No. 124807

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

I. RONALD'S DUE PROCESS RIGHTS WERE VIOLATED IN A PREJUDICIAL MANNER WHERE THE CIRCUIT COURT GRANTED THE STATE'S MOTION TO DISMISS HIS PETITION FOR RELIEF FROM JUDGMENT WITHOUT GIVING HIM A MEANINGFUL OPPORTUNITY TO RESPOND, AND WHERE THE COURT DISMISSED THE PETITION DURING AN *EX PARTE* HEARING WITH ONLY THE STATE PRESENT.

The situation this case presents is that of a litigant before an Illinois court who was given no reasonable chance to respond to a motion to dismiss his petition, and who was utterly abandoned by his court-appointed attorney. This, says the State, is perfectly acceptable and fully comports with due process (St.'s br., 7-14). The position taken by the State here is flabbergasting.

The prosecution has an obligation to seek impartial justice and due process of law for all of the people of the State of Illinois, one of whom is Ronald. United States Supreme Court Justice Sutherland wrote, in 1935: "[t]he [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). This Honorable Court also recognizes that the prosecutor is the representative of all the people of the county, including criminal defendants, and thus has a duty to safeguard the due process rights of the defendant as well as those of every other citizen. *People v. Lyles*, 106 Ill. 2d 373, 411-12 (1985).

While this case, obviously, focuses primarily on the manner in which Ronald's petition was treated, this Court's decision will have long-lasting ramifications

for all criminal *pro se* section 2-1401 petitioners. The State is of course free to vigorously argue its case, and Ronald hardly expects the State to confess error here. However, he and this Court should be able to count on the State to proceed with the understanding that it has an obligation to pursue due process of law for each and every litigant that comes before the Illinois courts. The State has not done that here. It simply cannot be acceptable for trial courts and court-appointed attorneys to treat section 2-1401 petitioners as shabbily as Ronald was treated here, and the State ought to at least acknowledge this.

In addition, the State has mischaracterized the nature of this case. In its "Nature of the Case" statement, the State asserts that there is an issue regarding whether Ronald's petition stated a claim for relief under section 2-1401 (St.'s br., 1). The State is mistaken. The nature of the case as presented to this Court is purely procedural. Ronald makes no argument that his petition states a valid claim for relief.

From the start, the State has therefore failed to recognize its duty to represent the due process interests of all litigants coming before the Illinois courts and has unfairly mischaracterized the nature of the case.

The State argues that the manner in which the trial court dismissed Ronald's section 2-1401 petition was not a violation of due process (St.'s br., 7-14). The State is wrong.

In making this argument, the State initially asserts that there is no substantial difference between a *sua sponte* dismissal of a section 2-1401 petition and a dismissal following a motion to dismiss (St.'s br., 7-12). The State is incorrect.

A *sua sponte* dismissal and a dismissal following a motion to dismiss are two substantially different things. If the State chooses to ignore a section 2-1401

petition, as the State could have done here, it essentially admits the well-pleaded facts in the petition and allows the court to determine, on its own, whether the petition sufficiently states a cause of action. *People v. Vincent*, 226 Ill. 2d 1, 10-13 (2007). When the State chooses this option, it makes no assertions of fact or law that the petitioner could challenge. However, when the State chooses to file a motion to dismiss, as it did here, it makes assertions of fact or law, or both, that the petitioner must be given a chance to rebut. *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 16; see also *Vincent*, 226 Ill. 2d at 22-23 (if the State had filed a motion to dismiss, the defendant would have had an opportunity to file a response) (Kilbride, J., dissenting).

The ramifications of the State's filing a motion to dismiss here can be illustrated by an analogy to a tennis match. In filing a motion to dismiss, the State had, in essence driven the ball into Ronald's court. It would be manifestly unfair to require him to stand idly by as the ball whizzed past, yet this is essentially what happened here, and the State insists this comports with due process. This cannot be the law. As the *Bradley* Court wrote, "It is well established that due process does not allow a trial court to grant a motion to dismiss a complaint without allowing the opposing party notice and a meaningful opportunity to be heard." *Bradley*, 2017 IL App (4th) 150527, ¶ 16. In other words, Ronald was entitled to take a swing at the ball once the State had chosen to launch it into his court. The trial court's overly hasty decision here deprived him of the opportunity to do that.

The State then asserts that since Ronald was able to file a motion to reconsider the court's dismissal of his petition, due process was not offended (St.'s br., 10, 15). The State neglects to mention that Ronald, who is incarcerated and is not

an attorney, was forced to file this motion himself since his court-appointed attorney had abandoned him. Leaving that glaring omission aside, the State's argument fails for a more important reason. Due process of law "protects fundamental justice and fairness." *Lyon v. Dept. of Children and Family Services*, 209 Ill. 2d 264, 272 (2004). There is a well-established and simple procedure to be followed when a party files a motion to dismiss: the opposing party is afforded an opportunity to respond before the court issues its decision. *People v. Bailey*, 2016 IL App (3d) 140207, ¶ 20 (parties are generally permitted to respond to motions filed by the opposing party). That procedure was not followed here. In addition, when Ronald filed his motion to reconsider, he had the burden of persuasion, whereas if he had been given a chance to respond to the State's motion, the State would have had the burden to establish a reason for dismissal. *Rucker*, 2018 IL App (2d) 150855, ¶ 29. Due process thus clearly did not fully play out here. *Id.*

The form that due process takes is every bit as important as the result. *Wilson v. Holliday*, 774 A. 2d 1123, 1135-36 (Md. App. Ct. 2001). This is so particularly where an individual's liberty is at stake, as is the case in criminal section 2-1401 petitions. *Rucker*, 2018 IL App (2d) 150855, ¶ 29. The fact that Ronald was able to file a *pro se* motion to reconsider therefore matters not a whit. The trial court took a shortcut here, and in so doing deprived Ronald of due process.

The State then takes issue with two of the cases Ronald relies upon, *Rucker*, 2018 IL App (2d) 150855, and *Bradley*, 2017 IL App (4th) 150527 (St.'s br., 10-12). The State asserts that the authorities these decisions relied upon "did not hold that due process provides the right that petitioner advocates for here" (St.'s br., 11). To be clear, the "right that petitioner advocates for here" is not anything

outlandish. Ronald simply requests that the standard process in which a motion is filed, then a response is filed, and then a decision is issued, be followed in section 2-1401 petitions. *Bradley*, 2017 IL App (4th) 150527, ¶ 16. The State, however, insists that this process can be shortcut when a petition is meritless on its face (St.'s br., 11-12). The State's suggestion leads courts down a dangerous road. Tribunals as diverse as Native American courts of appeal recognize that due process protects everyone. *Antoine v. Marchand*, 16 Am. Tribal Law 3, 8 (Colville Tribal Ct. of Appeals 2019). When shortcuts are taken, as the State advocates, mistakes can happen and litigants may be harmed. *Id.* The best practice is thus for courts to allow both parties be heard before reaching a decision. *Id.* ("Even in a case where the outcome appears certain, the Court must refrain from acting before all parties are given the opportunity to state their case").

The State also argues that a section 2-1401 petition should be swiftly and efficiently disposed of when the petitioner, like Ronald, has filed numerous unsuccessful petitions (St.'s br., 13-14). Ronald concedes that he has made a number of previous unsuccessful filings. However, it would have taken very little effort here for the trial court to have offered Ronald the opportunity to file a response to the State's motion to dismiss. A one or two-line written order setting a briefing schedule on the motion would have sufficed. Such an order would have taken virtually no appreciable time to draft. It is difficult to see how this would have been a significant imposition on the honorable trial court's time.

The State then argues, briefly, that the trial court's motion hearing was not an *ex parte* hearing, citing to *People v. Burnett*, 237 Ill. 2d 381, 386-87 (2010) (St.'s br., 14). *Burnett* is easily distinguishable. In that case, the defense had filed

a motion to reconsider the sentence. *Id.*, at 385. The trial court then denied the motion during a hearing in which the defense was not present, but the State was. *Id.,* at 386. The State, the party opposing the motion, offered no input, but certainly could have done so. *Id.* Here, it was the party opposing the State's motion, the defense, that was absent from the hearing in which Ronald's petition was dismissed (R2441-43). Ronald was therefore deprived of the opportunity the State enjoyed in *Burnett*: to respond orally to the motion presented by the opposing party. *Id. Burnett* therefore does nothing to help the State.

Moreover, the *Burnett* Court quoted from Black's Law Dictionary regarding the nature of an *ex parte* hearing: "'A judicial proceeding . . . is said to be *ex parte* when it is taken or granted at the insistence of or for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.'" *Burnett*, 237 Ill. 2d at 387 (quoting Black's Law Dictionary 517 (5th Ed. 1979)). What happened in the instant matter was thus a classic *ex parte* hearing: it was held for the benefit of the State, and without notice to or contestation by the defense.

The State then argues that any procedural error here was harmless (St.'s br., 15-23). This Court could certainly whitewash the trial court's procedural slop here by finding any error harmless. Regardless of the merits of Ronald's petition, however, this Court should not decide this case on the basis of harmless error. This Court should not do so because the manner in which the trial court disposed of Ronald's petition lacked the essential integrity proceedings before Illinois courts must have. *Bradley*, 2017 IL App (4th) 150527, ¶ 21.

In making its harmless error argument, the State asserts that the error here was not "structural," as it did not "render a criminal trial fundamentally

unfair" (St.'s br. 15-17). The State's argument falls flat for a simple reason: this appeal does not involve a trial; instead, it involves a section 2-1401 petition. Moreover, the fundamental unfairness of *any proceeding* in which a litigant is deprived of an opportunity to respond to a motion to dismiss his or her case, and is abandoned by his or her attorney, ought to be obvious.

Ronald's case provides this Court with an opportunity to reinforce the notion that the manner in which trial courts proceed matters every bit as much as the results of any given proceeding. The reason this Court should accept this opportunity and rule on the side of due process is readily apparent. Without such essential procedural integrity, the public will soon lose confidence in the courts. "'Justice and the law must rest on the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety.'" *People v. Lang*, 346 Ill. App. 3d 677, 682 (2d Dist. 2004) (quoting *People v. Courtney*, 288 Ill. App. 3d 1025, 1033 (3d Dist. 1997)); see also *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445 (2015) (emphasizing the need for "public confidence in judicial integrity").

The State's harmless error argument thus presents this Court with an important choice: it can whitewash the sloppy procedures of the circuit court under the rubric of harmless error and risk undermining public confidence in the integrity of the Illinois courts (*Williams-Yulee*, 575 U.S. at 445; *Lang*, 346 Ill. App. 3d at 682),or it can uphold the notion that due process and the integrity of the courts are absolutely vital. *People v. Stapinski*, 2015 IL 118278, ¶ 51 (due process requires fairness and integrity); *Bradley*, 2017 IL App (4th) 150527, ¶ 21; *United States ex rel. Weber v. Ragen*, 176 F. 2d 579, 586-87 (7th Cir. 1949) (due process preserves the "essential integrity of the proceedings"). The better choice seems clear.

Ronald's due process rights were violated where he was not given a meaningful opportunity to respond to the State's motion to dismiss, and where the court dismissed his petition during an improper *ex parte* hearing. These errors were necessarily prejudicial because they infringed upon the essential integrity of the proceedings. For the reasons expressed here and in his opening brief, he respectfully requests that this Court reverse the decision of the Appellate Court and remand the case for further proceedings.

II. APPOINTED COUNSEL'S COMPLETE FAILURE TO ADVOCATE FOR RONALD DURING PROCEEDINGS ON HIS PETITION FOR RELIEF FROM JUDGMENT CONSTITUTED INADEQUATE REPRESENTATION.

In addressing the State's arguments here, it is important to reemphasize, from the start, that *appointed counsel provided no representation whatsoever to Ronald*. "[T]he record does not show that appointed counsel provided any actual representation to defendant." *People v. Stoecker*, 2019 IL App (3d) 160781, ¶ 25 (Lytton, J., dissenting). That the State finds this acceptable is appalling.

The State asserts that one of the issues presented is whether a court-appointed attorney in a section 2-1401 case is required to go beyond the requirements of the Rules of Professional Conduct (St.'s br., 1). Nowhere in his brief did Ronald assert that counsel was required to go above and beyond the ordinary responsibilities any attorney would have while competently representing a client. The State's insinuation that Ronald is asking for anything other that routinely competent representation is an unfair characterization of his arguments.

The State goes on to further mischaracterize the issue of counsel's non-representation of Ronald by focusing on counsel's failure to respond to the State's motion to dismiss and his failure to appear for the motion hearing (St.'s br., 1). The issue presented here is broader than these two specific instances of non-representation. Again, counsel *did absolutely nothing to represent Ronald here*. The issue is thus whether it is acceptable for a court-appointed attorney to abandon his client. The obvious answer to this question is no.

The State asserts that Ronald asks for a "level of representation above and beyond that which the Rules of Professional Conduct require" (St.'s br., 23). This

is simply false. Ronald does not ask for special treatment. He simply asks that when counsel is appointed for a section 2-1401 petitioner, *counsel actually represent the petitioner*. This is not an unreasonable request.

The State then argues that "Section 2-1401 petitioners have no right to counsel" (St.'s br., 24-28). The State cites no authority for the proposition that section 2-1401 petitioners are barred from obtaining counsel and must in all cases proceed *pro se*. Section 2-1401 petitioners, like any other litigants before Illinois courts, remain free to retain counsel, and trial courts have the discretion to appoint counsel for them. See, *e.g.*, *People v. Pinkonsly*, 207 Ill. 2d 555, 558-59 (2003) (counsel appointed for section 2-1401 petitioner); *People v. Walker*, 2018 IL App (3d) 150527, ¶ 8 (same).

What the State likely means is that section 2-1401 petitioners have no statutory or constitutional right to counsel (St.'s br., 25-26). While this assertion is correct, it is meaningless in the context of this case. The fact remains that Ronald was appointed counsel here. When counsel was appointed, counsel assumed the basic duties of competent professional representation under the Rules of Professional Conduct. Ill. R. Prof. Conduct 1.3 (2010) ("A lawyer shall act with reasonable diligence and promptness in representing a client"); Ill. R. Prof. Conduct 1.3, comment 4 (2010) ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client"). Ronald does not ask this Court to "expand, by judicial decree, the statutorily derived right to reasonable assistance of counsel in postconviction proceedings to civil litigants," as the State incorrectly asserts (St.'s br., 27). Ronald merely asks that appointed counsel do their jobs.

The State then argues that if there is to be a standard governing the representation of section 2-1401 petitioners, that standard should be that of due diligence (St.'s br., 28-32). As he explained in his opening brief, this Court could grant Ronald relief without resolving the lack of clarity regarding the level of assistance required of appointed section 2-1401 attorneys (Def.'s br., 19). And, as he also explained in his opening brief, there really is no substantial difference between a "due diligence" standard of representation and a "reasonable assistance" standard of representation (Def.'s br., 24). Ronald, though, stands on the arguments he made in his opening brief (Def.'s br., 19-26). This Court should hold, if it finds it necessary to do so, that section 2-1401 petitioners are entitled to a reasonable level of assistance.

The State also takes issue with Ronald's suggestion that this Court should promulgate a Rule akin to Rule 651(c) for section 2-1401 attorneys (St.'s br., 31-32). Ronald reminds this Court that his suggestion was merely that – a suggestion. This Court could ignore or reject this suggestion and still grant Ronald relief. Ronald, however, reiterates his rationale for the promulgation of such a Rule: had the requirements of this proposed Rule been in place at the time this case proceeded in the circuit court, the procedural mess that spawned this appeal would likely not have occurred.

Next, the State argues that "counsel's performance" could not have prejudiced Ronald, since his petition was meritless, and that Ronald is asking for some sort of "above and beyond" standard for evaluating counsels' performance in section 2-1401 proceedings (St.'s br., 33-38).

As Ronald has repeatedly explained, counsel did not represent him. *Stoecker*, 2019 IL App (3d) 160781, ¶ 25 (Lytton, J., dissenting). There is therefore no such

thing as "counsel's performance" to analyze. Regardless of what standard this Court might choose to adopt, if any, to evaluate the performance of section 2-1401 attorneys, it cannot be acceptable for an attorney to abandon his client. Ill. R. Prof. Conduct 1.3 (2010); Ill. R. Prof. Conduct 1.3, comment 4 (2010). Again, Ronald does not ask for special treatment. He merely requests that appointed counsel represent him. In addition, as Ronald explained in his opening brief (Def.'s br., 27), the merits of his petition are irrelevant. The notion that it is acceptable for a court-appointed attorney (or any attorney, for that matter), to provide no representation for his or client whatsoever, and not even move to withdraw, should be flatly rejected.

Finally, the State asks that this Court remand the case "for an evidentiary hearing regarding counsel's performance" (St.'s br., 37-38). At the risk of flogging the proverbial dead horse, there *was no performance* by counsel. It is therefore not clear what such a hearing would accomplish, but if this Court were to decline to grant Ronald the relief he requests, he would not object to such a remand.

For the reasons expressed here and in his opening brief, Ronald respectfully requests that this Court find that appointed counsel's non-performance here was inadequate, reverse the dismissal of his section 2-1401 petition, and remand the case for further proceedings with new counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

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No. 124807

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 9, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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