

No. _____

In The
Supreme Court of the United States

TRACI M. CULL,

Petitioner,

v.

DYCK-O'NEAL, INC. & DEUTSCHE BANK TRUST
COMPANY AMERICAS, AS TRUSTEE,
RESIDENTIAL FUNDING CO., LLC FKA RESIDENTIAL
FUNDING CORP., ATTORNEY IN FACT,

Respondents.

**On Petition For A Writ Of Certiorari
To The Kentucky Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER P. FINNEY, Esq. <i>Counsel of Record</i> FINNEY LAW FIRM, LLC 4270 Ivy Pointe Blvd., Ste. 225 Cincinnati, OH 45245 (513) 943-6655 chris@finneylawfirm.com	DAVID A. KRUER, Esq. DAVID KRUER & COMPANY, LLC 118 W. Fifth St., Ste. E Covington, KY 41076 (859) 291-7213 dkruer@fuse.net
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Counsel for Petitioner

QUESTIONS PRESENTED

This matter arises from a motion seeking to void a default judgment entered against Petitioner in a state court foreclosure action where service of process was not in the manner required by the state statutes. In this time of recovery from the Pandemic and the earlier Great Recession, the important federal questions arising under the Due Process Clause as set out below are in need of clarity and amplification on a national level for those people that are or will be similarly situated as the Petitioner in this matter.

The questions presented are:

1. When the manner of service of process required under state law is not followed, is there a violation of the Due Process Clause by the state judiciary when a judgment based on such service of process results in deprivation of property (wage garnishment) of the person so served;
2. Is the process due under the Due Process Clause, for effective service of process, defined by applicable state law or must it merely be reasonably calculated to give notice and opportunity for a fair hearing.

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant/Appellant below, is Traci M. Cull.

Respondents, who were the Plaintiff and Intervening Plaintiff below, respectively, are Dyck-O'Neal, Inc. and Deutsche Bank Trust Company Americas as Trustee, Residential Funding Company, LLC fka Residential Funding Corporation, Attorney in Fact.

RELATED CASES

Dyck-O'Neal, Inc. v. Douglas A. Cull, et al., Case no.: 09-CI-003600, Campbell Circuit Court, Default judgment entered September 2, 2009, Order granting motion to substitute Plaintiff entered April 23, 2013, Order granting motion to intervene as intervening Plaintiff to Deutsche Bank entered February 27, 2019, Order denying motion to declare default judgment void as to defendant, Traci M. Cull, entered February 27, 2019.

Traci M. Cull v. Dyck-O'Neal, Inc., et al., Case no.: 2019-CA-1338-MR, Kentucky Court of Appeals, Opinion affirming order denying motion to declare default judgment void entered July 30, 2021 and reported at 2021 Ky. App. Unpub. LEXIS 458 and 2021 WL 32342260, Order denying petition for rehearing entered September 15, 2021 and is not reported.

Traci M. Cull v. Dyck-O'Neal, Inc., et al., Case no.: 2021-SC-0466-D, Kentucky Supreme Court, Order denying motion for discretionary review entered April 20, 2021 and is not reported.

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PROCEEDINGS BELOW

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JURISDICTION

The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL-STATUTORY PROVISIONS

The Fourteenth Amendment to the U.S. Constitution provides: “No state shall . . . deprive any person of life, liberty or property without due process of law.”

U.S. Const., Amendment XIV, § 1.

KRS 70.030 *Deputy sheriffs. . . .*

(1) The sheriff may appoint his or her own deputies and may revoke the appointment at his or her pleasure. . . . Before any deputy executes the duties of his or her office, he or she shall take the oath required to be taken by the sheriff. . . .

KRS 70.050 *Person may be empowered to execute process*

(1) A sheriff may, by writing, empower any person to execute an original or mesne process. The person so empowered shall indorse his action on the instrument empowering him, and shall make affidavit to the truth of the indorsement, and attach the affidavit to the process and deliver the indorsement and affidavit to the sheriff or his deputy, to be returned to the proper office. The indorsement shall have the same validity as if made by the sheriff. . . .

STATEMENT OF THE CASE

This case involves the sufficiency of the service of process upon the Petitioner, as a matter of state law, to allow the state court the required personal jurisdiction

for the entry of a money judgment against her by default as part of a foreclosure action.

During November, 2018, when her wages were garnished, the Petitioner learned of a default judgment, entered personally against her on September 2, 2009. As a consequence, she made a special limited appearance to file a motion to declare the default judgment against her void under applicable Kentucky Law.

Service of process upon Petitioner appeared to have been made by Timothy Rechtin of the Campbell County Sheriff's office on May 4, 2009 and his return of the summons was without an attesting affidavit of that service of process. The motion to declare the judgment void was denied by the Campbell Circuit Court based on a presumption that a sheriff's return of service is correct despite it being uncontroverted that both the testimony by Rechtin that he was not sworn in as a deputy sheriff until several years later when a new sheriff was elected and that the summons returned by Rechtin was not attached with an affidavit attesting to his purported delivery of the summons and complaint to the Petitioner. This order denied the motion over the objection of Petitioner to the report of the master commissioner that expressly cited the case of *Gardner v. Lincoln Bank & Trust Co.* in which the Supreme Court of Kentucky said:

In respect to process, the constitution places life, liberty, and property upon an equality, a party cannot be deprived of his property without service of process in the manner provided by law. A presumption of service may or may

not be true; and, if it is false, a judgment entered upon it, if it is enforced by execution, results in depriving the person, who is the subject of the presumption, of his property without due process of law." *Gardner v. Lincoln Bank & Trust Co.*, 251 Ky. 109, 111, 84 S.W.2d 497 (Ky. 1933).

The appeal to the Kentucky Court of Appeals was timely made on various grounds which included, as germane here, the failure of the lower court to recognize the service of process in question did not comply with either of the requirements of KRS 70.030 and 70.500. The grounds in support of the appeal also included specific citation to *Gardner* that identified the application of the Due Process Clause to the issue before the court.

The Kentucky Court of Appeals affirmed the ruling of the Campbell Circuit Court based on the presumption that a sheriff's return of service is correct and the Petitioner's contrary testimony was insufficient to impeach Rechtin's proof of service. It summarized Rechtin's testimony as he could not specifically recall the particulars of the service of process on the Petitioner but that if his signature was on the return, he had served it. The Kentucky Court of Appeals further ruled that even if the presumption was ignored because of application of KRS 70.030 or 70.050, the testimony of Rechtin was sufficient as proof of service of process because the Court was not persuaded that the defect invalidated the service of process. No

explanation for not considering the cited case of *Gardner* was made in the opinion affirming the lower court.

The petition for rehearing to the Kentucky Court of Appeals expressly identified the federal question arising under the Fourteenth Amendment and the application of the case of *Gardner* in relation to the Due Process Clause. However, that petition was denied by the Kentucky Court of Appeals.

The motion for discretionary review to the Kentucky Supreme Court also expressly identified the federal question arising under the Fourteenth Amendment to the U.S. Constitution and how the case of *Gardner* expressly applied the Due Process Clause in such regard. However, that motion was denied by the Kentucky Supreme Court.

REASONS FOR GRANTING THE PETITION

The Due Process Clause concerns the administration of justice and acts as a protection from arbitrary deprivation of life, liberty, or property by a state's action. Historically, as explained in the case of *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L. Ed. 232 (1884), "due process" has its roots in and relates to "the law of the land" as was contemplated in the Magna Carta and English common law. As further explained in *Hurtado* concerning the Fourteenth Amendment in contrast to the Fifth Amendment –

[Due Process] refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State,

exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. *Id.* 535, 120-121, 238.

At the time of the *Hurtado* decision, the making and altering referred to the state legislatures and goes on to say “[e]ach State prescribes its own modes of judicial proceeding.” *Id.* 121, 535, 238. Since that time, the view has expanded to apply to not only state legislative actions but also state judiciary actions when a state court decision constitutes a violation of federal law. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

Nationally, our country has been in a mode of recovery for more than the past decade which has had significant impact on our country’s court systems. The Great Recession brought a flood of state and federal foreclosure actions and a related deflation of real estate values throughout the country. This matter in controversy should be viewed as one within such a flood and as an example of how a system of justice may fail in doing what is required due to such burden caused by such volume. Thereafter just as the collapsed real estate market had generally recovered, the Coronavirus Pandemic arose and caused even greater

chaos in the court systems than the earlier national crisis.

As a result of these crises impacting our national court systems, a large number of civil actions are likely to have or will have issues regarding the sufficiency of the service of process under the Due Process Clause. Probably the majority of such cases will arise in state courts, such as this case.

Petitioner believes the Kentucky Supreme Court, the Kentucky Court of Appeals and the Campbell County Circuit Court, through their respective judicial actions on behalf of Kentucky have not provided the process the Petitioner that was due under Kentucky law in violation of the Fourteenth Amendment of the U.S. Constitution. Additionally, the conclusion of those state court proceedings should be viewed as being repugnant to the U.S. Constitution as a consequence of the Kentucky state courts not having personal jurisdiction over the Petitioner because she was not served in the manner required by Kentucky law, namely KRS 70.030 or 70.050.

It is respectfully submitted that this case is well suited for the Supreme Court to provide clarification and amplification of these important federal questions of how the Due Process Clause applies to the service of process, both on a state and federal level, when the circumstances of our court systems have been impacted by the crises occasioned from the Great Recession and the Coronavirus Pandemic with regard to perfection of service of process. The granting of certiorari would

create timely judicial economy through our nation's court systems. Lastly, such action will help quell some of the chaos our society has been suffering and reassure the quality of justice to those people situated similarly to the Petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER P. FINNEY, ESQ.	DAVID A. KRUER, ESQ.
<i>Counsel of Record</i>	DAVID KRUER &
FINNEY LAW FIRM, LLC	COMPANY, LLC
4270 Ivy Pointe Blvd., Ste. 225	118 W. Fifth St., Ste. E
Cincinnati, OH 45245	Covington, KY 41076
(513) 943-6655	(859) 291-7213
chris@finneylawfirm.com	dkruer@fuse.net

Counsel for Petitioner