

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 Writ Of Certiorari To The
Arkansas Supreme Court**

—◆—
**BRIEF FOR RESPONDENT
LINDA K. FLOWERS**

—◆—
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December 2005

QUESTION PRESENTED

After constructive notice and multiple attempts at actual mailed notice of a tax sale date or right to redeem real property are returned unclaimed after being mailed to the last known address of the taxpayer, does Due Process require the government to take heroic additional steps to locate an owner, above and beyond statutory requirements, when the taxpayer has never complied with nor challenged the statute at issue?

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STATEMENT OF THE CASE

On February 24, 2000, Petitioner Gary K. Jones and his wife, Jean, forfeit to the State of Arkansas, their real property at 717 N. Bryan Street, in Little Rock, Pulaski County, Arkansas for their failure to pay real property taxes in 1997, 1998, 1999, (and all subsequent years). Joint Appendix (“JA”) at 12. The Pulaski County Collector (“Collector”), certified this forfeiture to Respondent Commissioner of State Lands, which forfeiture occurred by operation of state law, Ark. Code. Ann. Sec. 26-37-101 (1997 Supp.). Record (“R.”) 96 (Exhibit 1 to Affidavit of Patricia Lah). Title to the property vested with the State of Arkansas on February 24, 2000, in care of the Commissioner of State Lands, who is charged with collection of the past due taxes, and sale of the real property.

Prior to the Collector’s certification of forfeiture to Respondent Commissioner of State Lands, the Collector published on January 18, 2000, in the state-wide daily newspaper, the Arkansas Democrat-Gazette, redemption information, with a notice that property not redeemed timely would be forfeit to the State in accordance with Ark. Code Ann. Sec. 26-37-102. R. 96. The Collector also caused the Jones property to be included in a list of delinquent lands, and entered in a permanent record, appropriately labeled, open to inspection by the public, and further stating what newspaper the notice of delinquent land was published and the dates of publication in accordance with Ark. Code Ann. Sec. 26-37-106. R. 96.

Additionally, prior to certification to the Commissioner of State Lands, the Pulaski County Assessor (“Assessor”) verified the assessment of taxes for the 1997 tax year, and further verified the name and last known address of the

owner of record, Gary K. Jones, in accordance with Ark. Code. Ann. Sec. 26-37-103. R. 96.

Finally, prior to the forfeiture in February of 2000, the Pulaski County Clerk and Recorder (“Recorder”) certified that the Assessor had recorded the list of parcels assessed for taxation as real property. R. 96. This record is evidence of the facts contained in the list and certificate in accordance with Ark. Code Ann. Sec. 26-37-106, and was appropriately certified and made part of the record in the trial court. R. 96.

Petitioner Jones did not challenge at any point the February 24, 2000, forfeiture of the real property to the State of Arkansas by operation of law. Jones challenged only notice of opportunity to redeem the land.

In order to carry out his statutory and state constitutional duties to collect past due taxes, or to sell forfeit lands, Respondent Commissioner of State Lands notified Mr. Jones of Jones’ right to redeem the property from the State of Arkansas. In March of 2000, Defendant Commissioner provided appropriate written notice of the right to redeem, a proposed Petition to Redeem, and instructions, by certified mail, to Petitioner Jones. JA 12. This notice told of the potential sale of the real property at public auction on or about April 17, 2002, two years in advance, in accordance with the statutory scheme. R. 99-101.

The March 2000 notice was mailed to the real property address, 717 North Bryan, Little Rock, which is the subject of the Petition. R. 102. Mrs. Jean Jones continued to live at this address through the hearing date in 2004. R. 29; Jones’ Addendum to Arkansas Supreme Court Brief at 33 (“Jones Add.”); R. 46 (Mrs. Jones’ Affidavit). The 717 North Bryan address was also the notification address of

record as certified to the Land Commissioner by the Pulaski County Assessor. R. 96.

After three attempted deliveries, the March 2000, certified mail notice was returned “unclaimed” to the Commissioner. JA 12; R. 102. There was no indication on the face of the letter that a forwarding order for Mr. Jones had expired with the post office. *Id.* There was no indication on the face of the letter that it was undeliverable. *Id.*

Neither Mr. Jones, nor his wife, had notified any appropriate County or State taxing authorities or taxing entities that either of them had a new mailing address.

After the first certified mail notice was returned to the Commissioner of State Lands unclaimed, on February 14, 2002, the Commissioner purchased a title report, which showed Gary K. Jones as the record owner prior to forfeiture. JA 12; R. 103. The title report also showed no change in record ownership information since the February 24, 2000, forfeiture of the real property to the State of Arkansas. *Id.*

On April 1, 2002, the Commissioner published notice of Jones’ right to redeem, the sale date, and other information, in a newspaper of general circulation in Pulaski County. JA 13; R. 106, 108. No purchasers came forward at the April 2002 auction, and the property became subject to a negotiated sale by operation of law, which law Jones does not challenge. JA 13.

Respondent Linda Flowers made a purchase offer in February, 2003. JA 13, R. 109. The Commissioner subsequently conducted additional research into the property. JA 13; R. 110. The negotiated sales research indicated that the real property existed as described, had the proper legal and street addresses, showed that title records indicated

Gary Jones remained as the most recent owner prior to forfeiture, had not transferred or attempted to transfer title, and finally that notice information should continue to be sent to Mr. Jones at the property address, 717 N. Bryan Street. *Id.* The Negotiated Sales Research also indicated that “the property does appear to be vacant.” R. 100.

As Mr. Jones said in his Brief to the Arkansas Supreme Court, “the State actually conducted extensive pre-sale research on the Joneses’ property.” Jones’ opening Brief and Addendum to Arkansas Supreme Court, at 9.

Respondent Land Commissioner subsequently mailed, by certified mail, notice of the pending negotiated sale to Mr. Jones at his last known address, and his address of record, the property address where Mrs. Jones lived, 717 N. Bryan. JA 13; R. 111-112. After three attempts at delivery, on February 20, March 12, and March 17, 2003, this notice was also returned unclaimed. JA 13; R. 112. There was no indication on the face of the letter that a forwarding order for Mr. Jones had expired with the post office. *Id.* There was no indication on the face of the letter that it as undeliverable. *Id.*

The Commissioner approved Flowers’ offer to purchase the property at 717 N. Bryan, on April 11, 2003. R. 109. The Arkansas Attorney General, Mike Beebe, subsequently approved Flowers’ offer to purchase the property at 717 N. Bryan on April 23, 2003. *Id.* Flowers purchased the property, and the Commissioner issued a Limited Warranty Deed for Forfeited Property Sold on May 28, 2003. JA 14; R. 115.

Flowers subsequently moved to evict any occupants, by notice delivered to the property address by a process server. R. 11. Mr. Jones promptly received that notice, as he admitted in his complaint, and within days, sued to

have the sale and deed set aside solely for Land Commissioner's failure to give Jones "actual notice" of the proposed sale and right to redeem. R. 1. Jones did not state, specify, or assert a general challenge to the statutory scheme. R. 1. Flowers counterclaimed. R. 8. Mr. Jones then amended his pleadings, by adding Mrs. Jean L. Jones, his wife, as an additional Plaintiff, but without changing his legal claims that the constitution required Land Commissioner to provide the plaintiffs "actual notice" of the sale and right to redeem. R. 19. Mr. and Mrs. Jones again did not attack the statutory scheme as a whole in their Amended Complaint. *Id.*

In order to avail himself of certain legal arguments and putative statutory protections (R. 31), Petitioner Jones has systematically claimed, in this litigation and on appeal, that the real property at issue is his "homestead," i.e., the place where he lived. R. 1 ("his home"); R. 26 ("homestead assertion"); R. 27 (argument concerning their "homestead"); R. 28 (Jones' October 15, 2003, Affidavit stating it is "homestead" and "my homestead" with no indication that Mr. Jones did not live on the real property); R. 29 (Mrs. Jones' Affidavit concerning "our homestead"). It was not until November 24, 2003, that Mr. Jones first made his contrary assertion in the proceedings below, that is, that he did not live at 717 N. Bryan Street. JA 9-10. Mr. Jones did not amend his pleadings in any way to reflect this change. JA 1-2 (summary of docket entries).

It is not now disputed, and has not been disputed, that Jones failed to file with the Pulaski County Recorder (and Clerk), the Pulaski County Assessor, and the Pulaski County Treasurer, any notice of a change in his mailing address for notices of taxes due on the real property. The notices at issue were mailed to Mr. Jones' last known address (717 N. Bryan). Mrs. Jean Jones continued to live

in the home on N. Bryan Street, through the hearing date in the trial court, which is also the same location where Respondent Commissioner repeatedly mailed the notices at issue herein. R. 46. It was not disputed that Mrs. Jean Jones was at all times relevant to this case, the wife of Petitioner Gary K. Jones.

The trial court granted summary judgment to Flowers and the Commissioner, confirming the sale, and denied Jones' motion for summary judgment, dismissing the case.

Mr. Jones subsequently admitted, on appeal to the Arkansas Supreme Court, that "actual notice" of the sale date and opportunity to redeem was not required after all. Jones' opening Brief and Addendum to Arkansas Supreme Court, at 13. The Arkansas Supreme Court unanimously affirmed, without oral argument, stating, *inter alia*, that Jones, in the trial court, ignored an applicable statute that required the property owner to notify the tax collector of his correct address. Pet. App. 10a. Rehearing in the Arkansas Supreme Court was denied, in a one-line Order, without argument.



SUMMARY OF THE ARGUMENT

The decision below should be affirmed, and this appeal dismissed, because Mr. Jones failed to satisfy Arkansas' long held rules governing preservation of issues for appeal. An appellant must bring to the Arkansas Supreme Court an argument raised and fully developed in the trial court, in order to preserve it for appeal. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567, 571 (2003). If a particular theory was not presented to the trial court, the

theory will not be reached on appeal. *Id.* (citing, *Ouachita Wilderness Institute v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997)). This Court should assume that the Arkansas Court did not rule on the issue for want of proper presentation to the state court. *Webb v. Webb*, 451 U.S. 494, 495 (1981) (citations omitted).

Here, Mr. Jones has failed to present his challenge properly to the Arkansas Court. It is undisputed that Mr. Jones did not raise any challenge to Ark. Code Ann. Sec. 26-35-705 in the trial court below; nor did he respond in any way to arguments timely made by Respondent Flowers and Respondent Commissioner in the trial court. Section 26-35-705 provides that the taxpayer, Jones, has an obligation to furnish the correct address to the taxing authorities in the event that the taxpayer changes address. Jones did not draw into question the constitutionality of Section 26-35-705, and consequently cannot prevail now.



ARGUMENT

I. PETITIONER HAS NOT PROPERLY PRE-SERVED FOR APPEAL THE ISSUES RAISED IN HIS PETITION.

The question presented is whether Due Process requires heroic additional steps to locate Mr. Jones when he failed to make a predicate challenge to the applicable statute in the trial court below. It is not enough to draw a statute into question by disputing an act done – or not done – by virtue of such statute. *See, Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224-26 (1889). Jones had to fully develop his arguments in both the trial court and the Arkansas Supreme Court. This he has not done.

With very rare exceptions, the Supreme Court should not consider a petitioner's federal claim unless it was either expressly addressed by, or properly presented to, the state court that rendered the decision. *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (citations omitted). It is not disputed that Mr. Jones did not challenge Arkansas Code Ann. Section 26-35-705 in the trial court. His failure to challenge that statute, or to obtain any ruling as to the constitutionality of that statute, precludes further review in this Court. Jones' jurisdictional statement to the Arkansas Supreme Court makes no mention of the arguments he now makes to this Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at v (Jurisdictional Statement).

Arkansas Code Annotated Section 26-35-705 provides as follows:

No later than July 1 of each year, the sheriff or collector shall be required to mail statements of taxes due by any taxpayer to the address provided by the taxpayer. In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.

Ark. Code Ann. Sec. 26-35-705 (1997). In short, this statute imposes upon a taxpayer a duty to safeguard his interests by ensuring that the taxing authorities have a valid mailing address. It is also part of a much larger statutory scheme.

A challenge to Section 26-35-705 is a predicate to making a successful Due Process challenge for lack of adequate notice of a right to redeem real property from the Commissioner for State Lands. In a series of cases, the Arkansas Supreme Court cited Section 26-35-705 in

turning back numerous Due Process challenges alleging inadequate constructive notice of sale of real property previously forfeit to the State of Arkansas. *See, Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). Petitioner Jones, although apparently aware of these cases, failed to challenge Ark. Code Ann. Sec. 26-35-705 in the trial court because such a challenge was contrary to his other arguments.

In the courts below, Jones argued, repeatedly, and unsuccessfully, that his interest in the real property was a "homestead" interest of a resident homeowner. Consequently, Jones claimed below, he was entitled in 2003 to the protections of a revised statute that went into effect on January 1, 2004, for the protection of homestead interests in real property, Ark. Code Ann. Sec. 26-37-301 (2003) (amendment effective January 1, 2004). The amendment requires the Commissioner of State Lands to provide actual notice to owners of a homestead (and no others) by personal service of process at least sixty (60) days before the proposed sale. Petitioner Jones has abandoned this argument in this Court.

Jones further argued in the courts below, as his Complaint and Amended Complaint state, that his sole line of attack was that "actual" notice had to be provided to him as the homestead owner. It was not until Mr. Jones' receipt of the Land Commissioner's November 17, 2003, Supplemental Brief in Support of Commissioner's Motion for Summary Judgment, citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), R. 32, that Jones changed his briefing, his argument, and his affidavit. Jones changed his assertions to state, for the first time, that he had not lived in the real property since 1993. JA 9-10.

Notwithstanding the sudden change in his affidavit and argument to the trial court, Petitioner Jones failed to amend his pleadings accordingly, although he had every right, and every opportunity, to do so. Ark. R. Civ. P. 15(a) (“party may amend his pleadings at any time without leave of court”).

Within a very short time after Mr. Jones’ new revelation that he had not lived at 717 N. Bryan since 1993, Respondents Flowers, on December 3, 2003, and Land Commissioner on December 9, 2003, promptly asserted that Mr. Jones had a statutory duty to notify the taxing authorities of his purported change of address, pursuant to Ark. Code Ann. Sec. 26-35-705. R. 81 (Flowers); R. 90 (Wilcox, Commissioner). In his only response to these legal arguments, Mr. Jones raised a challenge to another part of the statute (Section 26-37-202(e)), but failed to address the issue of Section 26-35-705 in the trial court. R. 135-138.

Moreover, Jones did not argue in the trial court that Respondent Commissioner had additional obligations to search telephone books, voter registration, and income tax records, notwithstanding Jones’ failure to follow the law and protect his interests by filing a simple change of address notice. Consequently, on January 14, 2004, the trial court made its ruling, without any argument from Mr. Jones whatsoever concerning Section 26-35-705, without ruling on the applicability or constitutionality of Section 26-35-705, and without deciding the question presented by Petitioner in his appeal here. Pet. App. 12a.

The Arkansas Supreme Court noted that Jones had failed to make a predicate challenge to the applicable statute at issue, when it stated:

The Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

Pet. App. 10a. In other words, the Arkansas Supreme Court did not pass on the constitutionality of 26-35-705 because Jones failed to challenge that Section in the trial court. Jones' failure is otherwise inexplicable, given the series of Arkansas Supreme Court cases, over a period of years, indicating that 26-35-705 was of primary importance in its previous decisions.

This Court should assume that the Arkansas Supreme Court's failure to pass on this question was due to want of proper presentation by Mr. Jones in the state trial court. *Street v. New York*, 394 U.S. 576, 582 (1969); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner Jones has done nothing to show the contrary.

The Arkansas Supreme Court did not address the merits of an argument that Section 26-35-705 is unconstitutional for imposing an obligation on the taxpayer to notify the taxing authorities of a new address, because the trial court did not rule on the issue. Jones first raised this challenge, albeit obliquely, in his Brief to the Arkansas Supreme Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at 10. Mr. Jones' failure to obtain such a ruling in the trial court was a procedural bar to consideration of those issues, and constitutional issues related thereto, in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases).

Mr. Jones' constitutional arguments concerning this statute had to be raised and fully developed in the trial court. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567, 571 (2003). Development of a challenge to Section 26-35-705 was required in order to provide a record sufficient to demonstrate error of a federal constitutional dimension on appeal. *Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). It is too late for Mr. Jones to argue that Due Process required Respondent Land Commissioner to provide more notices, or to undertake more research of phone, voter registration, and income tax records, above and beyond requirements of a statute Jones did not follow and did not challenge in any way in the trial court.

The Arkansas procedural rules, above, forbid the raising of federal questions at late stages in a case, and by any means other than presenting the issues to the trial court, making a complete record, and obtaining a ruling in the trial court in the first instance. These procedural rules are valid exercises of state power. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955); *Wainwright v. Sykes*, 433 U.S. 72, 81-87 (1977).

The Arkansas Supreme Court's long-held insistence on this procedural bar serves a legitimate state interest in having the trial court decide, in the first instance, all of the issues to be raised on appeal. It is important that the Arkansas trial court be given the first opportunity to consider the applicability of Section 26-35-705 in light of federal constitutional challenges, since the trial court might have construed the statute, as applied to the facts, in a way which saves its constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This is particularly so

where Mr. Jones revised the facts of his case, contradicted his own affidavit, and revised substantially the legal bases for his arguments, so many times.

This Court's only power over the Arkansas Supreme Court judgment is to correct it to the extent that it incorrectly adjudged federal rights properly presented, but not to revise the Arkansas Court's opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Given the independent and adequate basis in state procedural rules that form the basis of the decision below, it is fair to say that the Arkansas Supreme Court could and would make the same judgment, albeit with a slightly different written opinion, after any "correction" urged by Petitioner Jones. Consequently, this Court's decision would be nothing more than an advisory opinion. *Id.*; *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973). This Court should not exercise its powers in this case.

Petitioner's failure to raise the constitutionality of Section 26-35-705 in the trial court is also highly prejudicial to Respondents. As a consequence of Jones' failure, the record below is inadequate to address the factual and legal issues surrounding the application of Section 26-35-705 to the facts of this case, as Jones now construes them. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Jones' failure is particularly prejudicial to Respondents where the applicable constitutional "rule" is a rule of reasonableness under all the circumstances. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is impossible to argue the adequacy of Respondent Land Commissioner's actions – or purported failures to act – when Jones failed to develop a sufficient record on the matter at trial below.

Jones' failure to address Section 26-35-705 precluded Respondents from clarifying any factual ambiguities, including any ambiguities or uncertainties in the Lah Affidavit, JA 11-14, which could have been corrected in the trial court. Respondents may have been better able to flesh out the meaning, import, context, and extent of the "extensive pre-sale research on the Joneses' property" which Jones admitted in his opening Brief and Addendum to Arkansas Supreme Court, at 9. Respondents might also have better presented an explication of the handwritten notations on Exhibit 9 to the Lah Affidavit, which indicated next to the "notice information" to "send 1 cert. 1 reg. mail." R.75. Respondents might also have been able to present to the trial court the nature of the complex and expensive task it would be to locate the correct "Gary Jones" in the Little Rock telephone directory.

The Arkansas Supreme Court treats every act of the Arkansas legislature with a strong presumption of constitutionality. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). The burden is on Jones to prove the unconstitutionality of a state statute. *Id.* Petitioner's failure to challenge Section 26-35-705 in the trial court is his waiver of any challenge to that statute on appeal.

Likewise, Jones' failure to challenge Section 26-35-705 precludes his argument that his "ability" to take steps to safeguard his interests does not relieve the state of its obligations to provide Due Process. Petitioner's Brief at 16. Contrary to Petitioner's assertions, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793 n.2 (1983), does not decide this issue, but left the question open. Section 26-35-705 does not simply provide Jones with the "ability to take steps to safeguard" his interests. Section 26-35-705 requires

Jones to take steps to protect himself, as part of the statutory scheme, and in order to qualify for the protections of the statute. *Mennonite* said nothing about such a statutory requirement. 462 U.S. at 793 n.2. There is no discussion of this in the proceedings below precisely because Mr. Jones failed to raise and develop this issue.

The constitutionality of Section 26-35-705 was not an issue at all in the trial court and was not once explicitly cited by Petitioner in his three briefs to the Arkansas Supreme Court. Accordingly, the issue of the constitutionality of Sec. 26-35-705 is not preserved for review in the United States Supreme Court because it was not preserved for review in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases); Pet. App. 4a. The consequence is that there is an independent and adequate basis in state law to decide the issue, which this Court should not overturn.



**RESPONDENT
COMMISSIONER OF STATE LANDS**

Respondent Flowers further agrees with the Brief to be submitted by Respondent Wilcox, Commissioner of State Lands for the State of Arkansas.



CONCLUSION

Because Mr. Jones failed to make a predicate challenge to Ark. Code Ann. Section 26-35-705 in the trial court, the writ of certiorari was improvidently granted; the writ of certiorari should be withdrawn; Jones should be

denied any of the relief he seeks; and the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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