

ORIGINAL

No. 23-7077

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
JUN 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 REHEARING

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PETITION FOR REHEARING

Petitioner Wayne English (“English”) submits his petition for rehearing of this Court’s May 28, 2024 Order denying his petition for a writ of certiorari. The notice of the judgment was not mailed by the clerk until May 31, 2024, and not received by Petitioner until June 4, 2024.

REASONS FOR GRANTING REHEARING

This Court’s Rule 44.2 authorizes a petition for rehearing based on “intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.” S.Ct.R. 44. Petitioner English has discovered that this Court along with the Kentucky Supreme Court and several other court rulings has previously established that the mailing and delivery of documents is confirmed if a ‘proof of mailing’ is produced from the United States Postal Service. See *Dusenberry v. United States*, 534 U.S. 161 (2002); *Pleasant Unions, LLC v. Kentucky Tax Company et. al.* 2019-SC-0358-DG. This evidentiary proof supersedes other forms of evidence including sworn affidavits by office supporting personal or lawyers acting within the litigation. This issue was not presented in English’s Writ of Certiorari.

BACKGROUND

The courts, the statutes and the rules of the judiciary require under strict and unchangeable timelines that to appeal a party must submit and consummate their action within the relevant time parameters. 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 eventually located the notice on April 12, 2022 and placed it on docket, one day past the April 11, 2022 appellate deadline. The clerk refused to retrieve the envelope or review the USPS report.

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

A statutory filing requirement generally can be satisfied only by actual, physical delivery to the Government. *United States v. Lombardo*, 241 U.S. 73, 76, 78, 36 S.Ct. 508, 60 L.Ed. 897 (1916). This has come to be known as the "physical delivery rule." To help determine when the pertinent document was physically delivered, courts developed the common-law mailbox rule. If a document is properly mailed, the court will presume the United States Postal Service delivered the document to the addressee in the usual time. *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884); 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 report confirms that the notice was timely delivered. English request this Court to grant this petition for rehearing, have the case return to the Court of Appeals to be briefed by the parties and decided on the merits.

Dusenberry v. United States, 534 U.S. 161 (2002).

In Dusenberry, *supra*, this Court provided the necessary elements to provide notice to parties. Sending documents by U. S. mail directed through the postal service is sufficient to prove delivery. English produced a USPS tracking report that confirmed delivery of his notice of appeal to the District Court on April 9, 2024, two days prior to the appellate deadline.

In Dusenberry, Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ, joined.

"This case concerns the adequacy of the means employed by the Federal Bureau of Investigation (FBI) to provide notice to a federal prisoner of his right to contest the administrative forfeiture of property seized during the execution of a search warrant for the residence where he was arrested. In April 1986, officers of the FBI arrested petitioner Larry Dean Dusenberry at a house trailer in Atwater, Ohio. Later that day, they obtained and executed a search warrant, seizing drugs, drug paraphernalia, several firearms, a ballistic knife, an automobile registered in the name of petitioner's stepmother, and various other items of personal property. Two years later, the FBI also began the process of administratively forfeiting the cash and the automobile. To effect such a forfeiture, the statute required the agency to send written notice of the seizure... to each party who appeared to have an interest in the property. The FBI sent letters of its intention to forfeit the cash by certified mail addressed to petitioner care of the Federal Correctional Institution (FCI) in Milan, Michigan, where he was then incarcerated; The FBI received no response to these notices within the time allotted, and so declared the items administratively forfeited.

Nearly five years later, petitioner moved in the District Court ... seeking return of all the property and funds seized in his criminal case. The District Court denied the motion,... The Court of Appeals for the Sixth Circuit vacated the District Court's judgment and remanded for further proceedings. The District Court ruled that the Government's sending of notice by certified mail to petitioner's place of incarceration satisfied his due process rights as to the cash. The Court of Appeals affirmed. 223 F. 3d 422 (CA6 2000). Citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950), it held that the Government's notice of the cash forfeiture comported with due process even in the absence of proof that the mail actually reached petitioner. 223 F. 3d, at 424. we

granted certiorari to consider the adequacy of the FBI's notice to petitioner of its intended forfeiture of the cash. ... The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law." ... we have determined that individuals whose property interests are at stake are entitled to "notice and an opportunity to be heard." *United States v. James Daniel Good Real Property*, 510 U. S. 43, 48 (1993). ...

See, e. g., *Whiting v. United States*, 231 F. 3d 70, 76 (CA1 2000) (due process satisfied by Government's sending certified letter to inmate at his prison facility); *United States v. Woodall*, 12 F. 3d 791, 794–795 (CA8 1993) (requiring actual notice to defendant or his counsel of agency's intent to forfeit property); *United States v. Real Property*, 135 F. 3d 1312, 1315 (CA9 1998) (adequate to send summons by certified mail to jail with procedures for distributing mail directly to the inmate); *United States v. Clark*, 84 F. 3d 378, 381 (CA10 1996) (sufficient to send certified mail to prisoner at jail where he was located).

Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice. See, e. g., *Mennonite Bd. of Missions v. Adams*, 462 U. S. 791, 797 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U. S. 478, 484 (1988). We see no reason to depart from this well-settled practice.

... The Government here carried its burden of showing the following procedures had been used to give notice. The FBI sent certified mail addressed to petitioner at the correctional facility where he was incarcerated. ... *Mullane*, *supra*, (noting that the mails "are recognized as an efficient and inexpensive means of communication"); *Mennonite*, *supra*; *Tulsa* *supra*. ... See also *Black's Law Dictionary* 1087 (7th ed. 1999) (defining "actual notice" as "[n]otice given directly to, or received personally by, a party").

Since *Mennonite* concluded that mailed notice of a pending tax sale to a mortgagee of record was constitutionally sufficient, *id.*, at 799 Here, the use of the mail addressed to petitioner at the penitentiary was clearly acceptable for much the same reason we have approved mailed notice in the past. ... We think the FBI's use of the system described in detail above was "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action." *Mullane*, 339 U. S., at 314. Due process requires no more. The judgment of the Court of Appeals is Affirmed. " *Dusenberry v. United States*, 534 U.S. 161 (2002).

Jones v. Flowers, 547 U.S. 220 (2006).

The Supreme Court in *Jones v Flowers*, *supra*, provided that parties mailing time sensitive documents are required to follow up on delivery if issues affect or prevent delivery. Here within this case, English made several calls to the District Clerk concerning his mail, produced a USPS tracking report, disputed the April 12 filing of his notice of appeal, and immediately filed a motion for extension of time. All these actions confirmed timely delivery.

Chief Justice Roberts delivered the opinion of the Court:

“Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner “notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner’s property. ...

... due process requires the government to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U. S., at 314. The ...The Commissioner notes this Court’s ample precedent condoning notice by mail, see, e.g., *Dusenberry*, *supra*, at 169; *Tulsa*,*supra*; *Mennonite*, *supra*; *Mullane*, *supra*, at 318–319”.

... In *Mullane*, we stated ... the adequacy of a particular form of notice requires balancing the “interest of the State” against “the individual interest sought to be protected by the Fourteenth Amendment,” *Mullane*, at 314. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane*, *supra*; a mortgagee, *Mennonite*, 462 U. S. 791; owners of seized cash and automobiles, *Dusenberry*, 534 U. S. 161; creditors of an estate, *Tulsa Professional*, 485 U. S. 478; and tenants living in public housing, *Greene v. Lindsey*, 456 U. S. 444 (1982).

Jones v. Flowers, 547 U.S. 220 (2006).

After reviewing the USPS tracking report, English on April 11, and 12th contacted the clerk to confirm the notice of appeal was timely filed. The clerk could not find nor explain the

location of the document. English, after discovering his notice was filed on the 12th, immediately drafted a motion for extension of time to file appeal, printed the tracking report and mailed everything to the Court. The motion, the notice of appeal and the copy of the tracking report were received by the clerk who placed it on the docket on April 15th, 2022. This action of confirming the Court's receipt of the notice and English's actions in immediately responding to the clerk's delay in filing the notice is in comport with Jones, *supra*.

Pleasant Unions, LLC v. Kentucky Tax Company et. al. 2019-SC-0358-DG

The Kentucky Supreme Court ruled that a postal receipt is best evidence of the mailing and delivery of a tax notice which exceeds the sworn testimony of the attorney attesting that he had mailed the letter. The receipt is authentic, reliable, and easily verifiable. Justice Hughes issued the opinion of the Court:

“ Kentucky Tax Company, LLC acquired from Taylor County a certificate of delinquency for property owned by Pleasant Unions, LLC in Campbellsville, Kentucky. At the time Kentucky Tax Company bought the certificate of delinquency in 2010, KRS 134.490(1) and (2) required the purchaser to give two 4 separate notices to the delinquent taxpayer. The statute mandated notice “by first class mail with proof of mailing” shortly after the third-party purchaser received delivery of the certificate of the delinquency... . Kentucky Tax Company brought suit to foreclose its lien on the property and to collect the amounts Pleasant Unions owed. Pleasant Unions denied receiving the required notices and opposing summary judgment, challenged Kentucky Tax Company’s compliance with the notice requirements of KRS 134.490. The Court of Appeals affirmed the trial court, finding an affidavit from Kentucky Tax Company’s attorney tendered in support of its summary judgment motion was sufficient proof of mailing.

After review the Kentucky Supreme Court ruled that the attorney’s affidavit merely stating he caused notices to be sent by first-class mail does not constitute proof of mailing as required by KRS 134.490, and therefore, summary judgment was premature.”When notice sent by first-class mail is a person’s right under a Kentucky

statute, proof of the means employed to effect such notice must reflect specific actions taken to accomplish the mailing.

The Court determined that “proof of mailing” is not a term of art and that the statute does not require a specific USPS first-class mail service (i.e., certified mail, return receipt requested). Since the statute does not specify the form of proof, the question for the Court was the sufficiency of the proof offered: an attorney’s affidavit swearing that he “caused a letter to be sent by first-class mail with proof of mailing” to the taxpayer. The Court found this proof insufficient ... and reversed summary judgment in favor of the third-party purchaser.”

Pleasant Unions, LLC v. Kentucky Tax Company et. al. 2019-SC-0358-DG

A tracking report issued by the United States Postal Service is the best evidence and admissible to support, confirm and substantiate the mailing, movement and delivery of the U.S. mail. As shown in Pleasant, *supra*, the postal receipt exceeds the sworn testimony of an attorney that he had mailed the letter. *Id.* The postal receipt produced by English is conclusive documentation that his notice of appeal was timely.

USPS INVOICE RECEIPT CONFIRMS DELIVERY OF THE NOTICE OF APPEAL

The invoice produced by the postal service is conformation of both the mailing and delivery of English’s notice of appeal. Throughout state and federal jurisdictions, a party producing proof of mailing and delivery by the submission of a USPS tracking report establishes the timeline of a documents travel to the District Court. See *Goodin v. Gen. Acc. & Fire Life Ass. Corp.* 450 S.W.2d 252 (Ky. Ct. App. 1970) (the Kentucky Supreme Court found that the insurer's business usage established positive proof of a regular system of mailing where the insurer came forth with a postal receipt, a record certification, a return address on the envelope, and the use of first-class mail as the means of transmittal)..

The post-office receipt was an auxiliary document to sustain English's proof of timely delivery. English's testimony and pleadings validate the mailing, movement, and delivery of his notice of appeal. English's testimony concerning the existence of the USPS tracking report was clearly admissible. The Court of Appeals had substantial evidence before it that the notice was actually mailed and delivered prior to the appellate deadline.

CONCLUSION

English was pursuing an appeal of his property claim inside a bankruptcy case.

"The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law." ... we have determined that individuals whose property interests are at stake are entitled to "notice and an opportunity to be heard."

United States v. James Daniel Good Real Property, 510 U. S. 43, 48 (1993)" Dusenberry, *supra*.

USPS tracking is the postal service's primary and most cost effective method of mailing items that require confirmation of delivery to the intended address. It provides to the mailer the date and time an article was delivered. English has submitted uncontested, authenticated, and easily verifiable USPS records. The USPS priority mail tracking report which was submitted to the court by English identifies a time, location, and delivery of the package. 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). 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). The appellate deadline made the notice of appeal due on April 11, 2022.

On April 11, 2022, English contacted the District Clerk to confirm his notice was placed on the docket. The clerk could not find, locate or explain the whereabouts of English's notice or his priority mail envelope. On April 12, 2022 the district court called English to provide that they found his notice of appeal but still could not locate his envelope. Because the notice was docketed on the 12th, English immediately drafted his motion of extension of time, attached the notice of appeal and a copy of the tracking report which was docketed on April 15, 2022.

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 *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.").

English mailed his notice of appeal, tracked the package and confirm its delivery two days prior to the thirty day deadline. The notice of appeal was delivered on time and had properly invoked the jurisdiction of the court of appeals. English's documents and actions comport with Dusenberry,

Pleasant, and Goodin, *supra*. English has met his burden that his notice of appeal was properly, timely, and jurisdictionally before the Court of Appeals.

For the foregoing reasons and those stated in the writ of certiorari, the Court should grant rehearing, grant the petition for writ of certiorari and remand the case to the Court of Appeals for a decision on the merits.

Date: June 21, 2024

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

The word processing used to write this petition reports its length at 2,998 words including the contents that may be excluded under Rule 33.

/s/ Wayne English
Wayne English

CERTIFICATE OF COUNSEL

As pro se. I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

/s/ Wayne English
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 June 21, 2024.

/s/ Wayne English
Wayne English