

No. 20-321

In The
Supreme Court of the United States

WALTER D. BARNETTE,

Petitioner,

v.

HBI, L.L.C., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Nebraska**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

Petitioner Walter D. Barnette’s (“Barnette”) characterization of the questions presented does not accurately describe the issues posed, argued and decided in the proceeding below, but requests this Court to issue impracticable, *per se* rules within the context of the Fourteenth Amendment. The Nebraska Supreme Court did *not* hold that the due process requirements in *Jones* apply only to land containing homes. (App. A-23). Further, the record below contained insufficient evidence as to the incentive of the party providing notice and the magnitude of the owner’s deprivation in order for the Nebraska Supreme Court to consider whether there was a “windfall incentive.” (App. A-24).

COUNTERLIST OF ALL PARTIES

Sarpy County, Nebraska, Jim L. Kuhn and Edward Swaney were not parties in the appeal before the Nebraska Supreme Court. Sarpy County was granted summary judgment by the trial court on September 29, 2017. Respondent's Motion for Default Judgment as to Jim L. Kuhn and Edward Swaney was granted by the trial court on February 15, 2018.

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STATEMENT OF THE CASE

Respondent disagrees with Barnette's description of the factual background of this matter as there are a number of misstatements contained in the Petition for a Writ of Certiorari (the "Petition"):

1. There is no evidence in the record that "[i]n 2002 Walter Barnette purchased about an acre of land zoned for residential use in Bellevue, Nebraska, in Sarpy County, recently assessed at \$25,000." (Petition, at 4).
2. There is no evidence in the record that "[i]n 2010, Barnette fell on hard times and failed to pay his 2010 and 2011 property taxes for the land, totaling \$986.50." (Petition, at 5).
3. There is no evidence in the record that Guardian Tax Partners, Inc. was "a company Barnette did not know or have reason to know." (Petition, at 5).
4. There is no evidence in the record that publication was made "in a small Sarpy County newspaper that does not even circulate in the town of Bellevue where the property is located." (Petition, at 5-6).
5. There is no evidence in the record that "[s]uccessful notice would have given Pontian a profit of approximately \$500 of interest." (Petition, at 6).

The facts material to the questions presented are as follows. On March 5, 2013, at a public tax sale, Sarpy

County Treasurer’s Certificate of Tax Sale #12308 (the “Certificate”) was sold to Pontian Land Holdings, LLC (“Pontian”) for the delinquent taxes on the real estate owned by Barnette for the years 2010 and 2011 (the “Property”). (App. A-4). After purchasing the Certificate and waiting the statutorily required three years, Pontian served the notice upon each person required by statute (the “Notice”). (App. A-5). Pontian sent the Notice to Barnette by certified mail, return receipt requested, to the address where the Property tax statement was mailed, which was also Barnette’s residence. (*Id.*). The Notice was returned as “unclaimed.” (*Id.*). Accordingly, Pontian published the Notice as allowed by Nebraska law. (*Id.*). Following publication of the Notice, Pontian filed its application for a Treasurer’s Tax Deed with the Sarpy County Treasurer and on August 29, 2016, the Sarpy County Treasurer issued a Treasurer’s Tax Deed in Pontian’s name. (*Id.*).

Pontian then filed a Complaint against Barnette and other interested parties in the District Court of Sarpy County seeking to quiet title to the Property. (*Id.*). Barnette filed an Answer and Counterclaim seeking to quiet title to the Property in his name. (*Id.*). Pontian transferred the Property to HBI, L.L.C. (“HBI”), and an order was entered substituting HBI as the plaintiff. (*Id.*). After numerous motions for summary judgment, Barnette filed an Amended Answer and Amended Counterclaim. (App. A-5, A-6). Barnette’s Amended Counterclaim added a claim for Declaratory Judgment seeking declaration that Neb. Rev. Stat. § 77-1832 *et seq.* was unconstitutional under the

United States Constitution and the Nebraska Constitution. (App. A-6, C-8, C-9).

On January 15, 2019, the district court issued an Opinion and Order overruling Barnette's Third Motion for Summary Judgment and sustaining HBI's Amended Motion for Summary Judgment. (App. A-6). The district court quieted title in favor of HBI, finding that Barnette was given sufficient notice in compliance with Nebraska law and due process requirements. (*Id.*).

SUMMARY OF THE ARGUMENT

Barnette's Petition should be denied. The questions presented are not supported by the facts of this case. Moreover, Barnette's assertion that the Nebraska Supreme Court's decision conflicts with decisions of this Court rests squarely on a mischaracterization of the Nebraska Supreme Court's ruling, which applied this Court's due process rulings to the facts of this case.

ARGUMENT

I. THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUES RAISED BY BARNETTE.

The questions presented in the Petition are: (1) Did the Nebraska Supreme Court err in holding that the

due process requirements announced in *Jones* apply only to land containing homes? and (2) Does due process require a court to consider the potential windfall incentive of the party providing notice, and the magnitude of the owner's deprivation when balancing "all the circumstances" to determine if attempts at notice are reasonable and what "one desirous of actual information the absentee" would use? (Petition, at i).

As to the first question, the Nebraska Supreme Court explicitly held that "[w]hile the property at issue is one factor to be considered, we do not, as the dissent suggests, limit *Jones* to cases involving houses." (App. A-23). Accordingly, Barnette's first question presented entirely mischaracterizes the Nebraska Supreme Court's holding. As to the second question presented, the Nebraska Supreme Court noted the "record is void of any evidence regarding the burden on the government, and Barnette has presented no evidence demonstrating his property was anything more than a vacant lot." (App. A-24). Without such evidence, the Nebraska Supreme Court did not, and could not, "consider the potential windfall incentive of the party providing notice, and the magnitude of the owner's deprivation." As the facts of this case do not support the questions presented in the Petition, this case does not merit review. See Sup. Ct. R. 10.

II. THE NEBRASKA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH GOVERNING SUPREME COURT PRECEDENT AND AUTHORITY OF CIRCUIT AND STATE HIGH COURTS.

Due process requires “notice 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). The Due Process Clause of the Constitution does not require that an effort to give notice succeed. *See Dusenberry v. United States*, 534 U.S. 161, 170 (2002). “If it did, then people could evade knowledge, and avoid responsibility for their conduct.” *Ho v. Donovan*, 569 F.3d 677, 680 (7th Cir. 2009). Barnette would have this Court rule contrary its decision in *Jones v. Flowers* and create an absolute rule that, if notice was sent by certified mail and it is returned unclaimed, the sender must always take certain specific additional steps. However, the *Jones* decision only requires additional steps “if it is practicable to do so.” *Jones v. Flowers*, 547 U.S. 220, 225 (2006). Further, this Court explicitly stated, “we disclaim any ‘new rule’ that is ‘contrary to *Dusenberry* and a significant departure from *Mullane*.’” *Id.* at 238. Indeed, the Nebraska Supreme Court took into consideration the particular facts of this case and determined the method of service upon Barnette was reasonably calculated to apprise Barnette of Pontian’s intent to apply for a tax deed. (App. A-20). Accordingly,

there are no compelling reasons for granting certiorari and the Petition should be denied.

A. The Nebraska Supreme Court’s Decision Does Not Conflict with Cases Applying *Jones* to Property Interests Beyond Residential Homes.

The cases cited by Barnette do not support his argument that the Nebraska Supreme Court’s decision conflicts with binding due process precedent of this Court and the “overwhelming” authority of circuit and state high courts. (Petition, at 9). As argued above, *supra* Part I, Barnette’s assertion that the Nebraska Supreme Court limited the holding in *Jones* to property containing a residential home is false. (App. A-23) (“While the property at issue is one factor to be considered, we do not, as the dissent suggests, limit *Jones* to cases involving houses.”). Instead, the Nebraska Supreme Court properly considered the “practicalities and peculiarities of the case” as required by *Mullane* and determined “under the totality of circumstances presented, Pontian’s attempt at notice was ‘desirous of actually informing’ Barnette of its intent to apply of a tax deed.” (App. A-17, A-31). For example, the Nebraska Supreme Court noted that unlike Jones, who had not lived in the home for thirty plus years, Barnette lived at the address where the Notice was sent, at the time it was sent. (App. A-28). Also, unlike Jones, when the Notice was returned as unclaimed, Pontian took the additional step of publishing notice pursuant to Neb. Rev. Stat. § 77-1834. (App. A-26).

It is clear from Neb. Rev. Stat. § 77-1834 that the notice shall be published “where the real property is situated.” Neb. Rev. Stat. § 77-1834. There is nothing in *Jones* to suggest that statutes requiring publication in the county where the property is situated, as opposed to where the owner of the property resides, violate due process. In fact, in *Jones*, this Court specifically stated, “[i]t is not our responsibility to prescribe the form of service that the [government] should adopt.” *Jones*, 547 U.S. at 238 (quoting *Green v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982)). A case relied upon by Barnette further supports this holding. See *Rafaeli, LLC v. Oakland Cty.*, No. 330696, 2017 WL 4803570, at *4 (Mich. Ct. App. Oct. 24, 2017), *rev’d on other grounds*, No. 156849, 2020 WL 4037642 (Mich. July 17, 2020) (holding defendants obtained the plaintiff’s property “by way of a statutory scheme that did not violate due process”). Moreover, Barnette failed to meet his burden of establishing Nebraska’s statutory notice requirements were unconstitutional. (App. A-17).

Other cases cited by Barnette further demonstrate there is not a compelling reason to grant certiorari in this case. In *Plemons v. Gale*, the Fourth Circuit did not decide whether reasonable efforts had been employed to effectuate notice, but instead remanded to the district court for resolution of the issue. See *Plemons v. Gale*, 396 F.3d 569, 578 (4th Cir. 2005). Notably, the follow-up efforts contemplated by the Fourth Circuit, all involved locating the *correct* address, which in this case, Pontian already possessed. See *id.* at 577. (App. A-28). In *MacNaughton v. Warren County*, the Court of

Appeals of New York held the plaintiffs had not shown that there were any additional steps required under *Jones* that would have yielded plaintiff's new address. *See MacNaughton v. Warren County*, 20 N.Y.3d 252, 257 (N.Y. 2012). Here, there was no new address for Barnette that Pontian could have obtained. Indeed, the Nebraska Supreme Court noted “[o]ther states have rejected the argument that additional steps are required after notice sent to a property owner's last known and *actual address* was returned as unclaimed[.]” (App. A-26) (emphasis added).

In *Luessenhop v. Clinton County, New York* (cited by Barnette), the Second Circuit applied *Jones* to the facts of several different cases in a consolidated appeal. *See Luessenhop v. Clinton County, New York*, 466 F.3d 259, 270 (2d Cir. 2006). The Second Circuit analyzed the facts of each separate case, determined that due process had not been met in certain cases, but remanded other cases for further evidence on whether the notice given complied with due process. *See id.* at 270-72. Indeed, *Luessenhop* confirms that the “correct” application of *Jones* depends on the facts of each case. The other cases cited by Barnette confirm this interpretation. *See Linn Farms and Timber Ltd. P'ship v. Union Pacific R. Co.*, 661 F.3d 354, 362 (8th Cir. 2011) (stating its holding takes “into account the facts of this situation”); *Crownover v. Keel*, 357 P.3d 470, 477 (Okla. 2015) (“It is the totality of the circumstances and conditions of each individual case that determines if the constitutional requirements of due process are satisfied.”) (citations omitted); *Echavarria v. Pitts*, 641 F.3d

92, 95 (5th Cir. 2011) (holding *Jones* “limited its discussion to steps the State could have taken under the facts before it”); *see also DG Enter., LLC-Will Tax, LLC v. Cornelius*, 43 N.E.3d 1014, 1025 (Ill. 2015) (“[W]e do not read *Jones* as requiring this additional step in every case. Indeed, *Jones* expressly noted that there was leeway for different approaches[.]”). Accordingly, Barnette’s assertion that this Court’s decision in *Jones* applied a specific due process rule, regardless of the facts of the case, is inaccurate.

The other cases cited by Barnette are also factually inapplicable. In *Wilson v. Blount County*, Blount County never attempted to send notice through the mail. *See Wilson v. Blount Cty.*, 207 S.W.3d 741, 749 (Tenn. 2006) (“Although Blount County had Wilson’s post office address, it never attempted to send either Summons and Notice through the mail.”). In *Delta Property Management v. Profile Investments, Inc.*, “the Clerk had reason to know that the notice of the tax sale intended for Delta has been sent to an incorrect address.” *Delta Prop. Mgmt. v. Profile Inv., Inc.*, 87 So.3d 765, 773 (Fla. 2012). To the contrary, in this case, the Notice was sent in the mail to Barnette’s correct address. (App. A-28). Based on the foregoing, it is clear that there is no real conflict of opinions or authority between the courts applying *Jones* and the Nebraska Supreme Court’s decision. Accordingly, the Petition should be denied.

B. The Nebraska Supreme Court’s Decision Does Not Conflict with Cases Holding the Government Must Comply with Due Process Regardless of the Recipient’s Inaction.

Contrary to Barnette’s assertion, the Nebraska Supreme Court did not hold *Jones* did “not apply in this case because Barnette received stickers from the post office[.]” (Petition, at 16). Instead, the Nebraska Supreme Court applied *Jones*’ holding that additional steps are required “when reasonable to do so,” but determined, in this case, there were no additional reasonable steps that would have been useful. (App. A-30) (*citing Jones*, 547 U.S. at 234). To show the Nebraska Supreme Court’s decision conflicts with the “overwhelming” authority, Barnette cites to two cases, one of which supports the Nebraska Supreme Court’s application of *Jones* and another that is exceedingly distinguishable.

Similar to this case, in *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, the notice was sent to the correct address and returned unclaimed. *See Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 393 (N.Y. App. Div. 2006). Also similar to this case, the New York Court of Appeals noted, “there is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing.” *Id.* Accordingly, the court found that considering *Jones*, “the defendants could reasonably draw the strong inference that the intended recipients

simply were “attempting to avoid notice by ignoring the certified mailings” and conclude “attempts at alternative methods of giving notice were unnecessary and would prove futile.” *Id.* The Nebraska Supreme Court’s decision is entirely consistent with the New York Court of Appeals’ application of *Jones*. (App. A-30) (“In this case, regular mail (or mail addressed to ‘occupant’) would not likely have been useful or effective, especially given the fact Barnette has not alleged that he was unaware of the delivery attempts or that he was unavailable to claim the letter.”).

In *Sidun v. Wayne County Treasurer*, the property at issue was held in joint tenancy between the plaintiff and her mother. *See Sidun v. Wayne County Treasurer*, 481 Mich. 503, 505 (2008). All notices were sent to plaintiff’s mother, but the county treasurer failed to send notice to the address on the recorded deed for the property. *See id.* at 507. No notice was ever sent to the plaintiff. *See id.* at 513. In comparison, the Property at issue in this case was owned solely by Barnette, and the Notice was sent to the address where Barnette actually lived. (App. A-28). Therefore, the Nebraska Supreme Court was correct in concluding there were no additional steps that could have been taken to find a different address for Barnette. (App. A-30).

In addition, Barnette’s discussion concerning the various reasons why someone may not go to the post office to retrieve certified mail are entirely irrelevant because, in the proceedings below, Barnette presented no evidence regarding his failure to claim the certified mail. (App. A-28). Further, there is no evidence that

Barnette is elderly, suffering cognitive decline or mental deficiencies. Moreover, Barnette's discussion of cases regarding these issues do not establish there is a real conflict of opinions or authority between the courts applying *Jones* and the Nebraska Supreme Court's decision. Accordingly, the Petition should be denied.

C. The Nebraska Supreme Court's Decision Does Not Conflict with Cases Requiring Additional Steps When Certified Mail Fails.

Although Barnette correctly notes that this Court declined to specify the additional steps required when notice by certified mail fails, he is asking this Court to intervene and decide whether a lower court's evaluation of the additional steps taken in a particular case contravene *Jones*. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moreover, it is clear from the Nebraska Supreme Court's decision that it is entirely consistent with this Court's due process holdings in *Jones* as well as in *Mullane* and *Dusenbury*. The Nebraska Supreme Court considered that Barnette's actual address was known and the Notice was sent to that address. (App. A-28). The only new information revealed by the return of the Notice was that Barnette failed to retrieve the letter, or that he was avoiding service. *See id.* The cases cited by Barnette involve instances where additional information could be used to locate the party. *See, e.g., Linn Farms*, 661 F.3d at 359 ("Thus, an inquiry within

the Commissioner’s office could have revealed Missouri Pacific’s correct address[.]”); *Plemons*, 396 F.3d at 572 (“[W]hen 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[.]”). However, no amount of internet searching or public records review would have revealed any additional information, because Pontian knew Barnette’s address and the Notice was sent to Barnette’s correct address. (App. A-28).

Other cases cited by Barnette entirely refute his position. For example, in *Kennedy v. Mossafa*, the Court of Appeals of New York held that appellant’s “pattern of paying bills sent to an address that she claims was incorrect gave the [respondent] reason to believe that it was still the correct address.” *Kennedy v. Mossafa*, 100 N.Y.2d 1, 11 (N.Y. 2003). Accordingly, the court held “under the circumstances of this case, appellant’s current address was not reasonably ascertainable, and the attempted personal notice, coupled with posting and publication, satisfied due process.” *Id.* This is yet another case that is consistent with the Nebraska Supreme Court’s decision. Accordingly, there is no applicable authority showing a compelling reason for granting certiorari and the Petition should be denied.

III. THE FACTS OF THIS CASE ARE INSUFFICIENT TO DETERMINE WHETHER DUE PROCESS REQUIRES CONSIDERATION OF THE POTENTIAL WINDFALL AND THE MAGNITUDE OF AN ERRONEOUS DEPRIVATION OF PROPERTY.

First and foremost, as discussed above, *supra* Part I, there are no facts in the record to make a determination of whether due process in this case required consideration of the potential windfall to HBI compared to Barnette's deprivation of property. Second, to the extent possible, the Nebraska Supreme Court balanced the government's interest against the owner's interests, but noted there was "no evidence demonstrating [Barnette's] property was anything more than a vacant lot." (App. A-24). Barnette's calculation of the "windfall" to HBI is purely speculative and not supported by the record. (Petition, at 24). Third, the Nebraska Supreme Court specifically found that "under the totality of the circumstances presented, Pontian's attempt at notice was 'desirous of actually informing' Barnette of its intent to apply for a tax deed." (App. A-31). Whether Barnette disagrees, this Court rarely reviews misapplications of law. Sup. Ct. R. 10. Accordingly, there is no compelling reason for granting certiorari and the Petition should be denied.

IV. THIS CASE DOES NOT MERIT SUMMARY REVERSAL

Barnette has entirely failed to establish the Nebraska Supreme Court's decision is a "constitutional

outlier.” There is no support for Barnette’s argument that the Nebraska Supreme Court’s decision “strayed from the consensus,” and to the contrary, applicable case law establishes the Nebraska Supreme Court’s decision is consistent with other courts’ application of *Jones*. There is no “outlier practice” to correct, as the Nebraska Supreme Court correctly applied this Court’s due process precedent, and the Petition should be denied.

CONCLUSION

For all the aforementioned reasons, HBI respectfully requests that this Court deny Barnette’s Petition for a Writ of Certiorari.

Respectfully submitted,
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