In the

ORIGINAL

Supreme Court of the United States

In the Matter of:	:	
	:	
JOSEPH GREENE ET AL.,	:	
	:	
Appellants,	:	No. 81-341
	:	
v.	:	
	:	
LINNIE LINDSEY ET AL.	:	

Washington, D. C.

Thursday, February 23, 1982

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ALDERSON REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH GREENE ET AL.,

Appellants,

v. No. 81-341

LINNIE LINDSEY ET AL.

Washington, D. C.

Tuesday, February 23, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 o'clock p.m.

APPEARANCES:

WILLIAM L. HOGE, III, ESQ., Assistant Jefferson County Attorney, 1112 Kentucky Home Life Bldg., Louisville, Kentucky 40202; on behalf of the Appellants.

ROBERT FREDERICK SMITH, ESQ., Legal Aid Society, Inc., 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Greene against Lindsey. Mr. Hoge, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM L. HOGE, III, ESQ.

ON BEHALF OF THE APPELLANTS

MR. HODGES: Mr. Chief Justice, and may it please the Court:

The single issue presented is the constitutionality of the Kentucky conspicuous posting of notice in landlord and tenants cases. An alternative statement of the problem addressed is whether or not alternative constructive posting service continues to be satisfactory notice under the due process clause, unless shored up with additional mailing.

The facts of this case should be addressed in two parts. Number one, what in fact is the landlord and tenant or forcible eviction procedure in Kentucky; and number two, as concerns the specific plaintiffs in this case.

I would point out that I believe the facts of the case speak very strongly about notice in the legislative scheme that is set up. First, the landlord must notify the tenant in writing that the tenant is in breach of the lease for failure to make his rent

payments. That writing is by registered or certified mail. The tenant is on notice.

The second fact of the legislative scheme is that the written notice is defined under the statutes quite clearly, and only after that notice is sent as a condition precedent to the bringing of a Writ of Forcible Entry are you allowed to seek such an instrument, and in fact, the forcible writ cannot be sought until seven days after this notice is sent.

You then file in our lower court for a forcible writ. This writ is subsequently served under the statute, which is the issue of this case, 454.030. It is served one of three ways. It's served by actually serving the tenant, if you can find the tenant. Secondly, by leaving a copy of it with a 16-year old or better who would understand the action. And only thirdly by mailing, as we call it, only thirdly by posting the Writ of Eviction.

Next, --

QUESTION: Mr. Hoge, I see the statute says -- as to what you describe as the second method of service -- that the process server may explain and leave a copy of the notice. Have the Kentucky courts construed the phrase "may explain"? What does that mean?

MR. HOGE: No, sir, I do not believe they have

construed that. Nor, in fact, is this -- has that particular section ever been tested at all, to my understanding.

After it is posted, should that be the method -- and, of course, that would be the only issue that would concern this Court today -- then another period of time, seven days, at least three days, must expire. However, the record speaks clearly in this matter that there is at least two weeks or so after that finding before another writ, the Writ of Possession, is issued, and then another period of three days goes by prior to any literal set-out.

Now, I think the facts of this complaint tell the Court a great deal about the truth of service by posting in this case. Number one, all three plaintiffs did not pay their rent. There is no tenant in this case whatsoever that alleges that they paid their rent. Nor was the class so defined. Nor, in fact, can I conceive of any of the statistics which have been thrown in this case subsequently showing that any of the tenants, in fact, paid the rent.

Second, and which I purport is very strong evidence, notice that the landlord may well be subsequently upset. Next, I will point out each and every plaintiff in this case was at least two months in

arrears. Not only had they not paid the rent once and there was some mistake about the matter; they had withheld their rent.

Next, all three plaintiffs alleged -- and that's the extent of the proof in the matter, by the way, -- that they did not receive the Writ of the forcible detainer.

But the most important fact, I believe, in the entire case is that all three plaintiffs got the Writ of Possession, the second writ, by precisely the same means, by the posting statute, by the exact same service method, and all three admit that in their complaint.

QUESTION: Wasn't there something about it being placed under the door, also?

MR. HOGE: Yes, sir, Your Honor. In the complaint it states that it was found inside on the floor, and that it had apparently been stuck through the mail slot in the door. All three allege it was found in their apartment on the floor, and apparently put through the mail slot.

There is a case in Kentucky on that --

QUESTION: Then it isn't precisely the same.

MR. HOGE: Well, yes, sir. Possibly not. It is not the same in that we have no idea whether or not they got the original writ forcible. We only have an

idea of whether or not they did get the second one -- other than their allegation that they did not receive it.

Now, whether or not this statute is unconstitutional in the way the sheriffs practice the posting of the notice is an entirely different issue, and I don't believe has been addressed at all in this case, number one. And number two, might well have represented some type of complaint by some type of person that might have been in this class, but we don't have any record whatsoever on that kind of thing happening.

There is one case in Kentucky and unfortunately, I'm reticent to cite it because I don't have the cite with me. It's right under the forcible statute today, that says that placing of the notice was posting by placing it in the grill of the door. And a number of people did testify in their depositions that oftentimes they did stick it through the hole. They considered posting all the way more effective.

QUESTION: Mr. Hoge, I take it there was evidence which was not contradicted at the trial or in the court to the effect that the posted notices are sometimes removed. And was there any evidence produced as to the frequency with which mailed notices might be lost or not delivered? Was there any evidence about

that?

MR. HOGE: I think that's an excellent question in that it directs itself to the evidence that was presented. The evidence in this case was presented by six deputy sheriffs. That's the total extent of the sworn evidence.

QUESTION: When you say evidence, Mr. Hoge, the thing went off on a motion for summary judgment, didn't it?

MR. HOGE: Yes, sir.

QUESTION: So was it evidence in the sense of what, depositions, or -- ?

MR. HOGE: Yes, sir, one deposition taken in my office where the six deputy sheriffs, all of whom are politically appointed, gave their best opinion on what transpired and what they thought happened in forcible cases. Most of the time, they were confused about whether or not it was a forcible or a Writ of Possession, whether or not they were setting a person out or whether they were serving the original eviction notice. And they were quite apprehensive about what happened to them in attempting to serve writs for setouts, writs for possession. Yes, in that situation they were most upset.

Now, I won't mislead the Court. There is

testimony in here in the Joint Appendix, that a number of the deputy sheriffs testified that they had seen on a very few occasions where a writ had been taken down by another tenant in the same building. But that was, in fact, the extent of the evidence.

And the matter went to cross-motions for summary judgment in that the Sixth Circuit case was, on all fours beyond a question, the Weber case was right on point. The district court judge addressed the Weber decision, found it to be constitutional, stated that it was unfortunate that the additional mailing --

QUESTION: Well, he was bound by it, wasn't he?

MR. HOGE: Pardon me?

QUESTION: He was bound by it, wasn't he?

MR. HOGE: Yes, sir. And as a matter of fact, he comments on that. And he comments on that but he says it's a salutory rule that he was bound by, and points outr that the Weber decision had been the law for some 70 years. And quite frankly, it appears pretty clear that he felt it was unfortunate that mailing could not be mandated by a federal court as an additional due process safeguard in this particular case, but could not be mandated by a federal court since due process does not require a state to adopt the optimum method of service, but only a minimum standard to be satisfied.

QUESTION: It's not Kentucky's practice to also mail a notice, I take it.

MR. HOGE: No, ma'am. That is precisely what the issue is here today.

Now, this particular ultra-law, landlord and tenants law, applies only to the three major metropolitan areas at this time. In the rural area, there's never any question whatsoever where Mr. Jones might live, down the road, and they know where his farmhouse is. The particular facts of this case concerned a housing authority in a multiple multiple-unit dwelling, and was only brought on behalf, as I understand it, of the people that are in the urban areas at this time.

QUESTION: Do you think the result of the case is that both things have to be done?

MR. HOGE: Of the Sixth Circuit's decision? They both have to be done?

QUESTION: Posting and mailing?

MR. HOGE: Absolutely not. That's precisely why I'm here today. I maintain that the Kentucky legislature is allowed to prescribe the method of service in the fundamental area of landlord and tenants.

QUESTION: Well, what did the court of appeals hold?

MR. HOGE: The court of appeals held that the lower court was reversed. They held that they were compelled by the Mullane decision of this Court.

QUESTION: Yes. To require what?

MR. HOGE: To find this statute unconstitutional, as it would be so easy to add mailing.

QUESTION: But you think it would violate the court of appeals ruling if the plaintiff just mailed rather than posted?

MR. HOGE: Absolutely. I've been advised by --

QUESTION: And so do you think the net result is that he'd have to do both?

MR. HOGE: Yes, sir, number one. And number two, I've been advised that it's the state of the law today, the plaintiffs believe, that only personal service will be satisfactory as this statute has been ruled unconstitutional by the Sixth Circuit, and therefore, there is no procedure in landlord and tenants cases other than to -- in my experience -- hire bounty hunters to watch for the tenant and a special bailiff and finally get him personally served.

So that is one of the crying reasons that we have to be here, number one. Number two, I would point out that all of the sophisticated legislation of the

landlord and tenants law was passed in 1974. Our legislature meets every two years. Since that time we've had four legislatures. In each of those instances they have chosen not to amend or alter the forcible due process posting service method.

Now, the amicus point out that there are 17 states that have this type of statute. We believe that this statute in and of itself, as the legislature has found, and in fact written a law, is constitutionally sufficient. There's no question that it would be much more comfortable for me here this afternoon if I could say that this statute also has mailing. In fact, maybe possibly the Sixth Circuit would have had no problem with it had it said mailing, but it doesn't say mailing, number one.

Number two, the mailing issue in and of itself was somewhat unclear to me in the Sixth Circuit's decision as they cite the New York case, which is the one of three or four cases where this has been legitimately addressed. And in the New York case, the New York statute provides for a mailing as well. Judge -- the lower court, district court, also cited that case.

QUESTION: Mr. Hoge, what is the position of the Kentucky Attorney General about the issue in this case?

MR. HOGE: Well, the Kentucky Attorney General asked me to represent the state in this matter and I have gone forward this them, and, of course, they allege that it's constitutional.

QUESTION: But there's no formal appearance by the AG here.

MR. HOGE: No, sir. This is -- points up an excellent problem, though. The Louisville-Jefferson County area is the one of three municipal areas. The Kentucky legislature is very, very rural, and in fact, the ultra landlord and tenants laws are currently under tremendous attack in all of our courts and have been for sometime and hopefully will be resolved in the near future in the our court of appeals at this time as being unconstitutional special legislation, placing much higher restrictions and requirements on urban landlords than are placed on them in the balance of the state.

If this Court were to sustain the Sixth Circuit's decision that it would be, in my paraphrasing, much better to mail, I would have no system by which to have a statute passed to allow for that.

QUESTION: Well, this Court has no power anymore than the Sixth Circuit did, to say that mailing will be enough. All it could say is that mailing is or is not required under the Constitution. If Kentucky

wants to say that -- you may insist on mailing, but we're going to insist on posting, then you'd have to do both.

MR. HOGE: Justice Rehnquist states the case precisely. That is what we are here about. We are here about whether or not posting continues to be due process. That is exactly what we are here about.

QUESTION: Don't you suppose the Court, like the Sixth Circuit, could reach different conclusions about the validity of the statute as applied in different states or in different areas of the same state?

MR. HOGE: I believe so, but I believe it will be difficult for anyone to distinguish how this -- how mailing can be added to this statute. How mailing can be determined to be so much better that therefore, this statute is -- lacks due process, without saying at the same time that posting in and of itself is no longer sufficient.

QUESTION: Well, the court of appeals has said posting isn't sufficient in this case.

MR. HOGE: Yes, sir, and then --

QUESTION: And the statute, to the extent that it requires only posting, is unconstitutional.

MR. HOGE: Yes, sir, and that's precisely why it's wrong.

QUESTION: Well, -- what if you looked at the court of appeals opinion as representing its judgment about how posting operates in the particular environment that is involved in this case?

MR. HOGE: I would say first of all --

QUESTION: And it might come to a wholly different conclusion somewhere else.

MR. HOGE: I would say first of all that it would be improper if the court of appeals were determining the evidence that was presented that the district court judge had already decided the summary judgment matter on, because there was very little evidence and, in fact, the Sixth Circuit did not do that. They merely said that they recognized the New York case as allowing for mailing, and as mailing was appreciably sure to get there, that that would be the way we should do it in Kentucky.

But that, in fact, is -- and it is also the basis of the method which the court in the Sixth Circuit reasoned to this decision that makes the -- our office feel very much that it wasn't necessary. It just seemed expedient, it just seemed so much better. It's easy to stand here and say well, look, you're bound to get the mail. That's not always true. In my experience, yes, you're bound to get the mail. But look how much easier

it is to mail it, and therefore, the old system is improper.

But in fact, the way they got to that decision was to go back to the International Shoe, to the Pennoyer versus Neff matters which were built on fictions of in personam jurisdiction, on that kind of jurisdictional problem, and they gave very little attention to what we believe and what I think, in fact, are the exact questions presented here today -- the Mullane versus Hanover Trust.

That's what we're here about. We're not here about jurisdiction, we're not here about what might be a better process. We're here about whether this satisfies Mullane versus Central Hanover Trust.

And quite simply, it is our position that posting in this matter gave notice when the tenant didn't pay the rent, they knew about it. The test in Hanover, the test in all of the due process cases is whether from the totality of the circumstances, the person was reasonably calculated to have notice.

And in this matter, the tenant has not paid his rent. He knows that. And that brings up the difference in the rights which was not addressed at all by the Sixth Circuit. The landlord's original rights were to take by reasonable violence his property.

Self-help. Then forcible eviction statutes like this were passed under the police powers to obviate violence, quarrels and bloodshed.

Finally, in your Lindsey versus Normet decision and in a number of decisions, it's unquestionably justified to have special statutory treatment of landlord and tenant matters. In this situation, the landlord's duties under the safety codes and the health codes, the fire codes, the mortgages, the interest rates, they've been escalating the entire time. And the tenant's duties had been to remain in quiet possession and to pay his rent.

The tenant determines that he's going to breach his duty. The tenant has not duty whatsoever of any inquiry, no duty to be alert for the fact that the landlord would be unhappy with this? That seems to us impossible, and in fact, is part of the absolute justification why this is reasonably calculated.

QUESTION: Mr. Hoge, there are comments in the briefs about the inability under Kentucky procedure to counterclaim for lack of habitability.

MR. HOGE: Yes, sir.

QUESTION: Until a detainer action is instituted. Is this really true?

MR. HOGE: No, sir, I don't believe that's

true at all.

QUESTION: And is this reason for a tenant not to pay his rent?

MR. HOGE: I believe -- is it an excuse not to pay your rent? A reason not to pay your rent?

QUESTION: Well, suppose the tenant claims the place has become uninhabitable, it's overrun with rats and all kinds of things, and I suspect that this is not untrue with some of these places. Is this a reason for him not to pay his rent until he can get his habitability claim presented in court, as a counterclaim?

MR. HOGE: We don't believe so. We don't believe that he has a right of self-help, that he can just not pay his rent. We do believe he can send his landlord notice and advise, just as the landlord must advise the tenant, --

QUESTION: What claim does he have under Kentucky procedure?

MR. HOGE: Pardon?

QUESTION: What claim for lack of habitability does he have under Kentucky procedure? Can he sue his landlord?

MR. HOGE: Yes, sir.

QUESTION: There are comments in the brief that he may not until a detainer action has been

instituted.

MR. HOGE: I don't understand it to be that at all, sir. That's not the case. The remedy may be brought whether he's in possession or not. 383.685 -- he may bring an action against his landlord to remedy these problems, and he may, in a proper fashion, withhold his rent by sending the landlord notice.

QUESTION: Is there any provision for paying it into the clerk of court or into some neutral body?

MR. HOGE: Not to my knowledge, Your Honor.

Counsel will address this argument that in fact, this is no longer in rem, this is no longer solely a question of possession, though the Kentucky case that is currently the law of the matter states that that is all that the forcible eviction matter is because the tenant has a right to counterclaim.

It's our position that the tenant also has an independent right. This right is to withhold his rent.

QUESTION: Under Kentucky law, can the landlord not collect backdue rent as part of the forcible detainer action?

MR. HOGE: He can under the new uniform landlord and tenant law, if he seeks that remedy as well. However, it is not -- we do not take the position that this statute, 454.030, the one under attack, would

provide him service or process in that manner. That would, in fact, be an in personam matter that would require personal service. And in fact, no landlord does sue in any of these matters, in any of the matters before the court. No landlord has sued that way, nor in my experience does a landlord ever sue. They solely want the possession of the property back.

However, if they did sue for rent as well, then this statute, 454, would not apply. It would not be solely the matter of the writ.

QUESTION: Why if he's suing for back rent would -- why wouldn't posting be due process? I take it you just indicated that personal service would be required. As a constitutional matter?

MR. HOGE: No, sir. As I understand our Rule 4, it's similar to the federal rule --

QUESTION: You mean under Kentucky law you would have to give him personal service.

MR. HOGE: Yes, sir.

QUESTION: How about constitutional?

MR. HOGE: No, sir, I don't believe so. Not if --

QUESTION: You could still -- in a back rent action you could proceed by posting.

MR. HOGE: If the Kentucky legislature had

deemed that that kind of action for back rent, absolutely constitutionally sufficient.

I'll sit down and reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Smith?

ORAL ARGUMENT OF ROBERT FREDERICK SMITH, ESQ.

ON BEHALF OF THE APPELLEES

MR. SMITH: Mr. Chief Justice, my it please the Court:

Before I get to my prepared remarks I would like to address, if I may, some of the questions that the Court has previously asked. I am perhaps at a bit of advantage from Mr. Hoge in that I've had an opportunity to practice tenant-landlord law for quite sometime with our office. And I don't want this Court to have an incorrect impression of what the law may be.

Mr. Hoge was correct when he says that sometimes, a landlord may send a letter requesting the rental payment, but I can tell you from my experience, most landlords do not send a letter. And the provision of the law under which the letter is sent is under the Uniform Residential Landlord-Tenant Act.

Mr. Hoge is correct in pointing out to this Court that that Act currently applies to only three of Kentucky's 100 -- excuse me, two of Kentucky's 118

counties, and one additional city. In all other counties in Kentucky, the landlord is not required to send a letter prior to a writ being initiated.

And I would also say that even if the landlord were required to send a letter, and even if the landlord does send a letter, it is interesting to note that under Kentucky law, that letter must be hand-delivered or sent by Registered Mail. And even if the tenant gets that letter, there is no court date on it, there's no reason to believe that that letter in and of itself calls the person to court, because it does not.

QUESTION: Well, it gives the tenant some idea that the landlord is about to do something, doesn't it?

MR. SMITH: In the limited area in which it is used, it may raise the possibility that a landlord may go to court. But like I said, my experience has been there are numerous, close to 90% of the cases that I have been involved in, the landlord has not sent the letter.

QUESTION: Is that because the landlord was in some jurisdiction that didn't -- some part of Kentucky that didn't require the sending of a letter?

MR. SMITH: No, sir. In the area in which I practice, the Uniform Act is in effect, and in each case that I am participating in, the landlord should have

sent the letter. And in, like I said, in the numbers of cases that I have mentioned to you, they do not do so.

QUESTION: So then, so far as construing the statute on its face is concerned, we should construe it in connection with the requirement of the Uniform Act?

MR. SMITH: Justice Rehnquist, I think that that's a very interesting question. I think that this Court must look at the peculiarity of the current application of the Uniform Residential Landlord-Tenant Act. But it is our position that with regard to posting, posting is unconstitutional because it is not reasonably calculated to appraise the tenant of pending litigation.

Now, Mr. Hoge has mentioned that there is another writ that is sent out by the Kentucky courts. That is true, but that writ is sent out only after a judgment has been entered. And in this particular case, and in some of the cases, again, that I have been involved with, that writ is not received by the tenant until after the judgment is there, and after the time to appeal has lapsed.

There is Kentucky law which indicates that if you do not appeal an unfavorable decision in the Kentucky district court, the tenant-landlord court, the circuit court which is the next highest court has no

jurisdiction to entertain any sort of remedial action.

QUESTION: The only question here is whether for an eviction, the posting is sufficient under the Constitution, and that is the only question before the Court, isn't it?

MR. SMITH: Yes, sir, that's correct.

I might also add that Mr. Hoge indicated that the tenants had not paid their rent in this particular case. Long, long ago and far, far away that may have been true. But in fact, what occurred was the people offered their rent and the rent was refused by the public housing authorities. And if you will note in our record, we initiated litigation involving the public housing authorities, and that particular issue, the payment of rent, was settled favorably to the tenants.

The case that Mr. Hoge had requested is a case called Tinsley versus Majorna. It's 240 S.W. 2d, 539. It's a 1951 --

QUESTION: Well, has this got a whole lot to do with the issue we have to decide?

MR. SMITH: No, sir. If you prefer, I can go on with --

QUESTION: Well, then what are you wasting your time on it for?

MR. SMITH: All right. Because I thought that

the Court was interested and was willing to answer the questions. But I've got some other remarks and I'll be glad to go with them.

We in Kentucky with a minority of other states have a method of service of process which has come from a time that has long since passed. This same method of process risks our state court and those like it in becoming a landlord's rubber stamp, despite your warnings and ruling in Pernell versus Southall Realty. Posting simply does not withstand constitutional scrutiny at this time because it is not reasonably calculated, nor reasonably certain to appraise the tenant of the pending litigation.

Before I get into the constitutional ramifications before this Court, however, I would like to take just one moment to discuss the importance of an eviction action in state courts.

Possession is no longer the sole issue before a court in an eviction matter. Tenants -- excuse me. Landlords, in addition to possession, are now requesting back payment of rent, which is permitted under Kentucky statute. Tenants are defending their rights to stay in their homes and are counterclaiming for damages, usually based upon a landlord's failure to provide essential services and repairs to the property. There has --

QUESTION: Do you agree with Mr. Hoge that Kentucky law would require personal service if the landlord were to require or request back rent?

MR. SMITH: No, ma'am, I disagree with Mr. Hoge. The posting statute which allows the three-tier process but that final tier being posting, is an avenue available to a landlord to request both possession and for back rent. And that is in the Kentucky revised statute Section 383. I would guess it's .685, but I'm not sure what the balance of that is. But in Kentucky, in those jurisdictions that have URLTA you may not only request possession, but you may also request back rent.

Clearly, there has been a great change in the tenant-landlord law. Appellants argue that posting satisfies the constitutional requirements of the Fourteenth Amendment. We strongly urge this Court to reject these arguments. If you look at the essential legal argument of the appellants, and then view our discussion of Westmoreland, Sullivan that were contained in the Washington amicus brief and in our brief, I think that you will find that the legal authority upon which they have relied has been greatly diminished.

And with regard to their major factual argument that posting is a third alternative and a closely-controlled process, again, the record developed

for this Court and for the Washington experience clearly indicate --

QUESTION: I don't think the Washington experience is any part of the record before this Court. I don't think amicus are entitled to augment the record.

MR. SMITH: Yes, sir, I think that's correct, but there was an amicus brief filed pointing out some of the problems.

QUESTION: Right, but I don't think it -- so far as augmenting the record, it's really properly before the Court.

MR. SMITH: But our record shows that posting, which is a most unreliable form of notice, is that which is commonly used. Now, in our record, you can find the following: first, that writs are used, the Sixth Circuit found, in an overwhelming -- excuse me, in 50% of the time writs are posted as the form of notice. A deposition that is in the record --

QUESTION: Well, where did the Sixth Circuit find that?

MR. SMITH: Pardon?

QUESTION: Where did the Sixth Circuit find that? I can see the language where it says the summonses are not infrequently removed -- I did't find the 50% figure in their opinion.

Well, if you say it's there I'll go back and take another look at it. Don't interrupt your --

MR. SMITH: No, sir, I'll be glad to check. I don't want to mis-state the record.

In the Joint Appendix, page 4, the first literary paragraph, one, two, three, four, five, six seven rows down it says, Fifty percent of the summons were served via posting, and that not infrequently, the posted summons were removed by people other than those served.

QUESTION: Well, that isn't the same thing as saying 50% of the services by summons don't reach the --.

MR. SMITH: I'm just trying to point out that posting is an unreliable process and that it is a process that is used by sheriffs all too frequently.

Also, in the depositions that were taken in this case, there are two particular process servers who you wanted to look at. One is a guy named Hansford. He said that 75% of the writs that he served were by posting. And in a deposition that was taken for the plaintiffs on page 76, questions 37 and 38 indicate that posting was also used by this particular process server in the majority of times.

And also from our record you know that the process servers, having been -- when they were in the

office of the courts, were aware of tenants who had complained about never having received their writs. Were also --

QUESTION: Is this in the record, what you're telling us now?

MR. SMITH: Yes, sir, it is. I'll be glad to get that for you.

QUESTION: No. I just wanted to know if it's in the record.

MR. SMITH: Yes, sir, it is. And that a sample that was obtained through interrogatories in this case of 173 judgments that were entered by a particular court at a particular time, 150 were done by default. And the court was unable to tell us in our discovery which of these writs were served by posting, which were served by substituted service and which were served by in-hand service.

QUESTION: Of course, the mere fact that a judgment is taken by default doesn't mean that the process didn't reach the defendant.

MR. SMITH: Yes, sir. But our position would be that tenants, particularly these public housing tenants, who are the plaintiffs in this case and tenants who live in jurisdictions where there are writs of forcible entry and detainer -- excuse me, where there is

the warranty of habitability -- are extremely foolish and would take advantage of the court process and would not ignore the writ of forcible entry detainer because it is through the courts that they'll get their repairs.

And if they lose this apartment, particularly those people in subsidized housing and in public housing, they are going to lose, frankly, an excellent economic bargain, and they are not so foolish as to ignore that.

QUESTION: Well, are you saying that no tenant ever defaults in an unlawful detainer action?

MR. SMITH: No, sir, but I'm saying that if, in fact, tenants receive the writ, there are reasons why they would not want to ignore it. And the reasons being they'd lose the basis of their economic bargain in public housing and subsidized housing particularly.

In housing in which there are repairs that are needed, this is an excellent opportunity to go to court and use the arm of the law to get the repairs that are required by law.

QUESTION: Can I assume that there might be some people who aren't interested in litigating?

MR. SMITH: Perhaps, Justice Marshall.

QUESTION: There must -- I know you as a lawyer don't want to believe it, but there must be

some. One or two.

MR. SMITH: Yes, sir, but I -- there may be a --

QUESTION: I mean some of these people might not have wanted to litigated, so they defaulted.

MR. SMITH: Perhaps, Justice Marshall, that may be.

QUESTION: Well, there must be some. Aren't there some innocent people in this world?

MR. SMITH: Yes, sir, there are. But it is our position -- and what we're trying to convince this Court today is that it is not a good idea for many tenants in the position that these tenants are in, to ignore it.

QUESTION: I think it's a good idea for us to let the people default if they want to default.

MR. SMITH: Yes, sir, I guess if they wish to default that's --

QUESTION: Because you remember the Thirteenth Amendment?

MR. SMITH: Yes, sir.

QUESTION: No more slavery.

MR. SMITH: We believe that --

QUESTION: Counsel, is it your position that the constitutional requirement might be different

depending upon what part of the state the action occurs?

MR. SMITH: No, ma'am. Posting is used throughout all 121 or whatever counties there are in Kentucky. It is particularly unconstitutional in those areas where a tenant is being requested or the landlord is requesting that a tenant pay rent in addition to possession. It is particularly unconstitutional in areas where some sort of personal judgment is being sought.

But we believe that posting is unconstitutional on its face regardless of where it is used in Kentucky.

QUESTION: Do you mean that in multiple housing units, the notice is more likely to be taken away than out in the country where it's a single family dwelling? Is that what you're driving at?

MR. SMITH: Your Honor, I think that it is particular acute in multiple-housing dwellings. But there are multiple-housing dwellings in the counties in Kentucky.

The problem with posting is that the dangers that beset posting -- okay, someone else coming along, the ravages of the elements -- those are just as available in the counties as they are in the cities, but they may be more likely in the cities.

We believe that the record before this Court shows that the sliver of scotch tape and the thumbtack have indeed replaced the hard rap upon the door. It is significant to note that the process servers, those whose deposition we have taken, indicate that they know that tenants don't always receive their writs, they know they get torn away. They also know that there are times when the property itself is not amenable to posting and they have to fold them and stick them in a doorjam, which is even a less unreliable manner of notice.

So appellant's brief also concedes the point that there are times when tenants do not receive notice, and we think that that's very important. And again, as I mentioned, common sense will tell you that a piece of paper exposed to the ravages of the elements and to vandals does not fare well at all.

QUESTION: Do you think that notice by first class mail is constitutionally adequate, counsel?

MR. SMITH: Notice by first class mail in this particular situation would be adequate. Yes, ma'am. Whether you supplement posting with it or substitute the mail for posting. I think under either set of circumstances it would be constitutional.

QUESTION: I was just going to follow it up with a question about whether you think that mailboxes

are as vulnerable as front doors to vandalism.

MR. SMITH: Ma'am, I think that -- one of the things that we pointed out in our brief was the mails, both their delivery and once it rests in the mailbox, are protected by the federal law. Mailboxes are much more private than something that's shown and is available to anyone to come along. That would probably be the point that we were trying to make.

QUESTION: Is it a violation of Kentucky law to remove one of the posted notices from the door?

MR. SMITH: I searched for that particular Kentucky law and I found none. I did look.

QUESTION: Of course, the statute requires personal service if they can get it.

MR. SMITH: Yes, sir, that's correct.

QUESTION: And it requires leaving it with a member of the family if you can find one.

MR. SMITH: Yes, sir, that's correct.

QUESTION: And the only question is whether, when you can't do either one of them, whether posting is good enough.

MR. SMITH: Yes, sir, I believe that's correct. And I think the record shows, however, that posting which is an unreliable form of notice, is that that's used most often by the sheriffs. And one part of

the proof in this case indicated that the stamp that was pre-printed for the returns on the back of these writs indicated that posting was the first method of process.

In fact, one of the sheriffs, whose deposition we took, was not even aware that there was any statutory requirement for personal or substituted service --

QUESTION: Do you think the statute requires posting if they can't -- well, I'll put it this way. If you can't personally serve and if you can't find a member of the family, would it satisfy the Kentucky law if you mailed it?

MR. SMITH: Yes, sir, I think it would.

QUESTION: So you wouldn't have to do both?

MR. SMITH: No, sir, I don't believe you would. Kentucky just changed their civil rules to allow service in other types of civil cases by certified mail, in addition to the sheriff handing a summons to you.

QUESTION: Well, are you sure of your answer on Kentucky law? I gathered your opponent took a somewhat different position. I mean, if Kentucky says by statute that this is the way you serve an unlawful detainer action, do you think that one can simply substitute a form of service that isn't prescribed in the statute for one that is?

MR. SMITH: No, sir, my -- I'm sorry if I

misled you. My remarks were meant to say mailing as a supplement to or a substitute for posting I believe would satisfy the requirements of the Fourteenth Amendment. I'm sorry if I was imprecise.

QUESTION: You didn't mean it would satisfy Kentucky law.

QUESTION: Well, the Kentucky law says that if you can't find them, service may be by postal.

MR. SMITH: Yes, sir.

QUESTION: It doesn't say shall be; it says may be.

MR. SMITH: No, the current law would not be satisfied by mail because it's an element of service that's not contemplated by the current statute. Frankly, my answer was premised upon the fact that we would prevail in this case, the Court would find posting unconstitutional, and then what is Kentucky to do. And what Kentucky should do is either supplement posting with first class mail or substitute mail for posting.

QUESTION: Mr. Smith, where are your named plaintiffs now? Are they still in the housing?

MR. SMITH: No, sir, they are not.

QUESTION: Is there still a controversy?

MR. SMITH: Yes, sir, there is. We had numerous plaintiffs in addition to our individual

plaintiffs. Frankly, one of our plaintiffs is still in subsidized housing but it is not public housing. We have an organizational plaintiff, the Louisville Tenant Union, whose job it is as an organization to advocate for tenants. They are sued and do sue, and it just so happens that I am their general counsel and have participated in other litigation for the Louisville Tenant Union. And they are also a named plaintiff in this case, along with the Welfare Rights Organization. I am more familiar with the Tenant Union.

QUESTION: If the statute required that the service be made by slipping it under the door, would you be here?

MR. SMITH: If, in fact, it were slipped under the door, it's interesting to note that that's how they got this second writ in this particular case.

QUESTION: That's why I'm asking.

MR. SMITH: If it were shown that it were reasonably calculated to appraise the tenants of the pending proceeding, we would not be here. I really don't know what the stats would show on that, I'm sorry.

In our argument this afternoon and in our briefs, we believe that tenants have shown that posting fails to meet the minimal standards of the Fourteenth Amendment, and most importantly, fails to meet the test

that was espoused by Mullane and its progeny. That is, that where the names and addresses of individuals are easily ascertained, a manner of service no less reliable than the mail shall be used.

QUESTION: Well, that was in contrast to publication in the newspaper in Mullane, where there was just no bones about it. The people would never read it. Here you've got an argued percentage that perhaps don't receive it, but it certainly isn't the same thing as publication in a newspaper.

MR. SMITH: The Weber court compared it to publication, Justice Rehnquist. And also, I don't believe the issue is well, do some people get it. Mullane disfavored publication because it said well, it may be that some people get it, but it's not reasonably calculated to appraise most of the individuals who should get it. And we don't think that posting is reasonably calculated to appraise most individuals who should get it.

QUESTION: Well, Mullane said, too, we think that under such circumstances, reasonable risk that notice might not actually reach every beneficiary are justifiable. Now and then an extraordinary case may turn up, but constitutional, like other mortal contrivances, has to take some chances. And in the

great majority of instances, no doubt justice will be done.

MR. SMITH: We believe the chance is much too great with regard to this particular scenario. And we also don't want to be bound by specific numbers. We just believe that what we have shown you today is that posting is not reasonably calculated. I mean, due process isn't a mathematical computation, and it's bad for you or I to discuss mathematical computations with regard to due process.

But we believe that this record shows you that posting is not reasonably calculated.

In balancing the harm to tenants with the cost of constitutional notice, it is clear that the scales weigh in the tenant's favor. Cost in time and in money should mailing be required would be de minimus. The names and addresses of the tenants are easily ascertainable. Reliance upon such a system as posting, which falls below the de minimal requirements of the Fourteenth Amendment and the test established in Mullane, show you a system which is unconstitutional and must be struck.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hoge?

ORAL ARGUMENT OF WILLIAM L. HOGE, III, ESQ.

ON BEHALF OF THE APPELLANTS -- Rebuttal

MR. HOGE: I want to direct the Court's attention to the title of the statute in question, 454.030, Forcible Entry or Detainer, How Notice Served. It only applies to that statute.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Thereupon, at 2:45 o'clock p.m., the oral argument in the above-entitled matter was concluded.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Joseph Greene Et Al., Appellants, v. Linnie Lindsey Et Al., No. 81-341

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BY Suzanne Young