No. 04-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to make any additional effort to locate the owner before taking the property?

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In the decision below, the Arkansas Supreme Court held that, when notice of a tax sale is returned undelivered, due process does not require the government to make any additional efforts to locate the owner before selling his property. The court acknowledged that other courts have held that due process requires further efforts when notice is returned, but reaffirmed its own contrary precedent. The Arkansas Supreme Court's decision deepens an already intractable conflict among the state and federal courts and also is in conflict with this Court's precedents. The question presented, which arises often in the context of tax sales and property forfeitures, is of national importance. Petitioner Gary Kent Jones petitions this Court to review the judgment below, resolve the conflict among the courts, and provide much-needed certainty to property owners, tax collectors, law enforcement agencies, and courts across the country.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a) will be published at ___ S.W.3d ___, and is available at 2004 WL 2609800 (Ark. 2004). The trial court's decision granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment (Pet. App. 12a) is unpublished. The order of the Arkansas Supreme Court denying rehearing (Pet. App. 14a) is unpublished.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on November 18, 2004. Petitioner timely sought rehearing, which was denied on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file this petition to May 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT

Petitioner Gary Kent Jones lost his house in a tax forfeiture sale because he did not receive notice until it was too late to redeem the property. 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. Once Mr. Jones learned that his house had been sold, he brought this action against the purchaser and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and that no further action was required to comply with constitutional due process. The Arkansas Supreme Court affirmed, but recognized that a majority of other courts have held that due process requires the government to make further efforts to locate a property owner when a mailed notice is returned.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment; Mrs. Jones

continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. ADD at 48-49.[1]

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. During April 2000, the State mailed a certified letter to Mr. Jones in an attempt to notify him of the delinquency and his right to redeem. *Id.* The notice stated that the property would be subject to a public sale on April 17, 2002. *Id.* Because the notice was sent to the Bryan Street address instead of his apartment, Mr. Jones did not receive it. Rather, the notice was returned to the State marked "unclaimed." *Id.* On April 1, 2002, a notice of the public sale was published in a newspaper. *Id.*

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. *Id.* On February 19, 2003, the State sent another certified letter to Mr. Jones at the Bryan Street address in an attempt to notify Mr. Jones that his house would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. *Id.* Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter went unclaimed and was returned to the State. *Id.*

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[1] "ADD" refers to the record excerpts included in the addendum filed with Mr. Jones's appellate brief.

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. *See* SUPP ADD at 11, 26.[2]

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale. Pet. App. 2a. Even thereafter, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, an unlawful detainer notice was posted on the door of Mr. Jones's property. The occupants of the house discovered the unlawful detainer notice and contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD at 01, 11.

B. Procedural Background

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he did not receive constitutionally adequate notice of the tax sale or his right to redeem. Pet. App. 2a. Mr. Jones alleged that the State's failure to take reasonable steps to provide actual notice resulted in the taking of his property without due process. *Id.* at 3a. Ms. Flowers filed a counterclaim for unlawful detainer, and she moved for summary judgment, arguing that the two unclaimed letters sent by the State provided constitutionally sufficient

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[2]"SUPP ADD" refers to the record excerpts included in the supplemental addendum filed with respondents' appellate brief.

notice to Mr. Jones.[3] *Id.* The State filed a similar motion for summary judgment, and Mr. Jones filed a cross motion for summary judgment. *Id.*

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the Arkansas tax sale statute complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property. *Id.*

Mr. Jones appealed the trial court's ruling and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. On November 18, 2004, the Arkansas Supreme Court affirmed the trial court's decision. *Id.* The Arkansas Supreme Court held that the State had complied with the statutory scheme for tax sales, and that due process does not require the State to make any effort to discover a property owner's correct address even where the State knows that its notice has not been received.[4] *Id.* at 5a-6a.

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[3]After Ms. Flowers filed her counterclaim, Mr. Jones filed an amended complaint adding his wife as a plaintiff because she was the person living in the home at the time. Pet. App. 3a.

[4]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require actual notice to the owner of a homestead, absent proof that the notice sent by certified mail was received. As the court below recognized, the amendment has no effect on this case, Pet. App. 9a-10a. Moreover, the amendment does not diminish the mature conflict among the courts on the question presented. Even

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REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens An Entrenched Conflict On A Recurring Question Of National Importance.

A. The State And Federal Courts Are Split.

The question presented is whether, when notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional efforts to locate the owner before taking the property. In the context of both tax sales and forfeitures, there is a deep and intractable conflict on this question among the state and federal courts. *See generally* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 792 (2000) (noting a "wide variance" among the courts "in interpreting the scope of the government's duty when notice is mailed to the last known address available from the public records and is returned as undeliverable").

In the context of tax sales, "[t]he majority of jurisdictions that have addressed this issue . . . have held that the government must undertake additional efforts when the mailed notice is returned." *Id.* at 793. Most recently, the Fourth Circuit surveyed the conflicting decisions and held, based on a thorough analysis of this Court's precedents, 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." *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005). The Second Circuit

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[4](...continued)
within Arkansas, the question persists in cases involving all property other than homesteads.

has reached a similar conclusion. *See Akey v. Clinton County*, 375 F.3d 231, 236 (2d Cir. 2004) ("Akey's claim raises the question of what due process obligations the County incurred when her notice of foreclosure was returned as undeliverable. In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address."). The courts of last resort in numerous jurisdictions, including the District of Columbia, Georgia, Idaho, Maryland, New York, Oklahoma, and Pennsylvania, agree that the federal Constitution requires further reasonable efforts when a notice is returned.[5] Intermediate appellate courts in many other states, including Louisiana, Massachusetts, New Mexico, Ohio, and California, are in accord.[6]

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[5]*See, e.g., Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003) ("[W]e adopt and apply the majority rule requiring the tax sale purchaser, before resorting to publication, to make reasonably diligent efforts beyond the use of tax and real estate records in order to ascertain the address of the delinquent taxpayer."); *Kennedy v. Mossafa*, 789 N.E.2d 607 (N.Y. 2003) ("[W]hen the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 604 A.2d 484 (Md. 1992); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703 (Okla. 1989); *Rosenberg v. Smidt*, 727 P.2d 778, 781-83 (Alaska 1986); *Giacobbi v. Hall*, 707 P.2d 404, 408 (Idaho1985).

[6]*See, e.g., Vinscon, Inc. v. Ingram*, 835 So.2d 813, 815 (La.

(continued...)

The decision below is squarely in conflict with these decisions. The Arkansas Supreme Court acknowledged Mr. Jones's argument that, upon return of a tax sale notice, "a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address," but reaffirmed its prior precedent rejecting the majority approach. Pet. App. 10a (citing *Tsann Kuen Enters. Co. v. Campbell*, 129 S.W.3d 822 (Ark. 2003)).

Although in the minority, Arkansas is not alone in its approach. The courts of several other states, including Michigan, South Dakota, Indiana, New Jersey, and Florida, have held that the return of an undelivered notice triggers no duty to undertake additional efforts to locate a property owner.[7]

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[6](...continued)
Ct. App. 2002) (when "notice is returned to the tax collector undelivered or unclaimed, the tax collector is required to take additional steps to notify the tax debtor, and the failure of the tax collector to perform this obligation renders the tax sale null and void"); *City of Boston v. James*, 530 N.E.2d 1254 (Mass. App. Ct. 1988); *Patrick v. Rice*, 814 P.2d 463 (N.M. App. 1991); *O'Brien v. Port Lawrence Title & Trust*, 688 N.E.2d 1136 (Ohio Ct. Common Pleas 1997); *Bank of America v. Giant Inland Empire R.V. Ctr., Inc.*, 93 Cal. Rptr. 2d 626, 635 (Cal. Ct. App. 2000).

[7]*See, e.g., Smith v. Cliffs on the Bay Condominium Assoc.*, 463 Mich. 420 (2000) ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located."); *Dahn v. Trownsell*, 576 N.W.2d 535 (S.D. 1998); *Elizondo v. Read*, 588 (continued...)

Courts in other jurisdictions, including Colorado and New Hampshire, have held that a diligent inquiry in such circumstances is limited to making sure that no other addresses are available from tax or deed records, but that no further duties are imposed by due process.[8]

In addition to the tax sale context, the question presented in this case frequently arises in forfeiture cases in which courts must decide whether due process requires the federal government, upon return of mailed notice of forfeiture,

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[7](...continued)
N.E.2d 501, 504 (Ind.1992); *Clark v. Jones*, 519 N.E.2d 158, 160 (Ind. Ct. App. 1988) ("Even if the auditor knew that mail was being returned from [the last known address where the tax deed sale and notice were sent], the notice statutes and constitutional due process requirements do not impose . . . a duty to search for an alternative address."); *Atlantic City v. Block C-11, Lot 11*, 376 A.2d 926, 928 (N.J. 1977) (rejecting argument that "would place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct")*; Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So.2d 528 (Fla. Dist. Ct. App. 2004).

[8]*See, e.g, Schmidt v. Langel*, 874 P.2d 447 (Colo. Ct. App. 1994) ("[W]hen, as here, notice by mail has been sent but returned as undeliverable, if a diligent search of the county records would uncover no alternative address, neither constitutional due process concerns nor statutory requirements compel the county treasurer to follow up on information which she has no reason to believe would result in the discovery of a correct address."); *Kakris v. Montbleau*, 575 A.2d 1293, 1299 (N.H. 1990).

to take further steps to locate an interest-holder. As the Seventh Circuit has noted, the "circuits have answered this question in various ways." *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000). As with the tax sale context, the majority of courts, including the Second, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits, have held that additional reasonably diligent efforts are required before the government may resort to publication or proceed with the forfeiture.[9]

Three circuits – the First, Eighth, and Seventh – have rejected the majority rule. The First Circuit has held that, absent unusual circumstances, no additional efforts are required to contact a potential claimant once a notice has been returned undelivered. *Sarit v. Drug Enforcement Admin.*, 987 F.2d 10, 14-15 (1st Cir. 1993). Similarly, the Eighth Circuit has held that, when a notice sent to a claimant's last known address is returned undelivered, further efforts to locate the claimant are not required unless the government receives notice of the claimant's new address. *Madewell v. Downs*, 68 F.3d 1030, 1047 (8th Cir. 1995); *but see Foehl*, 238 F.3d at 479

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[9]*See, e.g., United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003) ("We now join [the majority of] circuits in holding that, when initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice."); *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001); *Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998)*; Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994); *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996); *Armendariz-Mata v. Drug Enforcement Admin.*, 82 F.3d 679, 683 (5th Cir. 1996); *United States v. Rodgers*, 108 F.3d 1247, 1252-53 (10th Cir. 1997); *Aero-Medical, Inc. v. United States*, 23 F.3d 328, 331 (10th Cir. 1994).

(questioning *Madewell*'s analysis). Finally, the Seventh Circuit, although rejecting "a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events," has "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *Garcia*, 235 F.3d at 291.

B. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

Given the nationwide importance of the question presented, the conflict among the courts is intolerable. In the tax sale context alone, the practical consequences of the conflict are enormous. Because property taxes are the primary source of revenues controlled by county and municipal governments, "[t]he lack of clarity about the constitutional requirements applicable to property tax foreclosure procedures profoundly affects the social and financial stability of a local government." Alexander, *supra*, at 751.

Without this Court's intervention, the legal actors involved in tax foreclosure proceedings – state and federal courts, officials and private contractors who administer the proceedings, purchasers of delinquent property charged with notice under state law, and property owners – are all faced with significant confusion about what due process requires when a mailed notice is returned. "The lack of common interpretation leaves the procedures in a large number of jurisdictions subject to constitutional challenge. It also leads to dramatic inefficiencies in the collection of taxes [and] inconsistent rules and standards, and impairs the ability of local governments and property owners alike to anticipate enforcement of the obligation to pay property taxes." *Id.* at 750.

The harm to individuals and businesses caused by the confusion among the courts is at least as great as it is to local governments. This is particularly so where, as here, the sale or forfeiture concerns someone's home. As the Court has explained, cases in which the government seeks to sell a person's residence illustrate an essential principle: "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). If the conflict among the courts is allowed to stand, property owners in one state or federal circuit may lose their homes where identically situated citizens in another state or circuit would not. This unacceptable state of affairs is compounded by the possibility that federal and state courts would reach differing conclusions about what due process requires in the *same state*. *Compare, e.g., Foehl*, 238 F.3d at 479 (Third Circuit decision holding due process requires additional efforts upon return of notice sent to last known address), *with Atlantic City*, 376 A.2d at 928 (New Jersey decision refusing to "place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct"); *compare Rodgers*, 108 F.3d at 1249 (Tenth Circuit decision holding that government "must take reasonable steps to locate a civil claimant when its initial mailings are returned unclaimed"), *with Schmidt*, 874 P.2d at 452 (Colorado decision holding that, where "notice by mail has been sent but returned as undeliverable," search of county records alone is sufficient).

Although this Court's decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983), made clear that in the tax sale context the government must make "reasonably diligent efforts to provide notice,""[i]n the years since

Mennonite, state and local governments have struggled to develop constitutionally adequate procedures for the enforcement of property tax collections." Alexander, *supra*, at 769. Deferring review at this time will lead to further chaos and uncertainty.

II. The Decision Below Conflicts With This Court's Precedents And Is Wrong On The Merits.

Certiorari is also warranted because the decision below is wrong. It held that regardless of how easily the State might discover information that would allow it to provide effective notice after an initial notice is returned, due process requires no additional efforts. That holding is contrary to this Court's precedent requiring notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As this Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Under the *Mullane* standard, "impracticable and extended searches are not required in the name of due process," but "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Id.* at 317-18. In this case, the State could easily have located Mr. Jones's correct mailing address by reference to the local telephone directory, voter registration records, or state income tax rolls. Under *Mullane* and its progeny, the State was required to take reasonable steps to ascertain Mr. Jones's correct mailing address, but the State took no steps at all. *See Mennonite*, 462 U.S. at 800 (if a party's name and address are "reasonably

ascertainable" notice by mail or equally effective means is required).

The State had a heightened obligation to take reasonable steps to ascertain Mr. Jones's current address under the circumstances of this case, because once the notice mailed to the Bryan Street address was returned, the State knew that its initial attempt to notify Mr. Jones had been ineffective. In *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), the Court held that the State had failed to provide notice "reasonably calculated" to apprise the interested party of the pendency of forfeiture proceedings where "the State knew that the [interested party] was not at the address to which the notice was mailed." Similarly, in *Covey v. Town of Summers*, the Court held that compliance with a statute, including notice by mail, was inadequate under the circumstances because the town officials knew that the interested party was incompetent. 351 U.S. 141, 144-47 (1956) (citing *Mullane*). As discussed in section I.A. above, many of the lower courts that have considered what due process requires following the return of mailed notice have held that the *Mullane* standard compels at least some further effort to determine the correct address. *See, e.g., Plemons*, 396 F.3d at 575-76, and cases cited therein.

In concluding that due process requires no further effort to locate the correct address of an interested party when the initial notice is returned, the court below relied heavily on Mr. Jones's failure to furnish his new mailing address to the tax collector. Pet App. at 10a ("[T]he 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 [of the Arkansas Code] requires the property owner to notify the tax collector of his correct address."). This aspect of the decision below also conflicts with this Court's

precedent because "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice. *Mennonite*, 462 U.S. at 799. That some courts, including the Arkansas Supreme Court here, have failed to adhere to this principle provides a further reason to grant certiorari. *Compare, e.g., Elizondo*, 588 N.E.2d at 504 (relying on the dissent in *Mennonite* and characterizing "the interest-holder's ability to take reasonable steps to protect his interest as a crucial aspect of the balancing test"), *with Schmidt*, 874 P.2d at 452 ("Whether defendant might have taken steps to safeguard her interest is irrelevant to whether adequate notice was given under the circumstances.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2005

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[10]Counsel acknowledges the work of Deepak Gupta, a graduate of Georgetown University Law Center, who took a lead role in preparing this petition.