, 153 Ill. 2d 264, 281 (1992) ("Because this issue could have been raised in defendant's first post-conviction petition, it is *res judicata*."). Thus, given that Char will otherwise lose his right to pursue post-conviction relief, this case presents circumstances deserving of this Court's exercise of its supervisory authority.

C.

Conclusion

If this Court rejects Arguments I and II, this Court should exercise its supervisory authority by remanding the case to the Fourth District with directions for it to treat both the reconsideration motion and notice of appeal as having timely been filed and to thereafter address the merits of this appeal. The peculiar circumstances of this case, and Char's inability to seek relief in a successive post-conviction petition, warrant 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,

CATHERINE K. HART
Deputy Defender

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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 forty-four pages.

/s/Austin Wright
AUSTIN WRIGHT
ARDC No. 6329028
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Char M. Shunick, No. 129244

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 4 of 4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

Report of Proceedings

E-FILED
Transaction ID: 4-22-0019
File Date: 2/24/2022 2:17 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-22-0019
	)	Circuit Court No: 2016CF27
	)	Trial Judge: Hon Raymond A Cavanaugh
v	)	
	)	
	)	
SHUNICK, CHAR M	)	
Defendant/Respondent	)	

EXHIBITS - TABLE OF CONTENTS

Page 1 of 1

Party	Exhibit #	Description/Possession	Page No
People	1	EXHIBIT 1	E 2 - E 2
People	2	DVD OF THE 1-16 HARD COPIES THAT WAS ADMITTED	E 3 - E 3
People	2	EXHIBIT 2	E 4 - E 4
People	3	EXHIBIT 3	E 5 - E 5
People	4	EXHIBIT 4	E 6 - E 6
People	5	EXHIBIT 5	E 7 - E 7
People	6	EXHIBIT 6	E 8 - E 8
People	7	EXHIBIT 7	E 9 - E 9
People	8	EXHIBIT 8	E 10 - E 10
People	9	EXHIBIT 9	E 11 - E 11
People	10	EXHIBIT 10	E 12 - E 12
People	11	EXHIBIT 11	E 13 - E 13
People	12	EXHIBIT 12	E 14 - E 14
People	13	EXHIBIT 13	E 15 - E 15
People	14	EXHIBIT 14	E 16 - E 16
People	15	EXHIBIT 15	E 17 - E 17
People	16	EXHIBIT 16	E 18 - E 18
People	17	DVD GPS DATA - SENT VIA US MAIL ON 3/9/2022	E 19 - E 19
People	18	EXHIBIT 18	E 20 - E 21
People	19	BAGS CONTAINING COCAINE - RETAINED BY CIRCUIT	E 22 - E 22

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
	)	**Case No. 16-CF-27**
vs.	)	
	)	
CHAR M. SHUNICK,	)	
Defendant,	)	

Order Dismissing Post-Conviction Petition

On September 20, 2021, the Defendant filed a Verified Petition for Post-Conviction Relief. Although the statute is not included in the Petition, it is presumed to be filed under 725 ILCS 5/122-1.

In a noncapital case, the trial court examines the petition, without input from the State, only to determine if it alleges a constitutional deprivation, unrebutted by the record, rendering the petition neither frivolous or patently without merit. People v. Phyfiher, 361 Ill. App. 3d 881 (1st Dist. 2005). The Court finds this Petition as frivolous and patently without merit for the following reasons:

1. In the Petition, the Defendant's claim is that his attorney, Ms. Elisa Nelson, had a Per se conflict of interest in her presentation of the defendant.

   It is clear from a simple review of the court file that on July 10, 2019, Ms. Nelson was allowed to withdraw as attorney for Defendant when attorney Patrick E. Halliday entered his appearance for the Defendant. Even though the case was scheduled for bench trial on that date, the matter was continued until a bench trial was held on December 30, 2019, with Attorney Halliday representing the Defendant at trial. The allegation of a conflict by Attorney Nelson is immaterial since she did not represent the Defendant at trial and this issue is patently without merit.

2. The Defendant additionally claims other issues, such as the denial of his Motion to Suppress Evidence, as a basis of this post-conviction motion.

   A simple review of the court file reveals that on July 1, 2020, the Defendant was

represented by Attorney Maureen Williams at a Motion for New Trial and Sentencing Hearing. On that date, Defendant was sentenced to 16 years IDOC to be served at 75% for truth in sentencing purposes. Subsequently, on August 26, 2020, the Defendant was resentenced after a hearing on Motion to Reconsider Sentence was filed by Attorney Williams. At that time, the Defendant was resentenced to 9 years IDOC to be served at 75%. In exchange, the Order clearly shows that the Defendant knowingly and voluntarily waived his right to direct appeal.

When this waiver of the Defendant's Right to Direct Appeal was made, he received the benefit of the bargain with the reduction of his sentence. This agreement binds the Defendant as well as the State and is required to be enforced. People v. Fearing, 110 Ill. App. 3d 643(4th Dist. 1982) and People v. Nichols, 143 Ill. App. 3d 673 (2nd Dist. 1986).

Based on the foregoing, the Post-Conviction Petition is dismissed in its entirety with prejudice.

Dated: 9/29/21

Raymond A. Cavanagh
Circuit Judge

FILED
KNOX CO., IL
SEP 30 2021
KELLY CHEESMAN
Clerk of the Circuit Court
Deputy

C 169

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
KNOX COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
	)	**Case No. 16-CF-27**
vs.	)	
	)	
CHAR M. SHUNICK,	)	
Defendant,	)	

ORDER

The Defendant has filed a Motion to Reconsider the Court's Dismissal of his Post-Conviction Motion with Prejudice on September 21, 2021. The Court has reviewed this Motion and finds as follows:

1. The Motion to Reconsider is denied.
2. This ruling may be appealed as a Final Order and is dispositive of Defendant's Post Conviction Petition.
3. All motions and orders will be forwarded to the Knox County State's Attorney for their determination as to whether they will seek to reinstate the Defendant's initial sentence of 16 years IDOC.

Dated: 12/13/21

Raymond G. Cavanagh
Circuit Judge

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KNOX CO., IL
DEC 14 2021
KELLY CHEESMAN
Clerk of the Circuit Court
Deputy

E-FILED
Transaction ID: 4-22-0019
File Date: 1/11/2022 4:00 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-22-0019

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

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

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Char M. Shunick
Appellant's Address:	Dixon Correctional Center 2600 North Brinton Avenue Dixon, IL 61021
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Manufacture and Delivery of Cocaine
Date of Judgment or Order:	September 30, 2021; December 13, 2021 (entered); December 14, 2021 (file-stamped)
Sentence:	9 years in prison
Nature of Order Appealed:	Dismissal of Post-Conviction Petition and Denial of Motion to Reconsider

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

2022 IL App (4th) 220019

NO. 4-22-0019

Rule 23 filed October 13, 2022

Modified upon denial of Rehearing December 7, 2022

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHAR M. SHUNICK, Defendant-Appellant.	) Appeal from the) Circuit Court of) Knox County) No. 16CF27)) Honorable) Raymond A. Cavanaugh,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court, with opinion.
Justices Steigmann and Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Char M. Shunick, is serving a sentence of imprisonment in Dixon Correctional Center in Dixon, Illinois, for a drug offense. He petitioned for postconviction relief, and the circuit court of Knox County summarily dismissed his petition. He moved for reconsideration, and the court denied the motion. He appeals. We conclude that because the motion for reconsideration was untimely, the notice of appeal likewise was untimely, and consequently, we lack jurisdiction to address the merits of this appeal. Our authority is limited to vacating the ruling on the motion for reconsideration and ordering the dismissal of the motion. We do so.

¶ 2 I. BACKGROUND

¶ 3 On December 30, 2019, in a bench trial, the circuit court found defendant guilty of unlawfully possessing, with the intent to deliver, a controlled substance (720 ILCS 570/401(a)(2)(B) (West 2018)).

¶ 4 On August 26, 2020, the circuit court sentenced defendant to imprisonment for nine years.

¶ 5 On September 20, 2021, defendant filed a *pro se* petition for postconviction relief.

¶ 6 On September 30, 2021, the circuit court entered an order summarily dismissing the petition "in its entirety with prejudice." See 725 ILCS 5/122-2.1(a)(2) (West 2020). The docket entry for that date notes that a "C/C" (courtesy copy) of the summary dismissal order was sent to defendant.

¶ 7 Defendant afterward filed a document titled "Motion to Reconsider and Leave to Amend Petition for Post Conviction Relief Under 725 ILCS 5/122-1." In this motion, which the circuit clerk file-stamped on November 3, 2021, defendant "move[d] the Honorable court to reconsider its dismissal with prejudice, and allow him to leave to amend the petition."

¶ 8 The final page of the motion for reconsideration was a "Certificate of Service," which, above defendant's signature, read as follows:

> "This is to certify That I have on this date served true and correct copies of the foregoing to:
>
> Clerk of the Circuit Court of Knox County and;
>
> Knox County State's Attorney
>
> 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."

¶ 9 On December 13, 2021, the circuit court signed an order denying the motion for reconsideration. The order is file-stamped December 14, 2021.

¶ 10 On January 5, 2022, defendant filed a notice of appeal.

¶ 11 On January 11, 2022, he filed an amended notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 Neither party questions our jurisdiction to decide the merits of this this appeal. Even so, we have an independent duty to make sure we have such jurisdiction. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008); *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009).

¶ 14 For us to reach the merits, a party had to file in the circuit court a notice of appeal that was timely. See *id.* To assess the timeliness of a notice of appeal in a postconviction case, we turn to the rules applicable to criminal appeals. Illinois Supreme Court Rule 651(d) (eff. July 1, 2017) provides, "The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals." Under Illinois Supreme Court Rule 606(b) (eff. Mar. 12, 2021), which governs criminal appeals,

> "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."

¶ 15 The next question, therefore, is what is the deadline for filing, in a postconviction proceeding, a motion directed against the judgment. We answer that question by analogizing to criminal cases. See Ill. S. Ct. R. 651(d) (eff. July 1, 2017). The final judgment in a criminal case is the sentence. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984). The defendant in a criminal case

has 30 days after the final judgment (that is, after the sentence) to file any motion directed against that judgment. See 730 ILCS 5/5-4.5-50(d) (West 2020). Correspondingly, in a postconviction proceeding, if the defendant wishes to file a motion directed against a summary dismissal—which likewise is a final judgment—the defendant must file the motion within 30 days after the entry of the summary dismissal order. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2006).

¶ 16 The circuit court in the present case entered the summary dismissal order on September 30, 2021. Assuming, for the sake of argument, that defendant's ensuing motion for reconsideration qualified as a motion directed against the judgment (but see *Fultz v. Haugan*, 49 Ill. 2d 131, 136 (1971) (holding that "[t]he motion for leave to amend is not a motion directed against the judgment")), the motion for reconsideration, judging by its file stamp, was untimely. We count 34 days from the date when the summary dismissal order was entered (September 30, 2021) to the date of the file stamp on the motion for reconsideration (November 3, 2021). See 5 ILCS 70/1.11 (West 2020) (explaining how to "compute[ ]" "[t]he time within which any act provided by law is to be done").

¶ 17 We are aware that the prison mailbox rule can overcome a file stamp. However, an incarcerated person who wants to rely on the prison mailbox rule must provide an adequate proof of service. Illinois Supreme Court Rule 12(b)(6) (July 1, 2017) lays down some specific requirements for the proof 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 [(735 ILCS 5/1-109 (West 2020))] 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."

"To rely on the date of mailing as the filing date," the incarcerated defendant must "provide proof of mailing by filing a proof of service that complies with" the rule quoted above. *People v. Shines*, 2015 IL App (1st) 121070, ¶ 33. Otherwise, "the date the circuit clerk's office file-stamped the motion controls." *People v. Blalock*, 2012 IL App (4th) 110041, ¶ 7.

¶ 18 The proof of service at the end of defendant's motion for reconsideration suffers from two deficiencies. First, it lacks a "certification under section 1-109 of the Code of Civil Procedure [(735 ILCS 5/1-109 (West 2020))]." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017). A certification under section 1-109 must be

> "in substantially the following form: 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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true." 735 ILCS 5/1-109 (West 2020).

The proof of service in defendant's motion for reconsideration contains no language resembling that prescribed by section 1-109.

¶ 19 In his petition for rehearing, defendant points out that a certification under section 1-109 need be only "substantially" in the form that section 1-109 prescribes. See *id.* He maintains that by "certify[ing] that the statements in the certificate of service [were] true," he satisfied this substantiality requirement. We are unconvinced. In his certificate of service, defendant used only one word from section 1-109: "certif[y]." See *id.* To be "substantially in the *** form" of the

certification language in section 1-109, a certificate of service must "contain[ ] the substance or main features" of that language. (Internal quotation marks omitted.) *People ex rel. Davis v. Chicago, Burlington & Quincy R.R. Co.*, 48 Ill. 2d 176, 183 (1971) (so construing a "Highway Code provision" requiring that a "ballot 'be substantially in the following form' "). A main feature of section 1-109 is the enforcement of truthfulness in the making of a statement. To that end, section 1-109 calls for the express self-subjection of the certifier to criminal liability should the statement contain a deliberate falsehood. Therefore, if a certificate of service—like the certificate of service in defendant's motion for reconsideration—lacks language making the certification subject to the penalties in section 1-109, the certificate lacks a main feature of that section and, thus, is not substantially in the form that section requires.

¶ 20 Second, the certificate of service in defendant's motion for reconsideration fails to "stat[e] *** the complete address to which the document was to be delivered." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017). This omission, defendant argues, was a minor defect. He quotes a passing remark in *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987), that "minor defects will be excused." The appellate court, however, has rejected the suggestion that a "defendant's failure to include *any* address to which his motion was sent is *** merely a 'minor defect.' " (Emphasis in original.) *People v. Liner*, 2015 IL App (3d) 140167, ¶ 17.

¶ 21 In sum, for the two reasons we have explained, we conclude that the certificate of service in defendant's motion for reconsideration fails to comply with Rule 12(b)(6). Consequently, "the date the circuit clerk's office file-stamped the motion controls," and the motion is untimely. *Blalock*, 2012 IL App (4th) 110041, ¶ 7. Because an untimely postjudgment motion fails to toll the 30-day period for filing a notice of appeal, the notice of appeal is untimely as well, and we lack jurisdiction to address the substantive merits of this appeal. See Ill. S. Ct. R. 606(b)

(eff. Mar. 12, 2021); Ill. S. Ct. R. 651(d) (eff. July 1, 2017); *Secura*, 232 Ill. 2d at 213; *People v. Orahim*, 2019 IL App (2d) 170257, ¶ 12.

¶ 22 Even if that were the case, defendant argues in his petition for reconsideration, dismissal of the appeal need not be the outcome. He urges us, instead, to provide the remand remedy in *People v. Cooper*, 2021 IL App (1st) 190022 (subject to revision or withdrawal). In *Cooper*, the defendant was in prison, and his *pro se* motion to withdraw his guilty plea, which lacked a certificate of service, was file-stamped one day after the expiration of the 30-day deadline for filing a postplea motion. *Id.* ¶ 5. The circuit court denied the motion both because the motion was untimely and also because the motion lacked substantive merit. *Id.* The defendant appealed, and the appellate court held that because the defendant filed his notice of appeal within 30 days after the circuit court's denial of his postplea motion, the appellate court had jurisdiction over the appeal. *Id.* ¶ 8. "[W]hile retaining jurisdiction" (internal quotation marks omitted) (*id.* ¶ 22), the appellate court remanded the case with directions to (1) allow the defendant an opportunity to demonstrate compliance with the prison mailbox rule by supplying a certificate of service that satisfied Rule 12(b)(6) and section 1-109, if he was "able to truthfully do so," and (2) appoint postplea counsel if the defendant was able to supply such a certificate of service. *Id.* ¶ 24.

¶ 23 For three reasons, we have difficulty squaring *Cooper* with precedent. First, *Blalock* held that because the postjudgment motion in that case lacked a sufficient certificate of service at the time the motion was filed, the date of the circuit clerk's file stamp was to be treated as the date of filing and, "[a]s a result, [the] defendant's motion was untimely." *Blalock*, 2012 IL App (4th) 110041, ¶ 11. In other words, the file stamp was deemed, on appeal, to be definitive. Second, a circuit court lacks jurisdiction to rule upon an untimely postjudgment motion. See *People v. Flowers*, 208 Ill. 2d 291, 303 (2003); see also *People v. Haldorson*, 395 Ill. App. 3d 980, 983

(2009). Third, in any case in which the circuit court ruled upon an untimely postjudgment motion, the appellate court's jurisdiction is " 'limited' " to "vacat[ing] the trial court's ruling on the motion and to dismiss[ing] the motion." *Orahim*, 2019 IL App (2d) 170257, ¶ 12 (quoting *People v. Bailey*, 2014 IL 115459, ¶ 29).

¶ 24 The supreme court's guidance used to be that if the postjudgment motion and, consequently, the notice of appeal were untimely, the appellate court should vacate the circuit court's judgment and dismiss the appeal. See *Flowers*, 208 Ill. 2d at 307. More recently, though, the supreme court has held that dismissing the appeal would not be the right course of action, because such a dismissal would "effectively leave[ ] the lower court's ruling on the merits undisturbed and intact"—an inappropriate outcome, considering that the trial court lacked jurisdiction to rule on the merits of the untimely postjudgment motion and, thus, its ruling was void. *Bailey*, 2014 IL 115459, ¶ 28; see also *In re N.G.*, 2018 IL 121939, ¶ 18 (holding that "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void" (internal quotation marks omitted)). In such a case, the supreme court explained in *Bailey*, the appellate court has jurisdiction, but the appellate court was limited to vacating the trial court's ruling on the untimely motion and dismissing the motion. *Bailey*, 2014 IL 115459, ¶ 29. Therefore, instead of following *Cooper*, as defendant invites us to do, we follow *Bailey* by denying his petition for rehearing, vacating the circuit court's ruling on the untimely motion for reconsideration, and ordering the dismissal of the motion. See *Orahim*, 2019 IL App (2d) 170257, ¶ 12.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we vacate the circuit court's ruling on the motion for reconsideration, and we order the dismissal of the motion.

¶ 27 Order vacated; motion dismissed.

People v. Shunick, 2022 IL App (4th) 220019

Decision Under Review:	Appeal from the Circuit Court of Knox County, No. 16-CF-27; the Hon. Raymond A. Cavanaugh, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Catherine K. Hart, Salome Kiwara-Wilson, and Roxanna A. Mason, of State Appellate Defender's Office, of Springfield, for appellant.
Attorneys for Appellee:	Jeremy S. Karlin, State's Attorney, of Galesburg (Patrick Delfino, David J. Robinson, and Brittany J. Whitfield, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

2015 IL App (1st) 142923-U

FIRST DIVISION
NOVEMBER 23, 2015

No. 1-14-2923

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee for the Registered Holders of LSTAR Commercial Mortgage Trust 2011-1, Commercial Mortgage Pass-Through Certificates, Series 2011-1,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No.14 CH 8961
BLUE ISLAND PLAZA, LLC, an Illinois limited liability company; PAUL TSAKIRIS,	)	
Defendants-Appellants	)	
(Unknown Owners and Non-Record Claimants, Defendants).	)	Honorable Allen Price Walker, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the plaintiff mortgagee's request to appoint a receiver over the mortgagor's non-residential property pending foreclosure proceedings. The request for a receiver was supported by a "sworn pleading," as required under section 15-1706(a) of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1706 (West 2012). In addition, the trial court properly found that the

> mortgagee had shown a "reasonable probability" of success in this action, as required under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 5/15-1701(b)(2) (West 2012). The mortgagor's asserted affirmative defenses and counterclaims also did not preclude the appointment of a receiver.

¶ 2 In this mortgage foreclosure action, the defendants-appellants Blue Island Plaza LLC (Blue Island) and Paul Tsakiris (together, the defendants) appeal from an order appointing a receiver over non-residential real property owned by Blue Island.

¶ 3 BACKGROUND

¶ 4 This foreclosure action was initiated in May 2014 by the plaintiff-appellee Wells Fargo Bank, National Association, as Trustee for the Registered Holders of LSTAR Commercial Mortgage Trust 2011-1, Commercial Mortgage Pass-Through Certificates, Series 2011-1 (Wells Fargo). The action is premised upon alleged defaults under three promissory notes and three corresponding mortgages, evidencing loans to three separate entities: Blue Island, 76th & Jeffrey Bldg., LLC (Jeffrey) and Calcity, LLC (Calcity). All of the relevant loan documents were executed on the same day in August 2006 in favor of the original lender, Citibank, FSB (Citibank), who is not a party to this action. Tsakiris signed the loan documents on behalf of each of Blue Island, Jeffrey, and Calcity.

¶ 5 Wells Fargo's complaint attached the loan documents, which evidence the following transactions. On August 3, 2006, Blue Island executed a promissory note in favor of Citibank in the principal amount of $2.15 million (the Blue Island note). The Blue Island note specifies that it is secured by a mortgage "of even date therewith" on property at 12601 S. Western Avenue, Chicago, Illinois[1] (the Blue Island property). An exhibit to the Blue Island note states that it is

[1]The loan documents are inconsistent in stating whether the Blue Island property is in Chicago or Blue Island, Illinois. However, they are consistent in describing the street address as 12601 S. Western Avenue and in identifying the zip code as 60406.

further secured by mortgages made by Jeffrey and Calcity on two additional properties located at 7615-29 S. Jeffrey in Chicago, Illinois (the Jeffrey property) and 1555-77 Sibley Boulevard in Calumet City, Illinois (the Calcity property).

¶ 6 Also on August 3, 2006, Blue Island executed a mortgage in favor of Citibank (the Blue Island mortgage), which encumbered the Blue Island property as security for the Blue Island note. Tsakiris signed the Blue Island mortgage on behalf of Blue Island. Following the signature pages, appended to the Blue Island mortgage is a page entitled "Rider to Mortgage #02-8435984" (the rider), which states:

> "This rider is made this August 3, 2006 and is incorporated into and shall be deemed to amend and supplement the Mortgage of the same date (the 'Mortgage') given by the undersigned (the 'Borrower') to secure the Borrower's note to Citibank Federal Savings Bank, Chicago, Illinois (the 'Lender') of the same date (the 'Note') and covering the property at: 12601 S. Western Avenue[,] Blue Island, IL 60406[.]
>
> In addition to the covenants and agreements made in the Mortgage[,] Borrower and Lender further covenant and agree as follows:
>
> 1. In addition to the Mortgage, the Note is secured by mortgages from 76th & Jeffrey Bldg., LLC and Calcity, LLC to the Lender of the same date described therein and located at:

7615-29 S. Jeffrey, Chicago, IL 60649 [and]

1555-77 Sibley Blvd., Chicago, IL 60409[.]

2. A default or event of default under the Collateral Mortgages shall also be a default under this mortgage."

The rider contains a signature (which resembles the signatures by Tsakiris on other loan documents), but the rider does not indicate the name of the signer or the entity on whose behalf the signature was made.

¶ 7 On the same date as the Blue Island note and mortgage, Calcity executed a promissory note in favor of Citibank in the amount of $1 million (the Calcity note). The Calcity note specifies that it is secured by a mortgage encumbering the Calcity property. Also on the same date, a mortgage (the Calcity mortgage) was entered by *both* Calcity and Blue Island, which were together defined as the "Borrower," in favor of Citibank. The Calcity mortgage states that it encumbers both the Calcity property and the Blue Island property.

¶ 8 Also on August 3, 2006, Jeffrey entered into a third promissory note (the Jeffrey note) in favor of Citibank in the amount of $1.325 million. The Jeffrey note states that it is secured by a mortgage encumbering the Jeffrey property. An exhibit to the Jeffrey note also states that it is "further secured" by mortgages made by Calcity and Blue Island on the Calcity and Blue Island properties. On the same date, a third mortgage (the Jeffrey mortgage) was entered into by *both* Jeffrey and Blue Island, which were together defined as the "Borrower." The Jeffrey mortgage specifies that it encumbered both the Jeffrey property and the Blue Island property.[2]

[2]Notably, the Calcity and Jeffrey mortgages appear to inadvertently confuse the notes corresponding to each mortgage. That is, the Calcity mortgage recites that it is made to secure a loan in the amount of $1.325 million (which was the amount of the Jeffrey note). However, the

¶ 9 Wells Fargo's complaint alleges that in 2011 it became the holder of each of the three notes and mortgages originally executed in favor of Citibank, following transactions involving other entities. Specifically, in March 2011, each of the three notes was negotiated from Citibank to another entity, LSREF2 Chalk, LLC, pursuant to an allonge for each note. At the same time, Citibank also assigned each of the three mortgages to LSREF2 Chalk, LLC.

¶ 10 On June 30, 2011, the notes were negotiated, through additional allonges, from LSREF2 Chalk, LLC to a second entity, LSREF2 Chalk Depositor, LLC. On the same date, each of the three mortgages was also assigned to LSREF2 Chalk Depositor, LLC. Finally, additional documents also executed on June 30, 2011, show that the three notes were negotiated from LSREF2 Chalk Depositor, LLC to Wells Fargo through additional allonges. On the same date, the three mortgages were assigned from LSREF2 Chalk Depositor, LLC to Wells Fargo. The exhibits to Wells Fargo's complaint included documents that were alleged to contain true and correct copies of each of these allonges and assignments.

¶ 11 Wells Fargo's complaint alleges that, beginning in February 2013, Jeffrey and Calcity failed to make monthly payments due under their promissory notes, resulting in defaults under the Jeffrey and Calcity mortgages. In turn, Wells Fargo alleged, each of the defaults under the Jeffrey and Calcity mortgages also triggered a default under the Blue Island mortgage. Thus, the complaint alleges that Blue Island "is in default under the Blue Island Note and [Blue Island] mortgage based on the default by Jeffrey and Calcity."

Calcity note is for only $1 million. On the other hand, the Jeffrey mortgage recites that it secures a promissory note in the amount of $1 million (the amount of the Calcity note). However, the parties do not address this apparent error in their briefs.

¶ 12 Wells Fargo alleges that in May 2014, it notified Blue Island that it was exercising its option under the loan documents to declare the entire balance of the Blue Island note immediately due and payable. After Blue Island (and Tsakiris, as Blue Island's guarantor) failed to pay the outstanding balance, Wells Fargo initiated this action by filing its complaint in the circuit court of Cook County on May 28, 2014.

¶ 13 The complaint pleads a count for breach of guaranty against Tsakiris for failing to pay the amounts due from Blue Island under the Blue Island note. The complaint also seeks a judgment of foreclosure and sale of the Blue Island property[3] pursuant to defaults under each of the Blue Island, Calcity, and Jeffrey mortgages. Wells Fargo's prayer for relief also sought "[a]n order placing the mortgagee in possession or appointing a receiver" for the Blue Island property.

¶ 14 Although the complaint is not expressly pleaded as a "verified" complaint, it includes the following notarized statement following the prayer for relief:

> "Monica Knake, being first duly sworn on oath, deposes and says that she is the Assistant Vice President of Hudson Americas LLC, attorney-in-fact for the Plaintiff; that she has read the foregoing complaint; that she has knowledge of the contents thereof and that the same is true."

The statement is signed by Knake, dated May 23, 2014, and notarized by a Texas notary public.

¶ 15 Wells Fargo apparently encountered difficulty in attempting to serve the complaint upon the defendants. On June 12, 2014, Wells Fargo filed a "motion for service upon defendant by

[3]In this case, Wells Fargo seeks to foreclose upon the Blue Island property only. According to the defendants, Wells Fargo has also initiated separate actions seeking to foreclose upon the Jeffrey property and the Calcity property.

special order of court." In that motion, Wells Fargo averred that its process server had been unable to effectuate service despite multiple attempts to serve the defendants at Blue Island's office and at Tsakiris' home address, alleging "a pattern of evasion of service by Tsakiris" at these locations. On June 27, 2014, the trial court granted Wells Fargo leave to serve through mail to Blue Island's office and Tsakiris' home, as well as by leaving a copy of the summons and complaint at Blue Island's office. The record reflects that the defendants were served on July 2, 2014.

¶ 16 On July 15, 2014, Wells Fargo filed a petition for the appointment of a receiver over the Blue Island property. As in the complaint, the petition alleged that a default on the Blue Island mortgage had resulted from defaults on the Calcity and Jeffrey mortgages which, in turn, arose from Calcity and Jeffrey's failure to make payments due under their respective notes.[4] The petition alleged that the Blue Island property consisted of a retail shopping center and that the Blue Island mortgage authorized the appointment of a receiver to "take charge of the Property to collect the rents, issues and profits thereof."

¶ 17 The petition contended that the requirements for appointment of a receiver under the Illinois Mortgage Foreclosure Law (the Foreclosure Law) were met because the Blue Island mortgage specifically authorized the appointment of a receiver upon default, and because there was a "reasonable probability that [Wells Fargo] will prevail on its Complaint upon a final hearing of this cause." The petition stated that "under these circumstances, the law presumes that

[4]Notably, whereas the complaint alleged that Calcity and Jeffrey failed to make payments after February 2013, the petition alleged that they failed to make monthly payments after February *2014*.

the Lender is entitled to possession of the Property, and accordingly, to appointment of a receiver." The petition also identified Wells Fargo's designated receiver and attached his resume.

¶ 18 Similar to the complaint, Wells Fargo's petition for a receiver concluded with the following notarized statement:

> "Monica Knake, being first duly sworn on oath, deposes and says that she is the Assistant Vice President of Hudson Americas LLC, solely in its authorized capacity as special servicer for Plaintiff; that she has read the foregoing petition; that she has knowledge of the contents thereof and that the same is true."

¶ 19 On September 2, 2014, the defendants filed their answer to the complaint, as well as affirmative defenses and counterclaims. The defendants' answer admitted that the Blue Island mortgage secured the Blue Island note and that a true and correct copy of the Blue Island mortgage was attached to the complaint. The answer denied substantially all of the remaining allegations, including Wells Fargo's allegations of defaults by Calcity, Jeffrey, and Blue Island.

¶ 20 The defendants pleaded four affirmative defenses, the first of which claimed that Wells Fargo was not the legitimate holder of the Blue Island note. Specifically, the defendants disputed that the Blue Island note had been properly negotiated to Wells Fargo through the three allonges included with the complaint. The first affirmative defense emphasized that the same individual had executed the second and third allonges on the same day, June 30, 2011, and claimed that this individual was "counsel to Hudson Advisors, LLC and/or Hudson Americas, LLC." The defendants alleged that these allonges "were without authority and are void." Thus, the defendants claimed that Wells Fargo was not a holder of, and did not have the right to enforce, the Blue Island note.

¶ 21 As a second affirmative defense, the defendants denied that there had been any default under the Blue Island mortgage. The defendants disputed that a default under either the Calcity mortgage or Jeffrey mortgage also constituted a default under the Blue Island mortgage, claiming that the Blue Island note and mortgage "were not *** cross-collateralized or cross-defaulted with any other indebtedness."

¶ 22 The third and fourth affirmative defenses claimed that the Calcity and Jeffrey mortgages were invalid to the extent they purported to encumber the Blue Island property. The third affirmative defense claimed that the Calcity mortgage was "void" because it "cannot grant a mortgage over the Blue Island Property where Calcity LLC is not the owner of record of said property." Similarly, the fourth affirmative defense claimed that the Jeffrey mortgage was void because "Jeffrey LLC cannot grant a mortgage over the Blue Island property."

¶ 23 In the same pleading, the defendants also asserted counterclaims against Wells Fargo based on its contention that the Blue Island property could not be encumbered by either the Calcity or Jeffrey mortgages. The defendants noted that, although the Calcity mortgage listed the "Borrower" as *both* "Calcity, LLC and Blue Island Plaza, LLC," the signature block contained only one signature by Tsakiris. The defendants thus claimed that the Calcity mortgage "was executed only on behalf of Calcity LLC" and not by Blue Island. Similarly, the defendants' counterclaims noted that the signature block for the Jeffrey mortgage identifies the "Borrower" as both Jeffrey LLC and Blue Island LLC, but contains only a single signature. Thus, the defendants alleged that the Jeffrey mortgage "was executed only on behalf of Jeffrey LLC."

¶ 24 Accordingly, the defendants asserted that Blue Island had not executed either the Calcity or Jeffrey mortgages, such that they could not encumber the Blue Island property. The counterclaims thus included two counts to "quiet title," seeking a declaration that Wells Fargo

had no right, title or interest in the Blue Island property through either the Calcity or Jeffrey mortgage. Two additional counts similarly alleged "slander of title" against Wells Fargo for "wrongfully" seeking to foreclose on the Calcity and Jeffrey mortgages with respect to the Blue Island property.

¶ 25 Also on September 2, 2014, the defendants filed their opposition to Wells Fargo's petition to appoint a receiver, arguing that certain statutory prerequisites had not been met. First, the defendants claimed that Wells Fargo's petition was not "supported by affidavit or other sworn pleading" as required by section 15-1706 of the Foreclosure Law, (735 ILCS 15-1706 (a) (West 2012)), despite the notarized statements by Knake in the complaint and the petition for a receiver. The defendants argued that, although a corporation may verify pleadings through an officer or agent, Knake was "neither an officer nor an agent of Wells Fargo." The defendants contended that "without knowing more about the relationship between [Wells Fargo], Hudson Americas LLC, and Ms. Knake" the court could not assume that "an 'attorney-in-fact' has any first-hand knowledge regarding the underlying facts," including the alleged defaults. In addition, the defendants argued that the notarized statements were deficient because they did not "substantially comply" with the Code of Civil Procedure's requirements for the content of certifications accompanying a verified pleading or affidavit.

¶ 26 The defendants independently argued that Wells Fargo had failed to establish a "reasonable probability" that it would prevail on a final hearing, as required for a mortgagee to be entitled to possession under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 5/15-1701(b)(2) (West 2012). The defendants contended that Wells Fargo's allegations of default were insufficient to meet this standard, and that the mortgagee must *prove* the default with evidence before a receiver may be appointed. The defendants argued that Wells Fargo's

complaint and petition for a receiver had "failed to offer even a shred of evidence, either in the form of an affidavit or verification, which tends to prove the existence of an actual default."

¶ 27 The defendants further emphasized that the alleged default under the Blue Island mortgage was derivative of defaults under the Calcity and Jeffrey mortgages, and thus was predicated on the single-page rider to the Blue Island mortgage, "which purportedly cross-defaulted and cross-collateralized the Blue Island loan with the Calcity and Jeffrey loans." However, the defendants asserted several defects with the rider, noting that: the rider was not previously referenced in the Blue Island mortgage; the rider did not explicitly refer to "Blue Island LLC"; and that the rider failed to define the term "Collateral Mortgages." Thus, the defendants denied that a default under the Blue Island mortgage had resulted from any default under the Calcity or Jeffrey mortgages. Finally, the defendants argued that it would be premature to appoint a receiver because they had asserted affirmative defenses and counterclaims that had not yet been "adjudicated."

¶ 28 On September 10, 2014, the court entered an order appointing a receiver over the Blue Island property, after noting that the property consisted of a shopping center and was non-residential. The order noted that the Blue Island mortgage provides that the mortgagee may seek appointment of a receiver upon a default, and that the complaint alleged an event of default "pursuant to cross-default provisions in the [Blue Island] Mortgage and Note." The court found that: "Based on the allegations of the Complaint, the terms and provisions of the [Blue Island] Mortgage and Note, and the motion to appoint a receiver, there is a reasonable probability that [Wells Fargo] will prevail on a final hearing" and that "[t]he defendant has not shown good cause why the receiver should not be appointed." The court thus granted the petition and appointed the

receiver designated by Wells Fargo. On the same date, September 10, 2014, Blue Island filed a notice of appeal.

¶ 29 ANALYSIS

¶ 30 We note that we have appellate jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(2), which permits interlocutory appeals from orders granting the appointment of a receiver. Ill. S. Ct. R. 307(a)(2) (eff. March 20, 2009).

¶ 31 The applicable standard of review upon appointment of a receiver was discussed by our court in *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158 (2010). In that case, we explained that our standard of review is *de novo*, at least when the trial court has not made findings of fact following an evidentiary hearing. See *id.* at 165 ("although we apply a *de novo* standard of review in the instant case, it is foreseeable that in a case in which a trial court has held a full evidentiary hearing on a motion to appoint a receiver, this court could find that an abuse of discretion standard or a manifest weight of the evidence standard would be appropriate to review the lower court's judgmental decision."). As there is no indication that the trial court held such an evidentiary hearing in this case, we review its order *de novo.*

¶ 32 The defendants' appeal largely reiterates the arguments raised in their opposition to Wells Fargo's petition to appoint a receiver.

¶ 33 First, the defendants argue that Wells Fargo did not comply with section 15-1706 of the Foreclosure Law, which states: "A request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion, whether or not such request is included in the complaint or other pleading. Any such request shall be supported by affidavit or other sworn pleading." 735 ILCS 5/15-1706(a) (West 2012). The defendants contend that the notarized

statements accompanying the complaint and the petition for appointment of a receiver fail to satisfy the requirement of an "affidavit or other sworn pleading."

¶ 34 Specifically, the defendants assert a number of deficiencies in the notarized statements. Among these, they contend that the statements violate the Code of Civil Procedure (the Code), which states: "Corporations may verify by the oath of any officer or agent having knowledge of the facts." 735 ILCS 5/2-605 (West 2012). The defendants argue that: "Without knowing more about the relationship between [Wells Fargo], Hudson Americas LLC, and Ms. Knake, the Trial Court should not have assumed that an 'attorney-in-fact' has any first-hand knowledge regarding the underlying facts," including the alleged defaults in this case. The defendants further claim that without a copy of the power of attorney, "there was no basis for the Trial Court to determine how much weight it should give" the allegations of the complaint.

¶ 35 The defendants also contend that the notarized statements do not comply with section 1-109 of the Code. 735 ILCS 5/1-109 (West 2012). That provision, regarding "verification by certification," requires:

> "The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: 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, except as to matters therein stated to be true on information and belief and as to such matters the undersigned

> certifies as aforesaid that he verily believes the same to be true."
>
> 735 ILCS 5/1-109 (West 2012).

The defendants contend that the language used in Knake's notarized statements failed to "substantially comply" with this provision.

¶ 36 We are not persuaded by the defendants' attacks on the sufficiency of Knake's notarized statements. The Foreclosure Law simply requires that a request for a receiver "shall be supported by affidavit *or other sworn pleading*." (Emphasis added.) 735 ILCS 5/15-1706(a) (West 2012). Although the defendants did not submit an affidavit, the complaint and petition for a receiver included notarized statements in which Knake swore that she had personal knowledge of the truth of the allegations. Thus, we find that the "sworn pleading" requirement was met.

¶ 37 Specifically, we find that the defendants' reliance on the Code's requirement that a corporate verification must be "by oath of an officer or agent having knowledge of the facts" is unavailing. 735 ILCS 5/2-605(a) (West 2012). Assuming that this Code provision applies to requests for the appointment of a receiver, it was nonetheless satisfied because Knake's sworn statements indicated that she was, in fact, an agent of Wells Fargo "having knowledge of the facts." In particular, Knake's statement accompanying the complaint stated that she was an officer of Hudson America LLC, Wells Fargo's "attorney-in-fact," and the statement accompanying the petition for a receiver stated that Hudson America LLC was acting "in its authorized capacity as special servicer for Plaintiff." These statements clearly indicate that Hudson America LLC was an agent of Wells Fargo.

¶ 38 The defendants suggest that the court needed to "know[] more about the relationship" between Wells Fargo and Hudson Americas LLC, or that Wells Fargo should have "attach[ed] a copy of the power of attorney." However, they cite no authority suggesting that a corporation

must set forth evidence to *prove* the nature of the agency relationship asserted in such a verification. As Wells Fargo's appellate brief notes, such a requirement would upset longstanding pleading practices, and we decline to impose such an unprecedented burden.

¶ 39 We also decline to find that Knake's notarized statements were rendered defective by section 1-109 of the Code. That provision requires certifications to be in

> "substantially the following form: 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, except as to matters therein stated to be true on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true." 735 ILCS 5/1-109 (West 2012).

¶ 40 We acknowledge that Knake's notarized statements did not include portions of the model language set forth in section 1-109 of the Code. For example, they did not recite that the statements were made "under penalties as provided by law pursuant" to the Code, and did not include any language regarding statements made "on information and belief" (which is not surprising, as Wells Fargo did not assert any allegations "on information and belief.") However, we conclude that the notarized statements nonetheless complied with the main objective of section 1-109: they provided sworn verification that Knake had personal knowledge of the truth of the facts alleged. In both the complaint and petition for a receiver, Knake, "being first duly sworn on oath," stated that she read and had personal knowledge of the truth of the allegations therein. We believe that Knake's statements accomplished "substantial" compliance with the language of section 1-109, which is all that the Code requires.

¶ 41 We next address the defendants' contention that Wells Fargo failed to satisfy the "reasonable probability" requirement entitling it to possession under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 15-1701(b)(2) (West 2012). Under the Foreclosure Law, before a mortgagee's request for a receiver may be granted, the court must first find that the mortgagee is entitled to possession. 735 ILCS 5/15-1702 (West 2012) ("Whenever a mortgagee entitled to possession so requests, the court shall appoint a receiver.").

¶ 42 Section 15-1701 of the Foreclosure Law "govern[s] the right to possession of the mortgaged real estate during foreclosure." 735 ILCS 5/15-1701(a) (West 2012). Pursuant to section 15-1701(b)(2), "in mortgage foreclosure cases involving nonresidential real estate, a mortgagee is entitled to be placed in possession of the property prior to the entry of a judgment of foreclosure upon request, provided that the mortgagee shows (1) that the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. However, if the mortgagor objects and demonstrates 'good cause,' the court shall allow the mortgagor to remain in possession." *Bank of America v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 164 (2010) (quoting 735 ILCS 5/15-1701(b)(2) (West 2006)). The Foreclosure Law thus "creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding [citations], and a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so." *Id.*

¶ 43 In this case, the defendants argue that Wells Fargo failed to prove a "reasonable probability" that it will ultimately prevail in this action, and thus is not entitled to possession of the Blue Island property or the appointment of a receiver. The defendants rely largely on statements by our court that "a proven default establishes a reasonable probability of succeeding

in the mortgage foreclosure action." (Citations omitted.) *Id.* at 166 (holding that the "reasonable probability" requirement was satisfied where the mortgagor had entered into letter agreements expressly admitting events of default); see also *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010) ("[B]ecause a proven default establishes a reasonable probability of success in a mortgage foreclosure action [citations] and [defendant] has admittedly defaulted on its note, there is a 'reasonable probability' that [plaintiff] will prevail on a final hearing in this case.").

¶ 44 The defendants contend that Wells Fargo's allegations of default are insufficient, because Wells Fargo failed to *prove* a "reasonable probability" of success through an affidavit or other evidence. They complain that the petition to appoint a receiver did not attach "any affidavit *** laying foundation or supporting the factual assertions therein," and that there are "no sworn statements *** to substantiate [Wells Fargo's] theory of default" against Blue Island.

¶ 45 The defendants' argument on the "reasonable probability" requirement reiterate their previous contentions that Knake's notarized statements were defective. The defendants further argue that even if the allegations in Wells Fargo's complaint and petition are treated as verified pleadings, they nonetheless cannot *prove* an event of default because the Code provides that "[v]erified allegations do not constitute *evidence* except by way of admission." (Emphasis added.) 735 ILCS 5/2-605 (West 2012).

¶ 46 As a further basis to find that the "reasonable probability" requirement was not met, the defendants additionally attack Wells Fargo's theory that Blue Island's default arose from the defaults under the Calcity and Jeffrey mortgages. They claim that the count of the complaint seeking foreclosure of the Blue Island mortgage is "devoid of any specific factual allegations regarding the purported cross-defaults under the Calcity Note or the Jeffrey Note." Further, they

argue that the rider to the Blue Island mortgage——which states that "[a] default or event of default under the Collateral Mortgages shall also be a default under this mortgage"—is insufficient to effect a default under the Blue Island mortgage. The defendants conclude that Wells Fargo "failed to demonstrate a reasonable probability" of succeeding "because no evidence was introduced proving the existence of a default."

¶ 47 We disagree. To the extent that the defendants suggest that the submission of evidence is required to establish a "reasonable probability" for purposes of section 15-1701(b)(2), we find no such requirement in the Foreclosure Law beyond the "affidavit or sworn pleading" that must accompany the request for a receiver pursuant to section 15-1706. As discussed above, we have determined that the "sworn pleading" requirement was met in this case.

¶ 48 Although our court has stated that "a proven default establishes a reasonable probability of success" for purposes of section 15-1701(b)(2), we have *not* held that the "reasonable probability" threshold requires the submission of any evidence *beyond* sworn allegations and the applicable mortgage documents—both of which were submitted by Wells Fargo in this case. Significantly, our court has held that an affidavit from a mortgagee is sufficient to establish a "reasonable probability of success" in a foreclosure action. *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 869 (1993). That decision recognized that "a proven default establishes a reasonable probability of success," but proceeded to hold that the affidavit of a bank officer describing the events of default under the mortgage established the requisite "reasonable probability of success" supporting the bank's right to possession. *Id.*

¶ 49 We find that this case is analogous to *Mellon Bank*. Although Wells Fargo did not present an affidavit, it did present sworn pleadings in which Knake, as Wells Fargo's agent, verified that she had personal knowledge of the facts underlying Blue Island's alleged default.

Contrary to the defendants' argument, Wells Fargo's allegations did set forth the underlying payment defaults by Calcity and Jeffrey under their respective notes and mortgages and how those defaults, in turn, constituted defaults under the Blue Island mortgage. Moreover, the pleadings also attached the relevant documents — including the Blue Island mortgage and the rider thereto — that support Wells Fargo's allegations.

¶ 50 The defendants offer several purported reasons why the rider to the Blue Island mortgage "does not do that which [Wells Fargo] alleges," and claim that the rider is insufficient to support a default by Blue Island resulting from Jeffrey and Calcity's defaults. However, the defendants' arguments as to why the rider "failed to cross-default or collateralize the loans" are, at best, tenuous. We do not find that the defendants' arguments with respect to the rider are sufficient to preclude the finding that Wells Fargo has at least a "reasonable probability" of prevailing in this foreclosure action.

¶ 51 First, the defendants note that the Blue Island mortgage does not contain an express reference to the rider, relying upon the principle that "[p]arties may not incorporate another agreement into a contract without an express reference demonstrating an intent to incorporate the other agreement into the contract." *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240 (2010). *Peterson* held that two separate documents, even if executed on the same date by the same parties, would not be construed as one contract "when *neither* document clearly refers to or expressly incorporates the other document." (Emphasis added.) *Id.* at 245.

¶ 52 However, that is not the situation here. Although the Blue Island mortgage may not refer to the rider, the rider clearly and explicitly refers to the Blue Island mortgage. As acknowledged in the defendants' brief, the rider is entitled: "Rider to Mortgage #02-8435984." The first page of the Blue Island mortgage states that it is "Loan No.: 02-8435984." In fact, the same loan number

appears in the lower right-hand corner of each of the 23 pages of the Blue Island mortgage preceding the rider. Moreover, the rider states that it "is incorporated into and shall be deemed to amend and supplement the Mortgage of the same date *** covering the property at: 12601 S. Western Avenue[,] Blue Island, IL 60406." Although the mortgage elsewhere states the address of the Blue Island property as "12601 S. Western Ave., *Chicago*, IL 60406," the use of the same street address and zip code leaves little doubt that the rider refers to the Blue Island mortgage. For the same reasons, the defendants' contention that the rider "makes no reference to Blue Island Plaza, LLC" is also unpersuasive. Although the rider does not specifically name the Blue Island entity, it certainly refers to the Blue Island mortgage.

¶ 53 Moreover, while the defendants argue that the rider does not "contain any signature or acknowledgment by Blue Island Plaza, LLC," they are mistaken as the rider does contain a signature. Although no individual or entity is explicitly identified as the signer, it appears to be very similar to Tsakiris' signatures appearing on the numerous other loan documents that he executed on the same date on behalf of Blue Island, Calcity, and Jeffrey. Thus, it is at least reasonably probable that Wells Fargo will be able to establish that Tsakiris executed the rider on behalf of Blue Island.

¶ 54 The defendants additionally attack the effectiveness of the rider because the term "Collateral Mortgages" is not defined in conjunction with its statement that a default "under the Collateral Mortgages shall also be a default under this mortgage." However, the immediately preceding sentence in the rider refers to the "mortgages from 76th & Jeffrey Bldg., LLC and Calcity, LLC *** to the Lender of the same date described therein and located at 7615-29 S. Jeffrey, Chicago IL 60649 & 1555-77 Sibley Blvd., Chicago, IL 60409." As the rider clearly

references the Calcity and Jeffrey mortgages, the defendants' contention that the term "Collateral Mortgages" "remains unclear" is, at least, highly questionable.

¶ 55 In any event, although the parties may continue to dispute the meaning of the rider's language in subsequent proceedings, at this stage of the case, the trial court did not need to conclusively determine the effect of the rider before appointing a receiver. Rather, the court needed only to find a "reasonable probability" that Wells Fargo would prevail in a final hearing of the cause. Contrary to the defendants' suggestion that Wells Fargo had to *prove* the existence of a default, the Foreclosure Law simply does not impose such an evidentiary burden.

¶ 56 The drafters of the Foreclosure Law could have easily specified that, in order to be entitled to possession pending foreclosure, the mortgagee must prove that its likelihood of success in the action is "probable," or could have used even more demanding language. Instead, the statute requires only that the court find "a reasonable probability" of the mortgagee's eventual success. 735 ILCS 5/15-1701(b)(2) (West 2012). If so, "the mortgagee shall upon request be placed in possession" unless the mortgagor can "show good cause." *Id.*

¶ 57 In this case, we agree with the trial court that the loan documents, as well as Wells Fargo's sworn allegations, established at least a "reasonable probability" that Wells Fargo would ultimately prevail in this foreclosure action, and that the defendants failed to demonstrate "good cause" as to why a receiver should not be appointed. We thus reject the defendants' claim that appointment of a receiver was erroneous due to any failure to comply with section 15-1701(b)(2) of the Foreclosure Law.

¶ 58 Finally, we address the defendants' separate argument that the trial court erred in appointing a receiver because the defendants had pending affirmative defenses and counterclaims which denied the existence of any default and claimed that Wells Fargo lacked

"standing" to bring this action. The defendants urge that it was premature to appoint a receiver because the trial court had "not yet adjudicated the Affirmative Defenses and [Wells Fargo] had not yet responded to same."

¶ 59 Tellingly, the defendants cite no provision of the Foreclosure Law suggesting that a receiver may not be appointed simply because the mortgagor has pleaded affirmative defenses or otherwise denies a default. To the contrary, "the Foreclosure Law creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding," and "a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so." *108 N. State Retail LLC*, 401 Ill. App. 3d at 164; 735 ILCS 5/15-1701(b)(2) (West 2012).

¶ 60 The defendants cite only one case as support for their suggestion that the mortgagor's assertion of affirmative defenses may preclude the appointment of a receiver. However, that case is plainly inapplicable, as it concerned affirmative defenses that were deemed *admitted*. See *First Federal Savings and Loan Ass'n of Chicago v. National Boulevard Bank of Chicago*, 104 Ill. App. 3d 1061 (1982). In that foreclosure case, the mortgagee moved for possession but failed to respond to the mortgagor's pending affirmative defenses, which included breach of contract, unclean hands and fraud. *Id.* at 1062. Our court affirmed the trial court's denial of the mortgagee's request to be placed in possession, as the mortgagee had "admitted the truth of affirmative defenses raised in the foreclosure action" through its failure to respond. *Id.* at 1063 (noting that "there is more than a likelihood that defendants will succeed on the merits since plaintiff has admitted the truth of the affirmative defenses").

¶ 61 In this case, there is no indication that Wells Fargo had failed to timely respond to, or otherwise admitted, any portion of the defendants' affirmative defenses or counterclaims. In fact,

only eight days had passed from the defendants' filing of those claims and defenses on September 2, 2014 to the appointment of the receiver on September 10, 2014. Especially as the petition for appointment of a receiver had been pending since July 15, 2014, we decline to find that the pendency of the defendants' recently-filed affirmative defenses and counterclaims rebutted the "presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding." *108 N. State Retail LLC*, 401 Ill. App. 3d at 164. Thus, for the reasons discussed, we do not find any error in the trial court's appointment of a receiver for the Blue Island property.

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 63 Affirmed.

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No. 4-22-0019

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

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

PETITION FOR REHEARING FOR PETITIONER-APPELLANT

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ARGUMENT

I. In *sua sponte* dismissing Mr. Shunick's appeal due to a lack of jurisdiction, this Court overlooked *People v. Cooper*, 2021 IL App (1st) 190022, ¶ ¶ 19-22.

This Court dismissed Mr. Shunick's appeal for lack of jurisdiction because it found that the proof of service on his motion to reconsider was deficient, meaning that motion to reconsider the denial of his post-conviction petition was filed late, resulting in his notice of appeal being filed late. *People v. Shunick*, 2022 IL App (4th) 220019-U ¶ ¶ 17-20. The State did not challenge jurisdiction in its brief, and this Court did not ask the parties to brief this issue. In its order dismissing the appeal, this Court overlooked the Appellate Court's decision in *People v. Cooper*, 2021 IL App (1st) 190022, ¶ ¶ 19-22. In light of the holding in *Cooper*, this Court should grant rehearing and ultimately remand for the circuit court to provide Mr. Shunick with an opportunity to supply a certification complying with Illinois Supreme Court Rule 12(b)(6) and 735 ILCS 5/1-109 (2020) if he can truthfully do so. Such a remand would ensure that this Court does not rule on the merits of any claims over which it lacks jurisdiciton, while simultaneously safeguarding Mr. Shunick's right to meaningfully access the courts.

In *Cooper*, as in Mr. Shunick's case, the relevant motion was file-stamped by the circuit court clerk more than thirty days after the entry of the relevant judgment. *Cooper,* 2021 IL App (1st) 190022, ¶ 5. And, as in this case, the defendant in *Cooper* did not include a certificate of service with his motion that strictly complied with Rule 12(b)(6) and 735 ILCS 5/1-109 (2020). *Cooper,* 2021 IL App (1st) 190022, ¶ 18. But, the Appellate Court did not dismiss Mr. Cooper's appeal. *Id.* at ¶ ¶ 19-22.

Instead, the *Cooper* court ordered a limited remand. *Id.* It explained that nothing in Rule 12(b)(6) prohibits "a litigant from supplementing his filing with a certification proving the date and manner of mailing" and noted that such a practice was permitted under the common-law

mailbox rule. *Id.* at ¶ 21, citing *A.S. Schulman Electric Co., v. Village of Fox Lake*, 115 Ill. App. 3d 746, 748-50. The Appellate Court went on to remand the case to the circuit court "for the limited purpose of inquiring of Mr. Cooper when his motion was mailed" and to allow him to "supply a certification complying with Rule 12(b)(6) and section 1-109 of the Code that establishes the date and manner of mailing for his motion[.]" As Mr. Shunick's motion was only file-stamped four days late, with two of those days being a weekend, and because he did attach a certificate of service indicating that his post-judgment motion was mailed within 30 days of the entry of the final judgment in his case, this Court should grant rehearing and ultimately order a similar remand for Mr. Shunick to comply with Rule 12(b)(6).

II. In *sua sponte* dismissing Mr. Shunick's appeal, this Court overlooked the fact that Mr. Shunick substantially complied with Illinois Supreme Court Rule 12(b)(6) and 735 ILCS 5/1-109 (2020).

This Court dismissed Mr. Shunick's appeal for lack of jurisdiction because it found that the proof of service on his motion to reconsider was deficient, meaning that motion to reconsider the denial of his post-conviction petition was filed late, resulting in his notice of appeal being filed late. *People v. Shunick*, 2022 IL App (4th) 220019-U ¶ ¶ 17-20. The Court pointed to three alleged deficiencies: a failure to include the certification required by 735 ILCS 5/1-109 (2020), a failure to state the time of deposit, and a failure to state the complete address to which the document was to be delivered. *Shunick*, 2022 IL App (4th) 220019-U ¶ 19. In so doing, the Court dismissed Mr. Shunick's appeal because he failed to strictly comply with Supreme Court Rule 12(b)(6) and 735 ILCS 5/1-109. However, only substantial compliance is required, and Mr. Shunick substantially complied with the rule and statute. As such, rehearing is required.

The first alleged deficiency in the certificate is its alleged failure to include a certificate as proscribed by 735 ILCS 5/1-109. However, the plain language of that statute does not require strict compliance. Instead, the statute explicitly states that the certification need only be "substantially" in the proscribed form. *Id.* The proscribed form says:

> "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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true."

Id. Put more simply, the person must certify that the statements are true. So, in the context of a certificate of service, the litigant must certify that the statements in the certificate of service are true. Mr. Shunick did just that. His certificate says, "this is to certify [t]hat I have on this date served true and correct copies of the foregoing to" the circuit clerk and the State's Attorney

"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.". This statement certified the truthfulness of the documents that he mailed on October 26, 2021, including the certificate of service. As such, his certificate substantially complied with the statute.

The second purported deficiency deals with Mr. Shunick's alleged failure to state the "time" of mailing. Mr. Shunick complied with that requirement. Rule 12(b)(6) requires that, in the case of mail by an incarcerated *pro se* litigant, the certificate must state the "time and place of deposit" in the institutional mail. Ill. Sup. Ct. Rule 12(b)(6)(2020). Merriam-Webster defines "time" as "the measured or measurable period during which an action, process, or condition exists or continues" and "the point or period when something occurs." Available at: https://www.merriam-webster.com/dictionary/time (last accessed 27 Nov 2022). When Mr. Shunick wrote that he deposited the motion in the institutional mail on October 26, 2021, he stated the point at which that event occurred. Rule 12 does not state how specific the description of the time must be, merely that one must be included. As the purpose of the certificate is to establish what day the motion was mailed on, Mr. Shunick's statement of the date is sufficient.

The final alleged deficiency in Mr. Shunick's certificate was his failure to include the complete addresses of the parties served in the certificate. Mr. Shunick did not include those complete addresses in his certificate. But his certificate did list the proper Knox County parties, and the State has not claimed that it did not receive a copy of the motion. Proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12, but "minor defects will be excused." *Ingrassia v. Ingrassia*, 156 Ill. App.3d 483, 502 (2d Dist. 1987). In a case like this, involving a *pro se* incarcerated litigant, where the State has not asserted that it did not receive a copy of the motion, this minor defect should be excused. As such, this Court should grant rehearing.

Additionally, in this Court's order dismissing Mr. Shunick's petition, this Court overlooked at least two Appellate Court decisions holding that the Appellate Court had jurisdiction despite the defendants' failure to strictly comply with Rule 12. 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, even though the certificates of service were deficient.

In *Humphrey*, 2020 IL App (1st) 172837, the First District Appellate Court held that it had jurisdiction based on a postmark that established the time of mailing. 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 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. Similarly, in *Hansen*, 2011 IL App (2d) 081226, ¶ 4, the defendant failed to comply with a prior version of Rule 12's requirement that the certificate of service be notarized. Despite the certificate's deficiency, the Appellate Court held that the document in that case, a notice of appeal, was timely filed and thus the court had jurisdiction. *Id.* at ¶ 14.

These cases demonstrate that strict compliance with Rule 12 is not required for the Appellate Court to have jurisdiction. As such, this Court should grant rehearing.

CONCLUSION

For the foregoing reasons, Char M. Shunick requests that this Court grant rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 367(a) and (c). The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 367(a) certificate of compliance, and the certificate of service, is six pages.

/s/ Roxanna A. Mason
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Assistant Appellate Defender

No. 4-22-0019

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

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

NOTICE AND PROOF OF SERVICE

TO: Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org

Mr. Char M. Shunick, Register No. Y43017, Dixon Correctional Center, 2600 North Brinton Avenue, Dixon, IL 61021

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 October 28, 2022, the Petition for Rehearing was filed with the Clerk of the Appellate Court 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 appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid.

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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, Fourth Judicial District, 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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Mr. Char M. Shunick, Register No. Y43017, Dixon Correctional Center, 2600 North Brinton Avenue, Dixon, IL 61021

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 June 7, 2023, 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 appellant 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 Brief and Argument to the Clerk of the above Court.

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