No. 20-321

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In the
Supreme Court of the United States

Walter D. Barnette,
Petitioner,
v.
HBI, L.L.C., et al.
Respondents.

On Petition for Writ of Certiorari
to the Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT SARPY COUNTY

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INTRODUCTION

Pursuant to the Rules of this Court and this Court's Order dated March 19, 2020, Petitioner timely filed a Petition for Writ of Certiorari regarding the case *Walter D. Barnett v. HBI, L.L.C. et al.* on September 4, 2020. After receiving a Waiver of Intent to File a Response, in a letter dated November 2, 2020, this Court directed the Clerk of the Court to request a response be filed by Respondent Sarpy County. On November 24, 2020, and December 3, 2020, an extension of time to file the requested response was granted. Respondent Sarpy County (hereinafter "Respondent") now submits the following in compliance with the Rules of this Court and the above outlined communications.

REASONS FOR DENYING THE PETITION

I

THIS COURT DOES NOT HAVE JURISDICTION TO ACCEPT THE WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 10, "[a] Petition for a writ of certiorari will be granted only for compelling reasons." While the Rule does indicate that the list of types of reasons that is included within the text is not necessarily restrictive, it does appear that Petitioner has relied upon such reasons in their argument for acceptance. Specifically, it appears that Petitioner has Petitioned this Court using Rule 10(b) ("a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals") and Rule 10(c) ("a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court") as rationale. Respondent disagrees that either of these types of reasons apply to the current case, and as such asserts that this Court does not have jurisdiction over the matter. While Respondent does

acknowledge that this Court does have judicial discretion to accept review on a writ, Respondent further asserts that the current case does not present a situation that is general enough to provide a decision that would be any more applicable than previous decisions issued by this Court.

A. The Holding of the Nebraska Supreme Court Does Not Conflict with a Prior Decision of this Court Nor is it in Conflict with the Decisions of All Other Circuit Courts or State Courts of Last Resort

Petitioner asserts that the ruling of the Nebraska Supreme Court conflicts with this Court's holding in *Jones v. Flowers*, 547 U.S. 220 (2006), as well as the decisions of all other circuit courts and state courts of last resort. Respondent will address this assertion in two parts.

1. The Holding of this Court in Jones v. Flowers is Distinguishable from the Current Case and Therefore the Decision of the Nebraska Supreme Court was not in Conflict

Petitioner asserts that the Nebraska Supreme Court erred in distinguishing *Jones* from the present case because the property in question was unoccupied and undeveloped. Pet. 13. Respondent disagrees. The Court in *Jones* emphasized the fact that a developed property is a matter of high significance by stating that "[t]his is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." *Jones*, 547 U.S. at 230. However, in making such statement, the Court negated to make any indication that an unoccupied property held the same gravitas. *Id.* Further, by stating that "notice required will vary with circumstances and conditions," the Court again reinforced the fact that what is considered required in one instance is not necessarily so in another. *Id.* at 227, (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115, (1956)). The status of the property itself, whether it be occupied, unoccupied or

undeveloped, is certainly one of those circumstances that should be considered, and the Nebraska Supreme Court doing so is not in conflict with this Court's holding in *Jones*.

Additionally, in the present matter and in distinction from the issue in *Jones*, Petitioner has not asserted that Mr. Barnett was unaware that the property had entered into the tax sale process. The only complaint against Respondent in the amended filings in the District Court case was regarding the existence of weed liens against the property. Am. Answer and Am. Countercl., ¶ 24. The Court in *Jones* focused heavily on the notice regarding the tax sale from the State, not notice sent by the end purchaser of the tax deed nor any enforcement action of that deed the purchaser may take. *See Jones*, 547 U.S. *passim*. While Petitioner may not have chosen to accept the Certified mail that was sent by Respondent HBI, the point in the process that Petitioner has appealed is the effecting of rights by Respondent HBI, not the tax sale itself or notice thereof. To read *Jones* to include notices sent from private parties rather than just the State is an extension of the rule of law and places a burden on private individuals that is suited only for government entities.

2. The Holding of the Nebraska Supreme Court is not in Conflict with the Decisions of All Other Circuit Courts or State Courts of Last Resort

The holding of the Nebraska Supreme Court focused on a situation in which the alleged failure of notice occurred regarding the application of a tax deed after a period in excess of three years from the date of the tax sale. As discussed above in relation to *Jones*, this situation is distinguishable from many of the cases in which Petitioner relies, as, among other things, there is no assertion that the notice of the tax sale itself was deficient.

Further, it is not unprecedented for the Nebraska Supreme Court to decline to extend the holding in *Jones*. In *NYCTL 1999-1 Trust v. 114 Tenth Ave. Assoc. Inc.*, 44 A.D.3d 576, 577 (2007), the New York First Department Appellate Division Supreme Court held that the

holding in *Jones* did not constitute a change in law that would alter the court's prior determination that notice in a foreclosure action was properly served because *Jones* addressed "sufficiency of notice provided to an individual by a state government," and the matter at bar for the court involved "process … served by a private actor."

In *DG Enterprises, LLC-Will Tax, LLC v. Cornelius*, 43 N.E.3d 1014, 1025 (2015), the Supreme Court of Illinois held that under *Jones* the sending of notice by regular mail when certified mail fails is not required in every case. The Tax Code referenced in *DG Enterprises* is very similar to the Nebraska Statutes in question as they existed at the time of the initial action in this case. *See*, Neb. Rev. Stat. §§77-1831, 1832, 1834 and 35 ILCS 200/22-10 through 22-25. In *DG Enterprises*, certified mail containing the notice of action to Lorrayne Cornelius, who was the owner/occupant of the property, was also returned as unclaimed. *DG Enterprises*, 43 N.E.3d at 1017. While the applicant for the tax deed did take additional steps to attempt to contact Cornelius, such steps were also unsuccessful. *Id*. Additionally, the steps were not required by the Tax Code, and it does not appear that they were taken into consideration by the court when determining whether or not the additional step of non-certified mailed notice was required. *Id.* Ultimately, DG Enterprises resorted to newspaper publication, just as Respondent HBI did in the present case. *Id*. at 1017-18. Just as Petitioner does here, Cornelius also relied upon *Jones* to argue that notice was insufficient. *Id*. at 1022. Ultimately, the court relied upon the finding in *Jones* that "there was leeway for different approaches and observed that the Illinois statutory scheme that requires notice be sent to "the occupants as a matter of course" in addition to the named parties of record, was an additional step." *Id*. at 1025 (citing *Jones*, 547 U.S. at 234-35). *See also*, *In re Application of County Collector for Judgment, Sale Against Lands, Lots Returned Delinquent for Nonpayment of General Taxes and/or Special Assessments*, 225 Ill.2d 208 (2013).

The holdings in *NYCTL* and *DG Enterprises*, while not an exhaustive list, clearly show that the decision of the Nebraska Supreme Court is not in conflict with all other circuit courts or state courts of last resort. This, along with the distinguishing factors of the current case, does not support acceptance of the Petition.

B. The Question of Whether Due Process Requires Considerations of the Potential Windfall and the Magnitude of an Erroneous Deprivation of Property Has Already Been Answered by this Court

Petitioner asserts that considerations of the potential windfall and magnitude of an erroneous deprivation of property have not yet been addressed by this Court. However, this Court has previously held, and asserts again in *Jones,* that "notice required will vary with circumstances and conditions." *Jones*, 547 U.S. at 227 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)). Petitioner cites to *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) as an example of the limitations on the types of factors to be considered. Pet. 10. In contrast, Respondent reads Morrissey to include any and all factors including financial impact when it states that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as *of the private interest that has been affected* by governmental action." *Morrissey*, 408 U.S. at 481 (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (emphasis added)).

Further, the Court has clearly previously considered the magnitude of deprivation of property, and highlighted this fact in *Jones* by stating that a sender will attempt to resend mail if practicable when "the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." *Jones*, 547 U.S. at 230 (citing *Small v. United States*, 136 F.3d 1334, 1337 (C.A.D.C.1998)). Additionally, the specific facts of this case,

including the amount of profit gained by the attainment of the property by Respondent HBI, are unlikely to be repeated in the future in exactly the same manner. As such, it is unlikely that acceptance of the Petition and issuance of an order based on this specific fact pattern will establish any precedent that is different from what has already been established by the Court.

Respondent Sarpy County asserts that established rule of law was appropriately applied in this matter. However, even if the Nebraska Supreme Court misapplied the established rule of law, Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of properly stated rule of law," and there is nothing of significant merit in this case that would require the Court to do so here.

II

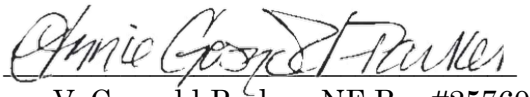
SUMMARY REVERSAL IS NOT APPROPRIATE IN THIS CASE

Summary reversal, as allowed by Supreme Court Rule 16.1, has been found to be appropriate to correct "outlier practice" when a court deviates from the standard accepted practice for review, and does so without a legal basis. *Davis v. United States*, 140 S. Ct. 1060, 1061-62 (2020). Summary reversal of the decision of the Nebraska Supreme Court is not appropriate in this matter because the decision of the Nebraska Supreme Court, as shown above, is not in conflict with the standard accepted practice. Further the Nebraska Supreme Court clearly presented a sound legal basis for its opinion by citing to *Jones* itself, stating first that "the failure of notice in a specific case does not establish the inadequacy of the attempted notice," and second that "the *Jones* Court explicitly stated: "[W]e disclaim any 'new rule' that is 'contrary to *Dusenbery* and a significant departure from *Mullane*.'" *HBI, L.L.C. v. Walter D. Barnette*, 305 Neb. 457, 471 (2020) (quoting *Jones*, 547 U.S. at 238).

Alternately, should the Court determine that the Petition should be granted, this matter is still not appropriate for summary reversal as doing so would involve extending a rule of law. In order to properly determine whether or not such rule should be extended, briefs on the merits of the case, which would include substantial argument not within the scope of this Brief in Opposition to the Petition, are necessary for consideration.

CONCLUSION

Wherefore, for the above reasons, the Petition for Writ of Certiorari should be denied.

BY: 
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