NO. 04-1477

IN THE

Supreme Court of the United States

GARY KENT JONES,
Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
COMMISSIONER OF STATE LANDS,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

PETITIONER'S REPLY

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PETITIONER'S REPLY

This case presents the question whether, when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional effort to locate the owner before taking the owner's property. The Brief in Opposition (BIO) provides no basis to deny certiorari.

1. Respondents Ignore All But Three Of The Cases That Comprise The Split Among The Courts And Either Misstate Or Fail To Grasp The Import Of The Cases They Discuss.

Respondents assert that the entrenched conflict among the courts that have addressed the question presented is "illusory" and that "[t]he Arkansas line of cases is easily reconciled with the cases cited by Petitioner." BIO 7. But the BIO ignores 30 of the 33 cases cited in the petition as examples of the deep and intractable conflict. In the tax sale context, the petition cites decisions of fourteen different courts on the majority side of the split, Pet. 6-7 & n.5-6, six courts other than Arkansas courts on the minority side, Pet. 8 n.7, and two courts that have taken an intermediate approach, Pet. 9 n.8. In the context of forfeitures for reasons other than delinquent taxes, the petition cites eight decisions on the majority side, Pet. 10 n.9, and three that reject the majority rule, Pet. 10-11.

Moreover, of the three cases respondents discuss, they misstate two and fail to grasp the import of the third. First, respondents err by asserting that the decision below can be reconciled with *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005). BIO 7. *Plemons* held that "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The court below held that

due process does *not* require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. 6a. Thus, the decision below directly conflicts with *Plemons* and the decisions of the courts following the majority rule, *see* Pet. 6-7 & n.5-6, but it is consistent with the approach taken by courts in several other states. *See* Pet. 8 n.7.

Respondents attempt to explain away the conflict with *Plemons* by claiming that the State here did enough to satisfy *Plemons* by sending two certified letters that were returned unclaimed, performing a title search and negotiated sale research, and providing constructive notice by publication. BIO 7-8. These acts are insufficient to satisfy the due process requirements articulated in *Plemons*. The return of the certified letters triggered the State's obligation to "make reasonable efforts to learn [Mr. Jones's] correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The State's other actions were not efforts to learn Mr. Jones's correct address. The title search confirmed that Mr. Jones owned the property, but did not shed any light on his correct mailing address.[1] The negotiated sales research verified the existence of the house, but was not calculated to discover Mr. Jones's correct address. Publication is a means of providing constructive notice, not a means to ascertain a correct address,

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[1]Although respondents claim that the State "examine[d] title records and other documents in the County real property records to find Mr. Jones," BIO 8, no evidence suggests that, while conducting a title search to identify those with an interest in the property to be sold, the State sought to determine Mr. Jones's correct address by examining records relating to any other property.

and is constitutionally sufficient only after reasonable efforts to learn the correct address have failed.

Respondents further err by claiming that *Plemons* held that consulting a telephone directory or making inquiry with the occupants of a property are "impracticable and extended searches" not required by due process. BIO 7. *Plemons* held only that those techniques were not compelled in that case, because the record showed that the telephone directory would not have yielded the correct address, and because contacting the tenants at the property was not likely to be successful after notices sent to "Occupant" at the property's mailing address had been returned as undeliverable. 396 F.3d at 577. But *Plemons* acknowledged that "checking the local telephone directory may be reasonable in a given situation." *Id.; accord Hamilton v. Renewed Hope, Inc.,* 589 S.E.2d 81, 85 (Ga. 2003); *Rosenberg v. Smidt*, 727 P.2d 778, 780 (Alaska 1986). In this case, it is undisputed that reference to the local telephone directory would have yielded Mr. Jones's correct address. ADD 48-49. Similarly, contacting the occupants of the property at issue here would not have imposed an unreasonable burden because State personnel visited the property as part of the negotiated sale research. SUPP ADD 26. Contacting the occupants would have yielded Mr. Jones's correct mailing address, and leaving a notice at the house would have apprised Mr. Jones of the pendency of the sale.[2] Significantly, the BIO does not mention *Plemons'* admonition that "it is, at the very least, reasonable to require examination (or re-examination) of all available public

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[2]Indeed, the unlawful detainer notice posted on the door of the property *after* the 30-day post-sale redemption period had passed was discovered by the occupants of the house who then contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD 1, 11.

records when initial mailings have been promptly returned as undeliverable." 396 F.3d at 577. In this case, the State could have located Mr. Jones's correct address by consulting publicly available voter registration rolls or state income tax records.

Respondents also wrongly assert that the decision below is consistent with *Akey v. Clinton County*, 375 F.3d 231 (2d Cir. 2004). BIO 8-9. *Akey* held that when a foreclosure notice sent to an outdated address was returned undeliverable, due process required a reasonably diligent search for the correct address, and that an inclusive search of the public record would suffice. 375 F.3d at 237. In this case the government could have located Mr. Jones's correct address by consulting public records, but the State failed to make further efforts to find Mr. Jones's correct address following return of the two certified letters. *Akey* held that such efforts are required by due process; the court below held the opposite.[3]

Respondents are correct that *Garcia v. Meza,* 235 F.3d 287, 291 (7th Cir. 2000), "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *See* BIO 9.

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[3]*Akey,* 375 F.3d at 237, noted the statement in *Kennedy v. Mossafa*, 789 N.E.2d 607, 612 (N.Y. 2003), that the "reasonable search of the public record" required after a notice is returned undeliverable "does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource[s]." But *Kennedy* also held that "[t]he public record does not consist solely of the tax roll." *Id.* at 611. At any rate, because *Akey* and *Kennedy* require a reasonably diligent search for the taxpayer's correct address after initial notice is returned, both cases conflict with the decision below.

That some federal circuits reject the majority rule only emphasizes the need for this Court to resolve the split.

2. *Dusenbery* Is Inapposite Because Mr. Jones Does Not Claim That Due Process Requires Actual Notice And *Dusenbery* Did Not Address The Question Presented Here.

Respondents err by claiming that "*Dusenbery* resolves this case." BIO 9 (citing *Dusenbery v. United States*, 534 U.S. 161 (2002)). *Dusenbery* simply rejected the notion that *actual notice* is required while reaffirming the rule that the government's efforts must be reasonably calculated under all the circumstances to apprise the interested party of the pendency of the forfeiture. 534 U.S. at 170 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, *Dusenbery* would be dispositive only if Mr. Jones claimed that due process requires actual notice before property may be taken. That is not his position, as even respondents concede. *See* BIO 9 (quoting Pet. App. 11a (noting Mr. Jones's view that "due process does not require actual notice")). Rather, Mr. Jones maintains that when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to take further reasonable steps to locate the owner before taking the property.

In *Dusenbery*, the government's notice was sent by certified mail and was actually received at the institution where Mr. Dusenbery was incarcerated. 534 U.S. at 164-65. The Court would have addressed the issue presented here only if the notice mailed to Mr. Dusenbery had been returned undelivered, thus informing the government that its attempt to give notice had failed. Because *Dusenbery* did not address the question presented, the deep split in authority presented by this case remains unresolved.

Indeed, the Fourth Circuit in *Plemons* and the Georgia Supreme Court in *Hamilton* have specifically recognized that *Dusenbery* does not answer the question presented. *Hamilton* criticized the trial court for improperly relying on *Dusenbery* as support for the conclusion that due process requires no more than a search of tax and deed records before resorting to publication. As *Hamilton* explained, "the Supreme Court [in *Dusenbery*] was only reaffirming the principle, drawn from *Mullane* . . . , that an interested party is entitled to notice which is reasonably calculated, under all of the circumstances, to apprise him of the pendency of a tax sale. The Supreme Court did not alter the current constitutional standard, which is that the notice must be sent to those interested parties whose names and addresses are ascertainable by 'reasonably diligent efforts.'" 589 S.E.2d at 84 (citations omitted). *Plemons* similarly explained the holding in *Dusenbery*: "[A]lthough the Constitution does not always require actual receipt of notice, it does always require efforts 'reasonably calculated under all the circumstances to apprise' a party 'of the pendency' of the deprivation of property." 396 F.3d at 573 (quoting *Dusenbery*, 534 U.S. at 168-71).

3. Mr. Jones Does Not Challenge Section 26-35-705; Thus, Respondents' Claim That Such A Challenge Was Not Preserved For Review Is Irrelevant.

Respondents assert that "Petitioner has no right to challenge [Ark. Code Ann.] Section 26-35-705," BIO 11, a statute requiring taxpayers to notify the taxing authorities of a change of address. Mr. Jones does not challenge that statute. Thus, respondents' discussion of whether "the issue of the constitutionality of Section 26-35-705 [has been] preserved for review" is inapposite. BIO 12. The only reference to Section 26-35-705 in the petition is the observation that any failure by

a taxpayer to comply with a state statute requiring notice of a change of address cannot relieve the State of its due process obligations under the Fourteenth Amendment, and that the failure of the Arkansas Supreme Court to adhere to this principle provides a further reason to grant certiorari. *See* Pet. 14-15 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) ("a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice)).

4. The Petition Does Not Omit Or Misstate Any Essential Fact, And Respondents' Assertion That The Decision Below Is Right On The Merits Underscores The Need For Review.

Respondents maintain that Mr. Jones received due process and attempt to recast the issue as whether the Fourteenth Amendment requires "every extraordinary step possible to guarantee that the written notices arrive in the property owner's hands," BIO 5, "heroic, extraordinary efforts," BIO 6, and a "higher level of searching . . . than any court has ever imposed." BIO 15. Respondents' hyperbole notwithstanding, this case presents an excellent vehicle for the Court to apply the *Mullane* standard to circumstances where the government knows that its initial efforts to notify a property owner of an impending sale have failed.

Respondents contend that the petition falsely "states that 'the State made no effort to locate Mr. Jones before selling his house' Pet. 2; and 'made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale.' Pet. 4." BIO 12. Respondents are wrong.

First, respondents have selectively quoted from the petition in a manner that omits important qualifying language. On page 2, the petition states:

> The State sent two notices to Mr. Jones by certified mail, but both were returned unclaimed. Although the State knew that its attempts to provide notice had been ineffective, and although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no effort to locate Mr. Jones before selling his house.

On page 4, the petition states:

> Although the State knew that Mr. Jones had not received the two notices it sent by mail, the State made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale, even though Mr. Jones's proper address could have been discovered with minimal effort. Moreover, State personnel apparently visited the Bryan Street property and viewed the house as part of the negotiated sale process, but the State did not post a notice at the house.

When read as a whole, both of these passages assert that the State made no *further* effort to locate Mr. Jones's correct mailing address *after* the mailed notices were returned.

Second, respondents suggest that the State took two steps to ascertain Mr. Jones's correct address: performing a title search and conducting negotiated sale research. BIO 12-13. As discussed on page 2 above, there is no evidence that either of these tasks was part of an effort to ascertain Mr. Jones's correct mailing address once the State knew that its attempts to provide notice by mail had failed.

Respondents argue that Mr. Jones "wrongly assumes" that the State knew he had moved from the Bryan Street house. BIO 13. That Mr. Jones had moved is irrelevant. The record shows that the State knew that its mailed notices had not been received, and that is what triggered the State's constitutional obligation to take further reasonable steps to locate Mr. Jones before taking his property. Similarly, respondents spill much ink blaming Mr. Jones's estranged wife for not claiming the two certified letters, even though she was not the record owner of the property and the letters were addressed to Mr. Jones alone. Blaming Mr. Jones's estranged wife for not claiming letters addressed to someone else does not negate the undisputed fact that the State could have located Mr. Jones's correct address with minimal effort. And like respondents' other efforts at obfuscation, it does nothing to diminish the need for this Court to resolve the deep division among the federal and state courts and provide much-needed certainty for state and local authorities, property owners, and purchasers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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