No. 124807

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Third Judicial District No. 3-16-0781
Respondent-Appellee,	)	
	)	There on Appeal from the Circuit Court of the Tenth Judicial Circuit, Stark County, Illinois No. 96 CF 14
v.	)	
	)	
RONALD LEE STOECKER,	)	The Honorable Michael P. McCuskey, Judge Presiding.
Petitioner-Appellant.	)	

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Petitioner appeals from the judgment of the Illinois Appellate Court, Third District, affirming the denial of his petition for relief from judgment under 735 ILCS 5/2-1401. *See People v. Stoecker*, 2019 IL App (3d) 160781.

A question is raised on the pleadings as to whether the petition stated a claim for relief from judgment under § 2-1401.

ISSUES PRESENTED

1. Whether the circuit court's dismissal of petitioner's § 2-1401 petition comported with due process and, if not, whether any error was harmless.

2. Whether appointed counsel was required to provide a level of representation beyond that required by the Rules of Professional Conduct and, if so, whether the fact that appointed counsel (a) did not respond to the State's motion to dismiss within four days of its filing and (b) did not appear in court when the circuit court ruled on the motion to dismiss amounted to inadequate representation.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 301, 304(b)(3), and 315. This Court allowed leave to appeal on September 25, 2019. *People v. Stoecker*, 132 N.E.3d 304 (Ill. Sept. 25, 2019) (Table).

STATEMENT OF FACTS

Following a 1998 jury trial, petitioner was convicted of the first degree murder and aggravated criminal sexual assault of a fifteen-year-old girl. C645-47; R2037-40; *see generally* R929-2044.[1] Petitioner drove the girl to a remote, rural area of Illinois, sexually assaulted her, slit her throat, and left her for dead in a field. *People v. Stoecker*, 2014 IL 115756, ¶ 3. The victim managed to walk to a nearby home for help. *Id.* She later described petitioner to police from her hospital bed but eventually succumbed to her injuries. *Id.* A DNA profile recovered from a semen stain on the victim's pants was "consistent with having originated from defendant" at all tested markers. *Id.* ¶ 10; *see id.* ¶¶ 7-10, 34, 37, 40 (profile generated expected to occur in 1 in 1.1 trillion Caucasians); *see also* C899. Petitioner was apprehended a year and a half later in Costa Rica; he had purchased a plane ticket (with cash) mere hours after attacking the girl and fled the country. *Stoecker*, 2014 IL 115756, ¶¶ 5-6.

In August 1998, following a hearing, *see generally* R2046-2123, the court sentenced petitioner to life imprisonment for the murder conviction and a concurrent 30-year term for the aggravated criminal sexual assault conviction, R2120; C828-29. *See also* C653-76 (pre-sentence investigation report). The life sentence rested upon a finding that the murder was

[1] "C__," "R__," and "Pet. Br. __" denote the common law record, the report of proceedings, and petitioner-appellant's opening brief, respectively.

accompanied by "exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-8-1(a)(1)(b) (1996); 720 ILCS 5/9-1(a)(2) (1996); *see* R2106-08; R2116-20; *see also* C867 (denying motion to reconsider).

The appellate court affirmed petitioner's convictions and sentences on direct appeal. *See* C897-906 (Rule 23 order in *People v. Stoecker*, No. 3-98-0750 (Dec. 3, 1999)).

2012 Petition for Relief from Judgment

Following direct review, petitioner unsuccessfully sought collateral relief in a variety of proceedings and forums.[2] Of relevance to this appeal, in 2012, petitioner filed a pro se petition for relief from judgment pursuant to 735 ILCS 5/2-1401, contending, among other things, that his life sentence was void because the "brutal or heinous" aggravator was not submitted to the jury and proved beyond a reasonable doubt, as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See* C2775-80; *see generally* C2764-69, 2775-80. The circuit court dismissed the petition with prejudice on November 16, 2012, upon determining that it was untimely and petitioner's life sentence was not

[2] *See People v. Stoecker*, 2019 IL App (3d) 160781 (third § 2-1401 petition); *People v. Stoecker*, 2015 IL App (3d) 140128-U (second § 2-1401 petition); *People v. Stoecker*, 2014 IL 115756 (motion for postconviction DNA testing); *People v. Stoecker*, 2014 IL App (3d) 130389-U (§ 2-1401 petition); *People v. Stoecker*, 2012 IL App (3d) 120183-U (attempted successive postconviction petition); *People v. Stoecker*, 384 Ill. App. 3d 289 (3d Dist. 2008) (postconviction petition); *People v. Stoecker*, 308 Ill. App. 3d 107 (3d Dist. 1999) (direct appeal); *see also Stoecker v. Ryker*, No. 08-1260, 2009 WL 269096 (C.D. Ill. Jan. 30, 2009) (federal habeas petition); Docket Sheet, *Stoecker v. Lashbrook*, No. 17-1032 (C.D. Ill.) (attempted successive federal habeas petition).

void. C2783. The court also denied petitioner's motion to reconsider. *See* C2864-69.

Petitioner appealed, and the appellate court affirmed, holding that *Apprendi* did not apply retroactively to petitioner's 1998 sentence. *Stoecker*, 2014 IL App (3d) 130389-U, ¶ 16 (citing *People v. De La Paz*, 204 Ill. 2d 426 (2003)).

Current Petition for Relief from Judgment

On August 29, 2016, eighteen years after his conviction and sentencing, petitioner filed yet another petition for relief from judgment pursuant to 735 ILCS 5/2-1401, *see generally* C3730-58, as well as a motion requesting the appointment of counsel, C3728-29. Petitioner reasserted that his life sentence was void because the "brutal or heinous" aggravator was not submitted to the jury or proved beyond a reasonable doubt, as required by *Apprendi*. *See* C3730-39. He also complained that the circuit court had insufficiently articulated the basis for its findings on the "brutal or heinous" aggravator. *Id.* To excuse his non-compliance with § 2-1401's two-year statute of limitations, petitioner claimed that (1) he could attack the purportedly void sentence at any time, and (2) he had only recently learned of two Supreme Court cases, *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), that allegedly made *Apprendi* retroactively applicable to his 1998 sentence. *See* C3735, 3738-39;

see also C3771-79 (motion to reconsider further relying on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)).

On September 23, 2016, the circuit court appointed counsel to represent petitioner and ordered the State to respond to the petition. C3760. A certificate of mailing filed by the Circuit Clerk on September 26, 2016, reflects service of the appointment order on counsel by regular mail. C3761. On November 14, 2016, the State moved to dismiss, arguing that the claim was barred by *res judicata* and untimely. C3762-67. That filing's certificate of service reflects email service on petitioner's counsel. C3764, 3767. Four days later, on November 18, 2016, the circuit court dismissed the petition, announcing its ruling in open court. C3768; *see also* R2441-43. Though only the State was present in court on that date, *see* R2441, the court stated on the record that it had "reviewed the file and the pleadings" and determined that the State's motion was "correct as a matter of law," R2442. Accordingly, the court dismissed the petition. *Id.*; C3768.

Petitioner subsequently filed a pro se motion to reconsider, C3771-79; *see generally* C3771-94, which the court denied on December 6, 2016, finding that "nothing contained therein [ ] change[d] the Court's decision," C3795.

The appellate court affirmed. *See Stoecker*, 2019 IL App (3d) 160781, ¶¶ 10-20. Regarding petitioner's claim that he was denied due process when the court granted the State's motion to dismiss outside of his or counsel's presence and without a meaningful opportunity to respond, the appellate

court found that "even accepting [petitioner's] argument that his due process rights were violated, any such violation would be harmless error, as the deficiencies in the petition could not be cured by remand," *id.* ¶ 10, because the petition was untimely and the issues raised therein were both meritless and barred by *res judicata*, *id.* ¶¶ 12, 16. As to petitioner's claim that his appointed counsel provided inadequate representation, the appellate court found that regardless of which standard of representation applied to appointed counsel's representation of a criminal defendant in a § 2-1401 proceeding, counsel's representation cannot have been inadequate, given the incurable defects in the petition. *Id.* ¶¶ 14-16.

STANDARDS OF REVIEW

This Court reviews de novo the dismissal or denial of a § 2-1401 petition. *People v. Thompson*, 2015 IL 118151, ¶ 25. Questions of law regarding whether a defendant is entitled to a particular level of representation by counsel are also reviewed de novo. *People v. Cotto*, 2016 IL 119006, ¶ 24.

ARGUMENT

I. The Manner in Which the Circuit Court Dismissed Petitioner's § 2-1401 Petition Did Not Violate Due Process, but Even If It Did, Any Error Was Harmless.

This Court should hold that dismissal of petitioner's § 2-1401 petition — which suffered from several incurable legal defects — before he had an opportunity to respond to the State's motion to dismiss did not violate due

process. Indeed, this Court has already held as much with regard to *sua sponte* dismissals, *People v. Vincent*, 226 Ill. 2d 1, 12-13 (2007), and the same rationale applies here. This Court need not deviate from *Vincent* merely because an opposing party, rather than the court, first observed the petition's fatal defects — particularly when the same procedural safeguards identified in *Vincent* are also available here in the event of an erroneous dismissal. And the circuit court's announcement of its ruling in open court was not an *ex parte* hearing, much less a due process violation. *People v. Burnett*, 237 Ill. 2d 381, 386-87 (2010).

Finally, even if a due process violation occurred, any such violation was harmless. Not only was petitioner's § 2-1401 petition indisputably untimely by sixteen years, the sentencing claims articulated therein were both procedurally barred and meritless.

A. Dismissal of the § 2-1401 petition on the State's motion was not a violation of due process.

"Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days"; it is "a civil remedy that extends to criminal cases," *Vincent*, 226 Ill. 2d at 7, and permits a convicted criminal defendant to make "either a legal or factual challenge to a final judgment if certain procedural and statutory requirements are satisfied," *Thompson*, 2015 IL 118151, ¶ 44. Such petition must be filed "not later than two years after the entry of the order or judgment," subject to

tolling for legal disability, duress, or fraudulent concealment. *Vincent*, 226 Ill. 2d at 7; *see also* 735 ILCS 5/2-1401(c) (eff. July 28, 2016 – Aug. 22, 2018).

Section 2-1401 petitions are "subject to dismissal for want of legal or factual sufficiency." *Vincent*, 226 Ill. 2d at 8. Accordingly, "when it is clear on [the petition's] face that the requesting party is not entitled to relief as a matter of law," a circuit court's *sua sponte* disposal of the matter does not run afoul of due process; nor is the petitioner entitled to respond to the identified legal bases for dismissal before the court rules. *Id.* at 12-13. The efficient disposal of a matter which "the claimant cannot possibly win" or "salvage[] by amendment," this Court has held, does not deprive a petitioner of the opportunity to be heard, particularly where "adequate procedural safeguards" — such as a motion to reconsider, the opportunity to amend the petition to "yield a meritorious claim," and de novo review on appeal — exist to protect against erroneous terminations. *Id.* at 13 & n.3 (quotations omitted).

Vincent's reasoning applies equally to cases in which a judgment of dismissal was preceded by a motion to dismiss. Indeed, a petition that is meritless remains so irrespective of who has first identified the fatal legal defect — the court or the opposing party. And the same procedural safeguards that militated against the finding of a due process violation in *Vincent* exist here. As the appellate court put it in *People v. Smith*, 2017 IL App (3d) 150265, the present case is merely a "factual variant of th[e] same question" that *Vincent* already resolved. *Id.* ¶ 22; *see also id.* ¶ 24 ("Though

Vincent involved a court *sua sponte* dismissing a section 2-1401 petition, its reasoning arguably applies equally to the instant case (where dismissal occurs upon the State's motion)."). Accordingly, this Court should hold that the circuit court's dismissal on the State's motion did not violate due process.

Petitioner fails to identify how a *sua sponte* dismissal on a matter of law — which indisputably "comports with due process" in view of the goal of "efficient use of judicial resources" and the availability of adequate procedural safeguards to prevent erroneous dismissal, *Vincent*, 226 Ill. 2d at 13-14 (quotations omitted) — meaningfully differs from a dismissal on identical grounds that happens to follow a motion to dismiss.[3] He refers to a denial of the "opportunity to be heard at a meaningful time and in a meaningful manner," Pet. Br. 11 (quotation omitted), but as in *Vincent*, "[i]t is unclear . . . in what way [petitioner's] opportunity to be heard has been compromised," given that he was "not [ ] denied access to the courts" and numerous procedural safeguards remained available to him after dismissal, 226 Ill. 2d at 12-13. Due process is not offended merely because the opposing party spotted the incurable legal defect first.

[3] To be sure, untimeliness differs from other matters of law because it is an affirmative defense; a circuit court may not *sua sponte* dismiss a § 2-1401 petition as time-barred. *People v. Cathey*, 2019 IL App (1st) 153118, ¶¶ 14-19 (citing *People v. Pinkonsly*, 207 Ill. 2d 555 (2003)). But once the State has raised the defense, dismissal of a petition as incurably time-barred on its face is no different from a *sua sponte* dismissal on any other incurable matter of law.

The facts of petitioner's case bear out *Vincent*'s logic: he was not denied access to the courts, as he was able to file the § 2-1401 petition and have the court consider it, C3730-58; C3768; R2441-43; he had numerous corrective remedies available to him following the petition's dismissal; he availed himself of one such remedy, a motion to reconsider, and was thereby able to respond to all of the purported legal grounds for dismissal, C3771-79; the court considered his motion, C3795; and had the dismissal truly been erroneous (which it was not), it could and presumably would have been corrected. *E.g.*, *Smith*, 2017 IL App (3d) 150265, ¶ 24 ("This defendant utilized one such remedy in the circuit court by filing his motion to reconsider. The court considered the motion and denied it.").

Petitioner relies primarily on two disagreeing cases — *People v. Bradley*, 2017 IL App (4th) 150527, and *People v. Rucker*, 2018 IL App (2d) 150855 — to contend that a right to respond to an opposing party's motion to dismiss is a natural corollary of the broader due process right to an opportunity to be heard. Pet. Br. 11-12, 14-16. But of the many cases that *Bradley* and *Rucker* cited to support this purportedly "well established" principle, *Bradley*, 2017 IL App (4th) 150527, ¶ 16, only one held as much. *See Merneigh v. Lane*, 87 Ill. App. 3d 852, 854-55 (5th Dist. 1980) (mandamus plaintiff suing for prison law library passes had due process right to receive copy of motion to dismiss, have meaningful opportunity to respond through memorandum in opposition thereto, and, in event of dismissal, amend

complaint to overcome deficiencies). In fact, most of the cases pre-date *Vincent* and made no mention of due process at all, *see, e.g.*, *People v. Gaines*, 335 Ill. App. 3d 292, 296-97 (2d Dist. 2002), *abrogated on other grounds by Vincent*, 226 Ill. 2d at 12; *Berg v. Mid-Am. Indus., Inc.*, 293 Ill. App. 3d 731, 735 (1st Dist. 1997); *Alper Servs., Inc. v. Wilson*, 85 Ill. App. 3d 908, 911 (1st Dist. 1980), or if they did discuss due process, did not hold that due process provides the right that petitioner advocates for here, *e.g.*, *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 28 (concerning due process right to notice that a *cause of action* is pending). *See generally Rucker*, 2018 IL App (2d) 150855, ¶¶ 23-24 (collecting cases); *Bradley*, 2017 IL App (4th) 150527, ¶¶ 15-19 (collecting cases).

More importantly, neither *Bradley* nor *Rucker* articulates how the filing of a motion to dismiss undermines *Vincent*'s logic or otherwise compels a different result. *Rucker* proposed that the distinction lay in the *number* of opportunities to be heard. 2018 IL App (2d) 150855, ¶ 29 ("If [the petitioner] had been given the opportunity to respond to the State's motion to dismiss, he could have responded to the State's argument before the court ruled on the motion[, and i]f the court ruled against him, he could *then* have filed a motion to reconsider. . . . The fact that he was not afforded the opportunity to respond to the State's motion deprived him of one of two responsive options."). But it can hardly be said that due process is not satisfied unless a party is heard at every conceivable opportunity, particularly where incurable

legal defects appear on the face of a § 2-1401 petition. *Cf. People v. Burnett*, 237 Ill. 2d 381, 388-91 (2010) (due process right to closing argument did not equate to general constitutional right to oral argument at all stages of criminal case, even if court has discretion to grant oral argument at other stages of proceedings). And tellingly, neither the General Assembly nor this Court, in its rules governing civil motion practice, has seen fit to guarantee a particular briefing schedule on motions to dismiss. *See* 735 ILCS 5/2-620 ("The form and contents of motions, notices regarding the same, hearings on motions, and all other matters of procedure relative thereto, shall be according to rules."); *see, e.g.*, Ill. Sup. Ct. R. 104, 181, 182, 191.

Petitioner also points to a "long history" of Post-Conviction Hearing Act cases recognizing a "right to notice and an opportunity to respond." Pet. Br. 13-14. But "[d]ue process is a flexible concept, and not all situations calling for procedural safeguards call for the same kind of procedure." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009) (quotations omitted). This Court has made abundantly clear that the Post-Conviction Hearing Act has "no application whatsoever to section 2-1401, an entirely different form of statutory, collateral relief." *Vincent*, 226 Ill. 2d at 6. And for good reason: whereas "the procedure to be used in section 2-1401 actions is the same whether the petitioner is seeking vacatur of a civil or criminal final judgment," *id.* at 11, the dictates of procedural due process in postconviction proceedings are geared specifically toward the "critical importance" of such

proceedings, and ensuring that "the purpose of the Act [to] vindicat[e] constitutional rights" is not defeated, *People v. Kitchen*, 189 Ill. 2d 424, 435 (1999). Thus, the "private interest . . . affected" and "risk of an erroneous deprivation of such interest through the procedures used," *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is vastly greater in the context of postconviction proceedings — all the more so given that successive petitions may not be filed without showing "cause and prejudice," 725 ILCS 5/122-1(f). The same cannot be said for petitions for relief from judgment.

Finally, as a policy matter, a rule precluding circuit courts from swiftly disposing of incurably meritless § 2-1401 petitions would be needlessly inefficient — especially because § 2-1401 is susceptible to abuse by criminal defendants who have exhausted other avenues of relief (direct appeal, postconviction review, and federal habeas review).[4] At the very least, given the "flexibility" of due process, *Birkett*, 233 Ill. 2d at 201, a circuit court's dismissal of a § 2-1401 petition that merely repeats a previously adjudicated § 2-1401 claim should not be considered a due process violation, *e.g.*, *People v. Donley*, 2015 IL App (4th) 130223, ¶ 43 (affirming *sua sponte* dismissal prior to expiration of 30-day window and explaining that it would be "unconscionable" to permit defendant to "file *successive* section 2-1401 petitions weekly" and burden circuit court with either "keeping track of which

[4] Petitioner's own case history illustrates this point; he has filed three § 2-1401 petitions, two postconviction petitions, two federal habeas petitions, and a direct appeal. *See supra* note 2.

bogus petition had been filed more than 30 days earlier, so it could *sua sponte* dismiss it with prejudice" or "shift[ing] that obligation to the already overburdened State's Attorney's office to determine when and how to address these spurious pleadings"); *cf. Sears v. Sears*, 85 Ill. 2d 253, 259 (1981) ("There is no provision in the Civil Practice Act or the supreme court rules which permits a losing litigant to return to the trial court indefinitely, hoping for a change of heart or a more sympathetic judge.").

For these reasons, this Court should hold that the circuit court's dismissal of petitioner's successive § 2-1401 petition did not offend due process.

B. The circuit court's announcement of its ruling in open court was not an *ex parte* hearing and did not violate due process.

Contrary to petitioner's suggestion, Pet. Br. 9, 11, 15-16, the circuit court's announcement of its ruling in open court was not an *ex parte* hearing. Petitioner's argument is foreclosed by *Burnett*, in which this Court held that ruling on a pending motion in open court, "without input from the State," was no "hearing" at all "in any accepted sense of the word, much less an '*ex parte* hearing.'" 237 Ill. 2d at 386-87; *see also Smith*, 2017 IL App (3d) 150265, ¶ 24. The same is true of the circuit court's ruling here. *See* R2441-43.

C. Even if the manner in which the circuit court dismissed petitioner's § 2-1401 petition was improper, such error is amenable to harmless-error review.

Regardless of whether this Court extends *Vincent* to judgments of dismissal on the motion of the opposing party, *Vincent*'s reasoning nevertheless illuminates why any such error by the circuit court should be subject to harmless-error review. For one thing, the impact of a petitioner's missed opportunity to respond to a motion to dismiss is mitigated, if not altogether cured, where the claimant subsequently avails himself of one or more of the available corrective procedural safeguards, such as a motion to reconsider and/or a request to amend the petition to "yield a meritorious claim." *Vincent*, 226 Ill. 2d at 13 & n.3. For another, a petitioner suffers no harm from the petition's dismissal where no response on his part could possibly have cured the petition's fatal defects. *Id.* at 13.

More importantly, the remedy of automatic reversal is reserved for "structural" errors that, by their nature, "render[] a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010); *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010); *see Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."). Consequently, the United States Supreme Court has deemed only the gravest of criminal trial errors structural: for example, the

"complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction." *Averett*, 237 Ill. 2d at 13 (structural error applies to "very limited class of cases"); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of right to counsel of choice is structural error).

This Court similarly adheres to a "strong presumption that [an] error is subject to harmless-error review." *Averett*, 237 Ill. 2d at 13. That an error is "serious" is not enough, *id.*, for even "most errors of constitutional dimension are subject to a harmless error analysis," *People v. Shaw*, 186 Ill. 2d 301, 344 (1998); *see also, e.g.*, *People v. Thurow*, 203 Ill. 2d 352, 364, 368 (2003) ("most constitutional errors can be harmless"). Instead, "[o]nly those constitutional violations that are 'structural defects in the constitution of the trial mechanism,' such as total deprivation of the right to trial counsel or absence of an impartial trier of fact, are *per se* error that necessitate remandment for a new proceeding." *Shaw*, 186 Ill. 2d at 344-45 (citation omitted). The complained-of error here — the purportedly premature dismissal of an incurably deficient civil collateral proceeding — cannot be likened to the exceedingly narrow class of per se reversible criminal trial errors.

Drawing on language from *Rucker*, *Bradley*, and *People v. Coleman*, 358 Ill. App. 3d 1063 (3d Dist. 2005), petitioner maintains that the circuit

court's dismissal of a § 2-1401 petition in this manner is "inherently prejudicial" and therefore not amenable to harmless-error review. Pet. Br. 13-17 (citing *Rucker*, 2018 IL App (2d) 150855, ¶ 25; *Bradley*, 2017 IL App (4th) 150527, ¶ 21; *Coleman*, 358 Ill. App. 3d at 1070-71). But inherent prejudice is not the standard for requiring automatic reversal. Rather, the error must be the type that violates a right so "indispensable to a fair trial" that it is impossible for a reviewing court to qualitatively assess its prejudicial impact or harm. *People v. Glasper*, 234 Ill. 2d 173, 189, 196, 201-02 (2009); *accord People v. Rivera*, 227 Ill. 2d 1, 22 (2007) (error amenable to harmless-error review where it was "possible to qualitatively assess for harm").

Reviewing courts are amply equipped to determine whether a circuit court's dismissal of a § 2-1401 petition on a matter of law — even if procedurally erroneous — was legally correct and therefore harmless. *Cf. Vincent*, 226 Ill. 2d at 8-9 ("[I]f the facts alleged cannot state a legal basis for the relief requested, *i.e.*, the petition is insufficient as a matter of law, the pleading may be challenged at any time, even on appeal."); *see also People v. Ocon*, 2014 IL App (1st) 120912, ¶ 42 ("Any remand when the petition lacks merit would be a waste of judicial resources."). Thus, the complained-of error is perfectly amenable to harmless-error review.

D. The circuit court's error, if any, was harmless.

Given the insurmountable legal defects in the § 2-1401 petition, any error in the manner of the circuit court's dismissal was harmless.

First, as alluded to above, *see supra*, Sec. I.C, petitioner's complaint that he was deprived of a "meaningful opportunity to respond" to the State's motion to dismiss, Pet. Br. 16-17, is belied by (1) his own pro se motion to reconsider, in which he responded to the arguments in the State's motion, C3771-79; and (2) the circuit court's ruling, noting that it had expressly considered petitioner's motion, C3795 ("The Court has reviewed the Motion to Reconsider and finds nothing contained therein to change the Court's decision."). As the appellate court noted in *Smith*, "the availability of corrective remedies, such as a motion to reconsider, render [the petitioner's] absence from the hearing and his inability to timely respond to the State's motion 'less of a concern.'" 2017 IL App (3d) 150265, ¶ 24 (quoting *Vincent*, 226 Ill. 2d at 13).

Second, there is no question that the petition is untimely — it was filed eighteen years after the 1998 sentencing judgment and sixteen years after the expiration of the statute's two-year limitations period. C828-29 (8/14/1998 sentencing judgment); C3730-58 (8/29/2016 § 2-1401 petition); 735 ILCS 5/2-1401(c) (two-year limitations period). The petition raised no allegation that any portion of this period should be tolled due to legal disability, duress, or fraudulent concealment, *see* C3730-58, nor did petitioner

make such an argument in his subsequent motion to reconsider, even after the State had raised the affirmative defense of untimeliness, *see* C3771-79. And this case is unlike *Pinkonsly*, where consideration of untimeliness for the first time on appeal would have deprived the petitioner of a chance to amend his petition to avoid the alleged time-bar, 207 Ill. 2d at 563-64, or *Cathey*, where the State's forfeiture of the affirmative defense and the circuit court's failure to mention untimeliness as the basis for dismissal similarly deprived the petitioner of the chance to "avoid dismissal by amending his petition," 2019 IL App (1st) 153118, ¶ 19. Nor could he have credibly done so, as he had raised a nearly identical *Apprendi* claim four years earlier in a § 2-1401 petition, affirmatively demonstrating long before the commencement of the present § 2-1401 proceedings that no legal disability, duress, and fraudulent concealment prevented him from raising this ground for relief. *See* C2764-69, 2775-80; 735 ILCS 5/2-1401(c); *see also* C907-16 (asserting *Apprendi* violation as early as May 2005, in petitioner's first collateral challenge to his sentence).

The petition did contend that petitioner could challenge a void sentence at any time. *See* C3735, 3738-39; C3771-79. But this argument fails since this Court jettisoned the "void sentence rule" in *People v. Castleberry*, 2015 IL 116916, ¶ 19. Only sentences imposed (a) by a court lacking personal or subject matter jurisdiction, *id.* ¶¶ 11-12, or (b) pursuant to a statute that was "void ab initio," *Thompson*, 2015 IL 118151, ¶¶ 32, 34, are "void"; all other alleged sentencing violations — petitioner's *Apprendi* and

statutory claims included — are merely "voidable" and subject to the applicable statute of limitations, *People v. Price*, 2016 IL 118613, ¶¶ 17, 31-32; *Castleberry*, 2015 IL 116916, ¶ 11; *see also Lucien v. Briley*, 213 Ill. 2d 340, 344-45 (2004) (*Apprendi* did not render "brutal or heinous" statute void *ab initio*). Accordingly, even if petitioner were correct that (a) *Apprendi* was recently deemed retroactive (which, as discussed below, it was not), and (b) his 1998 life sentence was imposed in violation of *Apprendi*, his challenge would still be time-barred. *E.g.*, *Thompson*, 2015 IL 118151, ¶ 34.

Third, both of petitioner's claims are procedurally barred. The appellate court previously adjudicated his *Apprendi* claim in 2014, affirming the dismissal of his 2012 petition on the ground that "*Apprendi* does not apply to [petitioner's] case." *Stoecker*, 2014 IL App (3d) 130389-U, ¶ 16. Thus, it may not be relitigated in these subsequent proceedings. *See People v. Rissley*, 206 Ill. 2d 403, 411-12 (2003); *People v. Creek*, 94 Ill. 2d 526, 533-34 (1983). In addition, petitioner's claim that the trial court failed to make a necessary finding when imposing his sentence is forfeited because it depends on a matter of record that could have been, but was not, raised on direct appeal. *People v. Burrows*, 172 Ill. 2d 169, 187 (1996); *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005) (despite Illinois courts' interchangeable use of terms "forfeiture," "waiver," "procedural default," and "*res judicata*," "we henceforth use the term 'forfeited' to mean issues that could have been raised [on direct appeal], but were not, and are therefore barred"); *see also People v. Durr*, 215

Ill. 2d 283, 295-96 (2005) (court "may affirm on any basis supported by the record"); *People v. Mamolella*, 42 Ill. 2d 69, 72 (1969); 735 ILCS 5/2-1401(b).

Untimeliness and procedural bars aside, neither of petitioner's claims is a cognizable § 2-1401 challenge — much less a meritorious one — rendering harmless any error in the circuit court's disposal of these § 2-1401 proceedings. Indeed, neither petitioner's *Apprendi* claim nor his claim that the sentencing court failed to sufficiently articulate its grounds for finding the "brutal or heinous" aggravator was a challenge to a previously unknown error of fact. *Pinkonsly*, 207 Ill. 2d at 565-66 ("meritorious defense under section 2-1401 involves errors of fact, not law"); *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000) (§ 2-1401 petition is "the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition"). And, as already discussed, each was a claim that his sentence is voidable, not void. *See Thompson*, 2015 IL 118151, ¶¶ 28-32, 34, 44 (citing *Warren Cty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 41) (§ 2-1401 also available to attack void judgments); *see also* 735 ILCS 5/2-1401(f).[5]

[5] Contrary to petitioner's suggestion, *People v. Lawton*, 212 Ill. 2d 285 (2004), was not an invitation for criminal defendants to use § 2-1401 to attack merely voidable convictions and sentences and thereby circumvent the limitations of other avenues of collateral relief. *See* Pet. Br. 10. Indeed, *Lawton* expressly distinguished individuals whose unique circumstances had otherwise completely deprived them of a mechanism for obtaining collateral relief from would-be criminal-defendant petitioners whose proper recourse for

Finally, petitioner's claims are plainly meritless. It is firmly established that *Apprendi* is not retroactively applicable to criminal cases — like petitioner's — where direct appeal was exhausted before *Apprendi*'s issuance on June 26, 2000. *De La Paz*, 204 Ill. 2d at 433, 439. Nor has the United States Supreme Court ever ruled — in the cases cited in his petition or otherwise, *see* C3731-32, 3738-39; C3773-77 — that *Apprendi* is retroactively applicable. *See Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015) ("[T]he Supreme Court has not declared *Apprendi* to be retroactive — nor has any court of appeals."); *see generally Montgomery*, 136 S. Ct. 718; *Welch*, 136 S. Ct. 1257; *Johnson*, 135 S. Ct. 2551. Thus, *Apprendi* does not apply, and any error in the manner of the petition's dismissal was harmless. *E.g.*, *People v. Taylor*, 349 Ill. App. 3d 718, 720-21 (1st Dist. 2004) ("[D]efendant has not alleged, nor could he ever allege, any facts in his petition that would circumvent *De La Paz* and make his extended-term sentence subject to *Apprendi*. . . . [H]e could not have cured [the petition's] inherent defects[, and d]ismissal of defendant's petition was inevitable.").[6]

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constitutional challenges lay in the Post-Conviction Hearing Act. 212 Ill. 2d at 297-99; *cf. People v. Gayden*, 2020 IL 123505, ¶ 49 ("The fact that defendant is now unable to seek relief using the proper vehicle for his claim . . . does not warrant a different result . . . . This court need not, and indeed cannot, create additional remedies apart from those set forth in the [Post-Conviction Hearing] Act for those defendants who fail to avail themselves of the remedies set forth in the Act.").

[6] To be sure, *Montgomery* directed state courts to adopt the first prong of the retroactivity framework articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *See Montgomery*, 136 S. Ct. at 729, 731-32. But this Court had already

Petitioner's statutory challenge also fails. The trial court had no duty to provide a statement of reasons for the sentence imposed, absent a request by petitioner on the record, and petitioner's failure to make such a request forfeited the issue. *People v. Davis*, 93 Ill. 2d 155, 162-63 (1982); *see also People v. La Pointe*, 88 Ill. 2d 482, 493 (1981) (court not required to "detail for the record the process by which he concluded that the penalty he imposed was appropriate"); *People v. Meeks*, 81 Ill. 2d 524, 534 (1980) (court not "obligate[d] . . . to recite, and assign a value to, each fact presented in evidence at the sentencing hearing"); *People v. Keller*, 267 Ill. App. 3d 602, 610 (1st Dist. 1994) ("[W]e know of no case which required the sentencing judge to articulate his express findings that the crime was exceptionally brutal or heinous."). And, in any event, the court identified petitioner's conduct as "heinous" more than once during sentencing. *E.g.*, R2116; R2117-18. Thus, petitioner's statutory challenge is meritless, and the circuit court's dismissal of his § 2-1401 petition was harmless.

II. Reversal Is Not Warranted Based on Appointed Counsel's Representation.

Petitioner's challenge to his counsel's representation presupposes that he was entitled to a level of representation above and beyond that which the Rules of Professional Conduct require of all practicing Illinois attorneys, but

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adopted *Teague* in its entirety when it decided in *De La Paz* that *Apprendi* is not retroactively applicable. *De La Paz*, 204 Ill. 2d at 433-35, 437. Thus, *Montgomery* is of no import to the merits of petitioner's *Apprendi* claim or the resultant harmlessness of the error alleged.

as a civil litigant seeking relief from judgment under § 2-1401 of the Code of Civil Procedure, petitioner had no right to counsel at all, let alone a guaranteed standard of representation emanating from such a right.

If this Court were to hold that the discretionary appointment of counsel in a § 2-1401 proceeding entitles a petitioner to some particular standard of representation, it should reject the reasonable-assistance standard provided to petitioners under the Post-Conviction Hearing Act in favor of the due-diligence standard the Court has applied to appointed counsel in related circumstances.

And regardless of which standard of representation this Court might apply, counsel's performance should be weighed against the resulting prejudice, if any — lest the standard of representation for discretionarily appointed counsel exceed that of counsel appointed as a matter of constitutional right.

A. Section 2-1401 petitioners have no right to counsel, and this Court should decline to adopt the reasonable-assistance standard statutorily provided to petitioners under the Post-Conviction Hearing Act.

Minimum standards of attorney representation for criminal defendants flow from the underlying right to counsel itself. *See People v. James*, 111 Ill. 2d 283, 291 (1986) ("'Of course, the right to effective assistance of counsel is dependent on the right to counsel itself.'" (quoting *Evitts v. Lucey*, 469 U.S. 387, 396 n.7 (1985))). In criminal trials and direct appeals, defendants have a constitutional right to counsel and, accordingly, a right to effective assistance

of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const., amend. VI; Ill. Const., art. 1, § 8; *see also People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001). On postconviction review, a petitioner's right to the reasonable assistance of counsel derives from the General Assembly's decision to provide a statutory right to counsel at second-stage proceedings under the Post-Conviction Hearing Act. 725 ILCS 5/122-4; *People v. Owens*, 139 Ill. 2d 351, 364 (1990) ("Because the right to counsel in post-conviction proceedings is derived from a statute rather than the Constitution, post-conviction petitioners are guaranteed only the level of assistance which that statute provides."); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007) (same); *see also People v. Slaughter*, 39 Ill. 2d 278 (1968); Ill. Sup. Ct. R. 651(c).[7]

A criminal-defendant petitioner in § 2-1401 proceedings has neither a constitutional nor a statutory right to counsel. *See* 735 ILCS 5/2-1401; *see also People v. Sweet*, 2017 IL App (3d) 140434, ¶ 44 (decision to appoint § 2-1401 counsel is discretionary); *People v. Kane*, 2013 IL App (2d) 110594, ¶ 21

[7] This Court has since extended application of the reasonable-assistance standard to postconviction counsel at all three stages of postconviction proceedings, whether appointed or privately retained, to accord with the General Assembly's intent under the Act. *People v. Johnson*, 2018 IL 122227, ¶¶ 16-23. That said, Illinois Supreme Court Rule 651(c) remains applicable only to counsel appointed at the second stage. *Id.* ¶ 18; *accord Cotto*, 2016 IL 119006, ¶¶ 41-42 (holding that Rule 651(c) does not apply to privately retained counsel at second stage, even though such counsel must provide reasonable assistance, and explaining that "this court has never conditioned the reasonable level of assistance standard on the applicability of that rule" and, instead, has "treated the reasonable assistance standard as generally applying to all postconviction defendants without reference to Rule 651(c) or between retained or appointed counsel").

(same). Accordingly, neither of the standards of representation flowing from the constitutional and statutory rights to counsel apply. *E.g.*, *People v. Love*, 312 Ill. App. 3d 424, 427 (2d Dist. 2000) ("[B]ecause defendant had no right to counsel, the appointment of counsel did not carry with it a right to a particular level of assistance of counsel.").

Petitioner offers that the "same rationale" for appointing postconviction counsel underlies the appointment of § 2-1401 counsel and that the same standard of representation should therefore be expected. Pet. Br. 22-23. But the rationale for appointing postconviction counsel and holding such counsel to a reasonable-assistance standard is not merely that pro se prisoners generally fare better with counsel, *see id.* at 22; it is that the legislature saw fit to provide a right to postconviction counsel by statute, as part of the establishment of "a statutory mechanism for incarcerated defendants to assert they have been unconstitutionally deprived of their liberty." *Johnson*, 2018 IL 122227, ¶ 17. The reasonable-assistance standard — and by extension, Supreme Court Rule 651(c) — provides courts with a vehicle by which they can ensure that "the purpose of the Act is fulfilled." *Johnson*, 2018 IL 122227, ¶ 17; *see also People v. Suarez*, 224 Ill. 2d 37, 42 (2007) ("To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel."). The same cannot be said for § 2-1401, which provides no right to counsel, much less any standard of representation or mechanism by which to enforce

it. Had the General Assembly intended to establish a right to counsel for criminal defendants pursuing § 2-1401 relief, it could and presumably would have done so.

This Court has also expressly discouraged any deviation from the application of "well-settled principles of civil practice and procedure" to "creat[e] exceptions based solely on the criminal-defendant status" of a subset of § 2-1401 petitioners. *Vincent*, 226 Ill. 2d at 14.[8] Yet, that is exactly what petitioner asks this Court to do. This Court should decline petitioner's invitation to expand, by judicial decree, the statutorily derived right to reasonable assistance of counsel in postconviction proceedings to civil litigants who have no right to counsel in the first place — particularly when the only cited ground for doing so is his status as a criminal defendant. *Cf. Love*, 312 Ill. App. 3d at 427 (because defendant had no statutory right to

[8] *See also Vincent*, 226 Ill. 2d at 6 ("an action brought under section 2-1401 is a civil proceeding and, according to this court's longstanding precedent, is subject to the usual rules of civil practice, even when it is used to challenge a criminal conviction or sentence"); *id.* at 6 ("[T]he Post-Conviction Hearing Act . . . has no application whatsoever to section 2-1401, an entirely different form of statutory, collateral relief."); *id.* at 11 ("[W]e stress again that the Act provides a different form of statutory relief than does section 2-1401, notwithstanding that it, like section 2-1401, allows for collateral relief from judgments. . . . [T]his court has long held that actions pursuant to section 2-1401 are civil proceedings and are to be litigated in accordance with the usual rules of civil procedure. . . . [T]he procedure to be used in section 2-1401 actions is the same whether the petitioner is seeking vacatur of a civil or criminal final judgment.").

counsel on postconviction motion for DNA testing, reasonable-assistance standard did not govern adequacy of appointed counsel's representation).

B. If any standard of representation governs appointed § 2-1401 counsel's performance beyond the Rules of Professional Conduct, it is only the due-diligence standard.

Petitioner proposes in the alternative that this Court apply a due-diligence standard based on *Tedder v. Fairman*, 92 Ill. 2d 216 (1982). *See* Pet. Br. 24-25. But as with the reasonable-assistance standard, application of the due-diligence standard would require this Court to create an "exception[] based solely on the criminal-defendant status" of a subset of § 2-1401 petitioners. *Vincent*, 226 Ill. 2d at 14. It is also unclear whether the standard articulated in *Tedder* was intended to apply outside of the narrow context of that case, for *Tedder* merely stated that "once a circuit court, in its discretion, has determined that appointment of the public defender is appropriate to represent an indigent prisoner, *limited to a grievance relating to the conditions of his confinement*, then that assistant public defender is expected to exercise due diligence in proceeding with the assigned case." 92 Ill. 2d at 227 (emphasis added); *see also Maloney v. Bower*, 113 Ill. 2d 473, 479-80 (1986) ("The court stated that such appointments were to be limited to situations involving grievances related to a defendant's confinement."). *Tedder* did not clearly identify due diligence as a standard of representation governing all attorneys appointed to represent indigent prisoner-litigants in civil proceedings on a discretionary basis. *Cf. People v. Gibson*, 136 Ill. 2d

362, 378 (1990) (even discretionary appointment of criminal standby counsel did "not enlarge that office's duties beyond those prescribed by the [Public Defender] Act").

But even if *Tedder*'s due-diligence standard does control, it requires only performance of the tasks specifically assigned by the court. Indeed, *Tedder* did not find appointed counsel's performance inadequate based on his failure to respond to, or otherwise argue against, various opposing motions to dismiss before the circuit court dismissed his clients' petitions (though counsel apparently did neither). *See Tedder*, 92 Ill. 2d at 219-21; *see also Tedder v. Fairman*, 93 Ill. App. 3d 948, 949-52 (4th Dist. 1981). Rather, the Court pointed to counsel's "fail[ure] to amend [his clients'] pleading[s] in the face of the circuit court['s] statements that both petitions were inadequate" — in particular, the court's order for a more definite statement and several additional orders allowing the petitioners more time to file amended pleadings. *See Tedder*, 92 Ill. 2d at 227; *id.* at 219-21; *see also People v. Walker*, 2018 IL App (3d) 150527, ¶ 36 (due diligence requires performance of "tasks assigned"); *Newsome v. Ill. Prisoner Review Bd.*, 333 Ill App. 3d 917, 923 (4th Dist. 2002) (due diligence requires ensuring that the pro se petition is "adequate to disclose the nature of [the] claims" raised); *Marrero v. Peters*, 229 Ill. App. 3d 752, 755 (4th Dist. 1992) ("[D]ue diligence in *Tedder* [wa]s an admonition to counsel to go forward in good faith. . . . [W]e generally expect counsel to consult with a client.").

Here, the circuit court did not assign any tasks to petitioner's appointed § 2-1401 counsel before disposing of the petition for legal insufficiencies that counsel could not have cured, *see supra*, Sec. I.D, belying any contention that the due-diligence standard was not satisfied here. *See* C3760; C3768.

This Court should reject petitioner's dubious suggestion that due diligence is the functional equivalent of reasonable assistance, Pet. Br. 23-25, or that a rule should be promulgated to make it so, *id.* at 28 & n.3. Reasonable assistance refers to "adequate or proper presentation of a petitioner's substantive claims," such as "attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted." *Perkins*, 229 Ill. 2d at 44; *but see People v. Pendleton*, 223 Ill. 2d 458, 476 (2006) (no obligation to raise new or novel claims). This is far and above the performance of "tasks assigned," *Walker*, 2018 IL App (3d) 150527, ¶ 36, or a basic assurance that the pro se petition is "adequate to disclose the nature of [the] claims" raised, *Newsome*, 333 Ill App. 3d at 923. Not to mention that the reasonable-assistance standard was designed to require proper substantive presentation of complex matters of constitutional law, 725 ILCS 5/122-1(a); by contrast, disclosure of the nature of a § 2-1401 claim under the due-diligence standard would require only a cogent presentation of the factual matters that the petitioner purports were previously unknown, *see Pinkonsly*, 207 Ill. 2d at 565; *Haynes*, 192 Ill. 2d at 461.

In the end, petitioner's proposed due-diligence standard is virtually indistinguishable from the postconviction reasonable-assistance standard. But it would be illogical to hold an attorney appointed on a discretionary basis to the same standard as an attorney appointed pursuant to a statutory right to counsel — just as an attorney appointed pursuant to a statutory right is not held to the same standard as an attorney appointed pursuant to a constitutional right. And more to the point, it would fly in the face of the long-held principle that the level of representation that a defendant is entitled to derives from, and is commensurate with, the nature of the right to counsel itself — a right which no § 2-1401 petitioner holds. *James*, 111 Ill. 2d at 291; *Owens*, 139 Ill. 2d at 364.

As for petitioner's related suggestion that this Court adopt a Rule-651(c)-like rule for discretionarily appointed § 2-1401 counsel, Pet. Br. 28 & n.3, this countervails multiple precedents of this Court declining to apply Rule 651(c) to § 2-1401 counsel, *e.g.*, *People v. Stoffel*, 239 Ill. 2d 314, 327 (2010), and postconviction counsel outside of second-stage proceedings, *see Johnson*, 2018 IL 122227, ¶ 18. It also ignores that Rule 651(c) is a mechanism by which this Court effectuates the distinctive purpose of the Post-Conviction Hearing Act. *Id.* ¶ 17; *Suarez*, 224 Ill. 2d at 42. Section 2-1401 has no such purpose that need be effectuated. Nor has petitioner justified his implied request that this Court simply depart from its normal rulemaking process and establish an untested rule by opinion — a power that

this Court exercises only "sparingly." *People ex rel. Berlin v. Bakalis*, 2018 IL 122435, ¶¶ 26-27; *see also* Ill. Sup. Ct. R. 3.

In sum, this Court should decline to apply either of the proposed standards of representation to appointed § 2-1401 counsel. Counsel's representation is sufficiently regulated by the Rules of Professional Conduct governing all attorney representation, and remedies for inadequate civil representation may lie in attorney discipline via the Attorney Registration and Disciplinary Commission and/or malpractice law, not appellate review of counsel's performance. *Marrero*, 229 Ill. App. 3d at 755 ("Even were we to conclude the public defender did not exercise due diligence in his representation of the plaintiff, there is no remedy available to plaintiff on appeal" because "*mandamus* is a civil action in which there is no constitutional right to counsel."); *but see Johnson*, 2018 IL 122227, ¶ 17 (malpractice action cannot recover "for a claim that has been lost under the [Post-Conviction Hearing] Act"). Should the Court determine — despite the strong language in *Vincent* cautioning against treating criminal-defendant petitioners differently from civil petitioners — that appointed counsel should be held to a higher standard of representation, it should adopt the due-diligence standard, given that § 2-1401 litigants lack any right to counsel at all.

C. This Court should reject petitioner's argument that counsel's performance cannot be weighed against the lack of harm or prejudice suffered.

Contrary to petitioner's argument, *see* Pet. Br. 27-28, that petitioner's § 2-1401 petition was incurably untimely, procedurally barred, and meritless is relevant to any claim that his appointed counsel's performance fell below the minimum level of representation (whatever that may be). Were this Court to hold otherwise — that is, that a reviewing court cannot consider whether (and to what extent) an appointed § 2-1401 counsel's subpar performance impacted the outcome of the proceedings — it would establish a standard of representation for discretionarily appointed counsel more stringent than *Strickland*, which held that the representation of constitutionally appointed counsel is not ineffective where the defendant cannot demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Petitioner's proposed rule thus defies reason.

The appellate court's reasoning in *People v. Zareski*, 2017 IL App (1st) 150836, is instructive. There, the court considered whether this Court's holding in *Suarez* — that an appointed, second-stage postconviction counsel's noncompliance with Rule 651(c) requires remand "regardless of whether the claims raised in the petition had merit," *Suarez*, 224 Ill. 2d at 47 — applied to a claim that petitioner's privately retained counsel provided unreasonable assistance at the third stage of postconviction proceedings. *See generally*

Zareski, 2017 IL App (1st) 150836, ¶¶ 45-61. The court determined that *Suarez*'s remandment requirement derived from the applicability of Rule 651(c), not the reasonable-assistance standard, and therefore, it would not conflict with *Suarez* to incorporate a "*Strickland*-like" "evaluation of prejudice" into the reasonable-assistance standard where Rule 651(c) does not apply — *i.e.*, outside of second-stage proceedings under the Post-Conviction Hearing Act. *Id.* ¶¶ 52-53, 55-56, 59; *see also Suarez*, 224 Ill. 2d at 51 ("Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties *mandated by the rule*, the limited right to counsel conferred by the Act cannot be fully realized.") (emphasis added)).

In reaching this conclusion, *Zareski* reasoned that it "would be an odd outcome" to require a client to prove prejudice under the *Strickland* ineffective-assistance standard but not under the "even lower" reasonable-assistance standard. 2017 IL App (1st) 150836, ¶ 54; *see also id.* ¶ 50; *People v. Pabello*, 2019 IL App (2d) 170867, ¶¶ 36, 40, 44; *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 37; *cf. People v. Custer*, 2019 IL 123339, ¶¶ 30-32 ("quantum of assistance" for postconviction petitioners is "significantly lower than the one mandated at trial by our state and federal constitutions"). Thus, an evaluation of prejudice as part of a reasonable-assistance analysis was proper and would "prevent pointless remands to trial courts for repeated

evaluation of claims that have no chance of success." *Zareski*, 2017 IL App (1st) 150836, ¶ 59; *see also Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). Similarly, here, it would be odd to hold counsel appointed to represent a defendant in a collateral § 2-1401 proceeding to a reasonable-assistance or due-diligence standard more unyielding than the effective-assistance standard applicable to counsel appointed pursuant to the Constitution.

Nor is § 2-1401 counsel governed by Rule 651(c), such that *Suarez* requires remand irrespective of the petition's viability. 224 Ill. 2d at 51-52. Indeed, in *Johnson*, this Court stated that the failure to raise claims that were "frivolous or patently without merit" "would not amount to a denial of reasonable of assistance of counsel" by privately retained, first-stage postconviction counsel, as the petitioner was "entitled to a reasonable level of assistance of counsel" but the attorney's performance was not further governed by Rule 651(c). 2018 IL 122227, ¶¶ 18, 23-24. It stands to reason that if even first-stage postconviction counsel's performance may be weighed against the harm or prejudiced suffered, § 2-1401 counsel's performance should also be weighed against the harm or prejudice suffered, if any — either as an independent "prong" of an overall adequate representation analysis, *e.g.*, *Shaw*, 186 Ill. 2d at 332, or at a minimum, as a factor relevant

to a more general determination of the representation's adequacy, as the appellate court did below, *see Stoecker*, 2019 IL App (3d) 160781, ¶¶ 14-16.

Moreover, petitioner here cannot show anything resembling a reasonable probability of a different outcome in light of the incurable and fatal defects in his § 2-1401 petition. *See supra*, Sec. I.D. Counsel would be under no obligation, even under the more onerous reasonable-assistance standard, to raise new or novel claims, *see Pendleton*, 223 Ill. 2d at 476, and petitioner has identified no additional matter that counsel could have asserted to overcome the petition's untimeliness and no argument as to how either of his § 2-1401 claims could have been amended to present a meritorious claim (assuming he could overcome the procedural bars of *res judicata* and forfeiture). *See Newsome*, 333 Ill App. 3d at 923 (rejecting claim that appointed counsel's performance fell below due-diligence standard where prisoner "suggested no way that appointed counsel in this cause could have amended the complaint so as to state a cause of action for *mandamus* under the facts of this case"). Thus, petitioner's complaint about his attorney's representation should be rejected, regardless of which standard of representation this Court might adopt.

Contrary to petitioner's suggestion, Pet. Br. 25-26, *Pinkonsly* accords with this result. Although *Pinkonsly* did not resolve the question of what standard of representation applies to appointed § 2-1401 counsel, it found that even presuming that the reasonable-assistance standard applied,

counsel's failure to "raise a putative legal error in a proceeding where only fact errors are cognizable" could not amount to unreasonable representation. 207 Ill. 2d at 568. Thus, *Pinkonsly* is dispositive: petitioner's § 2-1401 petition here also alleged only "putative legal error[s]" that were inappropriate for relief under § 2-1401, meaning that counsel's failure to pursue them could not be unreasonable. *Id.*; *Haynes*, 192 Ill. 2d at 461. But implicit in *Pinkonsly*'s finding is a more fundamental premise: that a petition's lack of merit — there, because it was noncognizable under § 2-1401 — undercuts the § 2-1401 petitioner's later contention that appointed counsel's failure to pursue the meritless claim amounted to inadequate representation. For this reason, as well, petitioner's inadequate representation claim should be rejected.

Finally, if this Court were to conclude that petitioner may have been prejudiced by counsel's performance, the proper outcome under either potential standard of representation is a remand for an evidentiary hearing regarding counsel's performance. Petitioner admits that the record has not been developed with regard to why counsel conducted himself as he did, *see* Pet. Br. 26-27, even though it is petitioner who "bears the burden of presenting an adequate record to support [his] claim of error," *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Indeed, it is unknown on this record whether counsel received notice that he had been appointed or, if he did, whether he merely decided to stand on the pro se petition (a course that petitioner

appears to concede may be appropriate in certain circumstances, *see* Pet. Br. 28). Therefore this Court is in no position to determine whether counsel's performance fell below either a reasonable-assistance or due-diligence standard of representation. *Cf. Gayden*, 2020 IL 123505, ¶ 36 (claim of ineffective assistance of counsel for failing to move to suppress evidence could not be resolved on record that was insufficient to determine merit of underlying suppression issue); *People v. Carter*, 2015 IL 117709, ¶¶ 20-25 (court could not determine whether dismissal of § 2-1401 petition was premature due to deficient service where record was insufficient to affirmatively establish deficient service). Accordingly, if this Court does not dispose of petitioner's claim on the ground that he has suffered no prejudice, remand for development of the record of counsel's representation would be appropriate.

CONCLUSION

For all of these reasons, this Court should affirm the appellate court's judgment. Alternatively, the Court should vacate, in part, the appellate court's judgment regarding the adequacy of counsel's representation and remand for an evidentiary hearing.

March 27, 2020

Respectfully submitted,

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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 containing the Rule 341(d) cover, the Rule 341(h)(1) 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 39 pages.

/s/ *Evan B. Elsner*
EVAN B. ELSNER

PROOF OF FILING AND SERVICE

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. The undersigned deposes and states that on March 27, 2020, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and served upon the following e-mail addresses of record:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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