

23-7077
No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: Porter Development Partners, L.L.C.

Debtor

WAYNE M. ENGLISH,

Petitioner,

V.

LOWELL T. CAGE, TRUSTEE,

Respondent.

FILED

MAR 21 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The courts, the statutes and the rules of the judiciary require under strict and unchangeable timelines that to move forward, to appeal, or to respond to appellate pleadings and orders, a party must submit and consummate their action within the relevant time parameters. Proceeding pro se, Petitioner Wayne English ("English") mailed his notice of appeal by USPS priority mail on April 7, 2022, four days prior to the 30 day appellate deadline. Fed. R. App. P. 4(a)(1). The tracking report provided that the postal service delivered the notice on April 9, 2022. The District Clerk for unknown reason had misplaced the notice, subsequently placing the notice on the docket on April 12th one day past the April 11, 2022 appellate deadline.

English reference and produced his USPS priority mail tracking report which confirmed delivery to the District Court on April 9, 2022 at 4:59 pm. Apx. C. The tracking report which was attached to English's motion for extension of time, shows it was printed on April 12th at 11:38am, immediately subsequent to his phone call to the clerk. Id. Ignoring the evidence of delivery and this Court's adherence of the 'mailbox rule', the U. S. Court of Appeals for the Fifth Circuit ruled the appeal was untimely and dismissed it for want of jurisdiction.

Rosenthal v. Walker, 111 U.S. 185, 193 (1884) (Under the mailbox rule, if a

letter "properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed."); See also Phila. Marine Trade Ass'n.-Int'l Longshoremen's Ass'n Pension Fund v. C.I.R., 523 F.3d 140, 147 (3d Cir. 2008).

The questions presented are:

1. Is this decision by the Fifth Circuit Court of Appeals in ruling that the Petitioner's appeal was untimely is in direct conflict with this court in Rosenthal and in the Third, Ninth, and Tenth Circuit Court of Appeals under the 'mailbox rule'.
2. Is the Federal common law doctrine under the 'mailbox rule' still in force giving litigants the expectation of the timely delivery of the mail?
3. Is the production of a USPS priority mail tracking report prima facie evidence of the movement and delivery of the U. S. mail to governmental facilities?
4. Is the failure of the clerk to timely file and docket pleadings fatal to the litigants' judicial proceedings?

and Carol Maas, and Jim Pier (collectively the "Taylor Claimants"), who are represented by Charles Thomas Schmidt. Schmidt Law Firm PLLC, 7880 San Felipe Suite 210, Houston, Texas 77063.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the bankruptcy court, the District Court, and the Court of appeals.

-In the Matter of : Porter Development Partners, L.L.C. et al, U. S. Bankruptcy Court Southern District of Texas, Houston Division No. 15-31305-H5-7, Jointly Administered, pending.

-English v Lowell T. Cage, Trustee, U. S. District Court for the Southern District of Texas, USDS no. 4:21-CV-1804, Judgment 1/6/23.

-English v Lowell T. Cage, Trustee, U. S. Court of Appeals for the Fifth Circuit, No. 23-20047, judgment December 22, 2023.

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Appendix A – U. S. Court of Appeal for Fifth Circuit Order denying Petitioner’s Appeal (November 7, 2023) and denial of Petition for Rehearing (December 22, 2023).

Appendix B – U. S. District Court for the Southern District of Texas denying Petitioner’s Motion for Extension of Time (December 1, 2022) and denying Petitioner’s Motion for New Trial (January 6, 2023).

Appendix C – USPS Tracking Report time stamped printed on April 12, 2022 at 11:38 am.

Appendix D – Notice of Appeal filed by clerk on April 12, 2022.

Appendix E – Motion for Extension of Time with copy of certified envelope filed in the U. S. District Court on April 15, 2022.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wayne English respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit as the decision is in conflict with this Court's decision in Rosenthal, and various U. S. Court of Appeals under the 'mailbox rule' doctrine.

OPINIONS BELOW

The opinion of the court of appeals affirming the district order (Apx. A) and the panel rehearing (Apx. A) were unpublished and unreported. The district

court order denying the motion for extension of time (Apx. B) and the denial of the motion for new trial (Apx. B) was unreported. The bankruptcy court orders are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. #1254.

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution that provides in relevant part: Due process of law is part of any proceeding that denies a citizen “life, liberty or property”.

Rule 4 of the Federal Rules of Appellate Procedure.

The common law doctrine under the ‘mailbox rule’ as defined by this Court in *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884).

Rule 301 of the Federal Rules of Evidence: Presumptions in Civil Cases.

STATEMENT OF THE CASE

This application for writ of certiorari arises from the dispute concerning the timing of English's notice of appeal. The district court on March 10, 2022, issued an order denying English's motion for new trial of a bankruptcy court's summary judgment. English as a creditor in the Porter Development Partners LLC, had filed claims against bankruptcy assets for his investment in the Partnership. The bankruptcy court has set aside funds to compensate English if he could prove ownership in a partnership subsidiary. After the district court denied his bankruptcy appeal and his motion for new trial, English mailed his notice of appeal by USPS priority mail on April 7, 2022. Apx. B. The deadline under the Federal Rules of Appellate Procedure was April 11, 2022 because the 10th was on a Sunday. Fed. R. App. P. 4(a)(1). Using priority mail, purchasers could track the pickup, movement and delivery of the mail through the tracking number assigned to the priority mail package. Apx. C. Referencing the tracking number assigned to English's package, the report provided: 1) that "USPS was in possession of item" on April 7, 2022 at 3:52 pm; 2) that at 8:41 am on April 8, 2022 it had "arrived at USPS Regional Facility {at the} North Houston Tx Distribution Center"; 3) at 6:18 am on April 9, 2022 it was "out for Delivery {to} Houston, TX 77002"; and 4) that on April 9, 2022 at 4:59pm, "Your item was delivered in or at the mailbox at 4:59

pm on April 9, 2022 in Houston, TX 77002.” Apx. C. Although the tracking report does not disclose the contents of the mail and the exact address of delivery, the zip code for the district court of 77002 corresponds to the same zip code where the priority mail was delivered. *Id.* The District Clerk did not file the notice of appeal until April 12, 2022, one day past the appellate deadline. Apx. D. The receipt of a notice of appeal by the clerk of the district court suffices to meet the “filing” requirement under Rule 4 even though the notice has not been formally “filed” by the clerk of the court. *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955); Fed. R. App. P. 4.

Due to delays in the administration of the appeal and the removal of James Colling (“Colling”) as co-appellant from the appeal pursuant to a settlement with the Trustee, the district court did not deny English’s motion of extension of time until December 1, 2022. See *USCA 5th cir. 22-20199* (dismissal of James Colling); Apx. B. English’s motion for extension of time contained a copy of the USPS tracking report and another copy of the notice of appeal. Apx. C, D, E. The tracking report attached to the motion was time stamped on April 12, 2022 at 11:38am. Apx. C. In filing the motion for extension of time, the clerk had attached a copy of the certified mail envelope, a standard practice in the District Court; however, when the notice of appeal was placed in the docket on April 12,

2022, no copy of the priority mail envelope was published or visible. Dist. Ct. Dkt #18 & 20; Apx. C,D. Lowell T. Cage, Trustee, Respondent (“Trustee”) has not disputed the USPS tracking report nor disputed that the clerk had not received the notice of appeal in English’s priority mail package.

The case was transferred to the court of appeals under docket number 23-20047, and both parties filed briefs. On November 7, 2023, the court of appeals denied English’s appeal of the district court’s order denying the motion for extension of time by providing, “Because English has not shown that his notice of appeal reached the clerk before the deadline, we AFFIRM.” Apx. A. The court of appeals denied English’s petition for rehearing on December 22, 2023. *Id.*

REASONS FOR GRANTING THE PETITION

The ruling by the Fifth Circuit is in conflict with the common law doctrine under the ‘mailbox rule’ and this court and various other courts of appeals throughout the federal judiciary. See *Rosenthal; Longshoremen* (3rd Cir. 2008), *supra*; *McCann v. Newman Irrevocable Trust*, 458F.3d 281, 287 (3d Cir. 2006)(under the mailbox rule the presumption of receipt imposes the burden on the opposing party); *Accord Crude Oil Corp. v. Comm’r*, 161 F.2d 809, 810 (10th Cir. 1947)(When a document is properly addressed and deposited in the mail, “there

is a rebuttable presumption of fact that it was received in the ordinary course of mail.”); and *Schikore v. Bank America Supplemental Retirement Plan*, 269 F.3d 956, 961 (9th Cir. 2001) (the mailbox rule can be an efficient tool “for determining ... whether or not receipt has actually been accomplished.”).

Parties wishing to appeal a federal district court order have 30 days to file their notice of appeal. Fed. R. App. P. 4(a)(1). It is clear and support by stare decisis that whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or order, they must send their response and it must be received prior to the deadline. See *Slaton v. State*, 981 S.W.2d 208, 210 (Tex.Crim.App.1998) (per curiam) (“If an appeal is not timely perfected, a court of appeals does not obtain jurisdiction to address the merits of the appeal.”).

Petitioner Wayne English (“English”) mailed his Notice of Appeal to the Southern District Court of Texas on April 7, 2022, four days prior to the April 11, 2022 deadline. Apx. C.; Fed. R. App. P. 4(a)(1). The clerk, after misplacing English’s mail, did not docket the notice until April 12, 2022. Apx. D. To dispute the untimely filing of his notice, English contacted the clerk and provided a copy of his priority mail tracking report showing that his mail was processed on the 7th

and delivered on April 9, 2022. Apx. C. Both the District Court and the U. S. Court of Appeals for the Fifth Circuit denied English's appeal for want of jurisdiction due to the alleged late filing. Apx. A,B.

Because of continued issues with claims of delivery and the timely filing of documents by the clerk, this Court instituted a presumption of receipt of the mail under the common law "mailbox rule." Rosenthal, *supra*. (a letter "properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed."). It is recognize by the courts' that the mailbox rule can be an efficient tool "for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished." Schikore, *supra*. Additionally, once a party proves mailing, the presumption of receipt "imposes the burden of production on the party against whom it is directed [.]" McCann, *supra*; Accord, *supra*. ("When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.").

“In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.” Fed. R. Evid. 301. Here, within this case, the Trustee has not disputed or submitted any evidence to rebut the presumption of timely delivery of English’s notice of appeal. The Trustee has not produced any testimony with personal knowledge, document, log sheet or other evidentiary support. In his response, the Trustee only referenced that the notice was docket on April 12, 2022. Under Rule 301, the burden of proof after a presumption is identified rest on the party that is disputing the facts and evidence that gives rise to the presumption. In addition to the presumption under Rosenthal, English has submitted uncontested, authenticated, and easily verified USPS records. Apx. C.

The USPS priority mail tracking report which was submitted to the court by English, identifies a time, location, and delivery of the package. Apx. C. This included the time USPS acquired the mail (3:52 pm on 4/7/22); the time it arrived in Houston, Texas (8:41 am on 4/8/22); the time the package left the Houston post office for delivery (6:18 am on 4/9/22; and the time the priority mail package was delivered (4:59 pm on 4/9/22). Apx. C.

Although the presumption of delivery can be overcome by testimony from personal knowledge or other evidence, no testimony or documents were introduced by the Trustee to rebut English's tracking report. The mailbox rule has never been an "immutable legal command." *Laborers' International*, 594 F.3d 732, 738 (10th Cir. 2010). Rather, it is simply an evidentiary presumption, based on the historic efficiency of the United States Postal Service, that letters will be timely delivered to the addressee when properly mailed. See *Rosenthal*, 111 U.S. at 193.

"In this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice." *Lupyan v. Corinthin College Inc.*, 761 F.3d 314 (3rd Cir. 2014).

In other instances of litigation, that may be true, but, not here within this case. English mailed his notice of appeal, tracked the package and confirm its delivery two days prior to the thirty day deadline. Apx. C. The notice of appeal was delivered on time and had properly invoked the jurisdiction of the court of appeals.

Due to problems in mailing and having pleadings docketed by the clerk, various courts and the Fifth Circuit have provided that litigants are not responsible for delays attributed to a clerk filing documents. See *Parissi, supra.*; *Deloney v. Estelle*, 661 F.2d 1061-63 (CA5 1981) (Because an appellant has no control over delays between receipt and filing, a notice of appeal is timely filed if received by the district court within the applicable period specified); *Ward v. Atlantic Coastline Railroad Company*, 265 F.2d 75 (5th Cir. 1959) (“Being in the custody of the clerk, it met the requirements that it {was} “actually” received in the clerk’s office within the thirty-day period.”).

A fundamental requirement of due process is “the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 234 U.S. 394. “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545 (1965).

English filed his appeal on time in the District Court. He produced an USPS priority mail tracking report that confirmed the mailing, the movement and the delivery of his notice of appeal. Apx. C. A delay in the clerk docketing the notice timely is neither the responsibility of English, nor the basis for his appeal lacking jurisdiction. Because the notice was delivered on time and within the thirty day

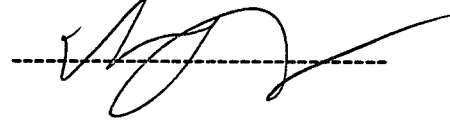
appellate timeline, this Court should grant this writ and remand the case to the court of appeals for a decision on the merits.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Date March 20, 2024

Respectfully submitted,



Wayne English

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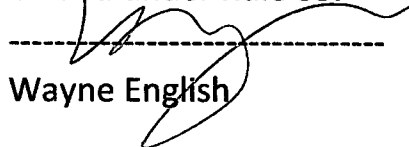
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CERTIFICATE OF COMPLIANCE

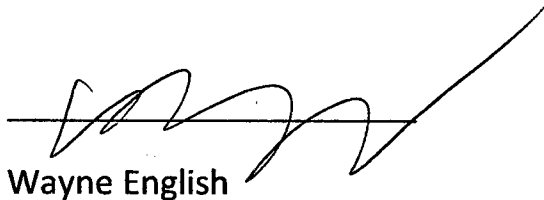
The word processing used to write this brief reports its length at 3,219 words including the contents that may be excluded under Rule 33.



Wayne English

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was sent via fax, mail, e-mail, electronic service, or hand delivered to all counsel of record on March 20, 2024.



Wayne English