No. _____

In the Supreme Court of the United States

_____

ESTATE OF MARY LOWE, BY ROBERT F. HARRIS,
COOK COUNTY PUBLIC GUARDIAN AND
SUPERVISED ADMINISTRATOR,
*Petitioner,*

*v.*

APEX TAX INVESTMENTS, INC. AND JOHN HERNDON,
*Respondents.*

_____

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF ILLINOIS*

_____

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, when mailed notice of a tax sale or property forfeiture is returned undelivered, the Due Process Clause of the Fourteenth Amendment requires the person charged with giving notice to make any additional effort to locate the homeowner before the property is taken?[1]

2. Whether, when the undelivered, returned notice either reveals the homeowner's actual whereabouts or contains information, such as the fact of her hospitalization, that is reasonably likely to lead to the discovery of her whereabouts and mental incapacity, the Due Process Clause permits the property to be taken without requiring the party responsible for giving notice to undertake reasonable additional efforts to provide actual notice?

3. Whether a finding of "due diligence," made as a matter of state law in an *ex parte* proceeding, forecloses a party who did not receive actual notice of the proceeding from challenging the sufficiency, on federal constitutional grounds, of efforts to discover her whereabouts?

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[1] The first question presented for review is substantially the same as the question presented in *Jones v. Flowers*, No. 04-1477, pet. for cert. granted, Sept. 27, 2005.

## PARTIES TO THE PROCEEDING

Petitioner is the Estate of Mary Lowe, by Robert F. Harris, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe. Respondents are Apex Tax Investments, Inc. and John Herndon.

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# PETITION FOR A WRIT OF CERTIORARI

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The Estate of Mary Lowe by Robert F. Harris, Cook County Public Guardian and Supervised Administrator, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-43a) is reported as *In re Application of County Collector*, 217 Ill. 2d 1, 838 N.E.2d 907 (2005). The order of the Appellate Court of Illinois, First Judicial District, affirming the Circuit Court of Cook County's denial of the petition to set aside tax deed (Pet. App. 44a-62a) is unpublished pursuant to Illinois Supreme Court Rule 23. The memorandum opinion of the Circuit Court of Cook County granting partial summary judgment in favor of petitioner

(Pet. App. 82a-87a) is not reported. The orders of the Circuit Court of Cook County denying petitioner's motion for summary judgment (Pet. App. 81a) and denying the petition to set aside tax deed (Pet. App. 63a) are not reported. The order of the Circuit Court of Cook issuing the tax deed is not reported (Pet. App. 88a-90a).

## JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1 provides in relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law.

Section 22-15 of the Illinois Property Tax Code, 35 Ill. Comp. Stat. 200/22-15, provides in relevant part:

> The purchaser or his or her assignee shall give the notice required by § 22-10 by causing it to be published in a newspaper as set forth in § 22-20. In addition, the notice shall be served by a sheriff … upon owners who reside on any part of the property sold by leaving a copy of the notice with those owners personally.
>
> The same form of notice shall also be served upon all other owners and parties interested in the property, if upon diligent inquiry they can be found in the county,

> and upon the occupants of the property in the following manner:
>
> (a) as to individuals, by (1) leaving a copy of the notice with the person personally or (2) by leaving a copy at his or her usual place of residence with a person of the family, of the age of 13 years or more, and informing that person of its contents. The person making the service shall also cause a copy of the notice to be sent by registered or certified mail, return receipt requested, to that party at his or her usual place of residence.
>
> ***
>
> If any owner or party interested, upon diligent inquiry and effort, cannot be found or served with notice in the county as provided in this Section, and the person in actual occupancy and possession is tenant to, or in possession under the owners or the parties interested in the property, then service of notice upon the tenant, occupant or person in possession shall be deemed service upon the owners or parties interested.
>
> If any owner or party interested, upon diligent inquiry and effort cannot be found or served with notice in the county, then the person making the service shall cause a copy of the notice to be sent by registered or certified mail, return receipt requested, to that party at his or her residence, if ascertainable.

Section 22-45 of the Illinois Property Tax Code, 35 Ill. Comp. Stat. 200/22-45, provides in relevant part:

> Tax deeds issued under § 22-35 are incontestable except by appeal from the order directing the county

> clerk to issue the tax deed. However, relief from such order may be had under § 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under that Section with respect to final orders and judgments in other proceedings. The grounds for relief under § 2-1401 shall be limited to:…
>
> (3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or
>
> (4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in § 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by §§ 22-10 through 22-30.

Section 22-40(a) of the Illinois Property Tax Code, 35 Ill. Comp. Stat. 200/22-40(a), provides in relevant part:

> If the redemption period expires and the property has not been redeemed … and all the notices required by law have been given … and the petitioner has complied with all the provisions of law entitling him or her to a deed, the court shall so find and shall enter an order directing the county clerk … to issue to the purchaser or his or her assignee a tax deed. The court shall insist on strict compliance with §§ 22-10 through 22-25.

## STATEMENT

### Background

In 1977, Mary Lowe purchased a single-family home in Cook County, Illinois, located at 13250 South Riverdale. (C 56.)[2] She regularly paid all property taxes until 1991, when she failed to pay $110.65 in property taxes assessed for the 1991 property tax year. (C 4.) In 1993, Ms. Lowe quitclaimed the property to herself and her companion, William Austin. (EX 66-67.)

Beginning in the early 1960s, Ms. Lowe experienced psychiatric problems, including auditory hallucinations and delusional thinking. (SR II 26.) Ms. Lowe was diagnosed with chronic disorganized schizophrenic disorder and hospitalized 27 times between 1964 and 1996. (SR II 25-26.) Her final hospitalization lasted 16 months, from August 26, 1995 until December 16, 1996. (SR II 26, 32; EX 96, 131.) It was during that period that respondent Apex Tax Investments, Inc. ("Apex") secured ownership of Ms. Lowe's home by prosecuting an application for issuance of a tax deed in the Circuit Court of Cook County. (Pet. App. 88a-90a.) Ms. Lowe, who was released to the custody of her son, Bruce Lowe, on December 16, 1996, never received notice of the tax deed proceeding. (SR II 26, 32; EX 96, 131.) She died on November 15, 1998, two days after her 72nd birthday. (C 57, 451.)

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[2] The record consists of 10 volumes: a four-volume record consisting of a consecutively-paginated three-volume common-law record ("C") and a one-volume report of proceedings ("R"); a three-volume supplemental record containing a one-volume common-law record ("SR") and a nonconsecutively-paginated two-volume report of proceedings ("SRII" and "SRIII"); and a consecutively-paginated three-volume supplemental record containing the exhibits admitted in evidence at the evidentiary hearing of February 20, 2002 ("EX").

Mr. Austin died of natural causes, apparently in late 1994. (Ex. 261). Mr. Austin's death triggered a renewed schizophrenic episode, in that Ms. Lowe suffered the delusion that Mr. Austin was still alive, and she continued to live with his decomposing body until January 4, 1995, when she was found by the Chicago police, while walking naked outdoors. (C 29; EX 95-96.) She was again hospitalized, but later released to an outpatient treatment program. (EX 95-96, 130.)

Ms. Lowe was again hospitalized for about two weeks in July 1995. (EX 103.) According to Ms. Lowe's medical records, she was delusional, her speech was incoherent, and her thinking was disorganized. (EX 113.) On August 26, 1995, she was re-hospitalized. (EX 101.) On this occasion, Ms. Lowe was transferred to the Tinley Park Mental Health Center ("TPMHC"), a state mental hospital, where she remained until December 16, 1996. (SR II 26; EX 96, 278-280.) She suffered from hallucinations and delusional thinking, but eventually responded to treatment in October 1996, when she was given a new antipsychotic drug. (EX 96.) The TPMHC staff noted Ms. Lowe's need for a guardian, due to the likelihood that she would not be able to care for herself upon discharge. (EX 300, 317, 378, 395, 454, 460.)

Ms. Lowe's mental illness was well-known in her neighborhood. (SR II 60-61, 83.) Jewel Hightower, a letter carrier whose route included Ms. Lowe's home from 1991 forward, was aware of Ms. Lowe's mental illness, as were Ms. Lowe's neighbors. (SR II 54-58, 60-61, 82-83, 85-87.) According to Ms. Hightower, Ms. Lowe exhibited a variety of strange behaviors, including coming outside undressed, shouting names and obscenities, moving her furniture to the curb, and screaming at passersby. (SR II 56-57, 60-61.)

Such episodes frequently were followed by hospitalizations. (SR II 58.)

Ms. Hightower would hold Ms. Lowe's mail during her hospitalizations. (SR II 58-59, 62, 82.) Until Ms. Lowe's last hospitalization in August 1995, she would call the post office when she returned home, and Ms. Hightower would then deliver Ms. Lowe's mail. (SR II 58-59.)

**Apex's Tax Deed Petition and Failed Attempts at Providing Notice**

On March 3, 1993, Apex purchased Ms. Lowe's home for $347.61, and received a "certificate of purchase," at a tax sale authorized by Articles 22 and 23 of the Illinois Property Tax Code, 35 Ill. Comp. Stat. 200/21-190 *et seq*. and 22-5 *et seq*. (the "Code"). (C 2, 4.)[3]

On October 5, 1995, Apex filed a petition in the Circuit Court of Cook County seeking a tax deed to the property (the "tax deed petition"). (C 2-4.) Under the Code, Ms. Lowe was entitled to redeem the property by paying the unpaid taxes, plus certain expenses, before the redemption period expired on February 21, 1996. *See* 35 Ill. Comp. Stat. 200/21-345 through 21-355.

Apex was required to comply with certain statutory notice provisions, including the publication of notice in a newspaper published within Cook County and service of notice by the Cook County Sheriff. *See* 35 Ill. Comp. Stat. 200/22-10 through 22-25. If the Sheriff could not effect personal service, Apex was required to undertake a "diligent inquiry" to locate and serve the owner with notice. *See* 35 Ill. Comp. Stat. 200/22-15.

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[3] This amount included the amount of delinquent 1991 property taxes ($110.65), interest, and statutory fees. (C 4.)

On October 26, 1995, the Sheriff attempted to serve Ms. Lowe, Mr. Austin, and the "occupant" of the property. (C 11-13.) The Sheriff reported that he had been unable to serve anyone at the property, which he reported to be "vacant per neighbors." (*Id.*) He then sent notices by certified mail addressed to the property to Ms. Lowe, Mr. Austin, and "occupant." (C 54-55.)

Ms. Hightower, the letter carrier, later testified that she became concerned when she received the Sheriff's letters because she recognized their potential importance. (SR II 64-65, 79-80.) Ms. Hightower had learned that Ms. Lowe was hospitalized at TPMHC, but she did not know when Ms. Lowe would be released. (SR II 65, 75-76, 82.)[4] Ms. Hightower duly recorded the fact of Ms. Lowe's hospitalization at the branch post office. (SR II 72, 82-84.)

Ms. Hightower marked the envelopes addressed to Ms. Lowe and "occupant" with her initials (JHT), her postal route number (2719) and the annotation "Person is Hospitalized." (C 54; SR II 66-70, 79.) Ms. Hightower also knew that Mr. Austin had died and therefore wrote "deceased" on the letter addressed to him. She then returned the letters to the Sheriff. (C 15, 54; SR II 65-66.) The Sheriff filed the letter addressed to Mr. Austin with the court on November 22, 1995; he later filed the letters addressed to Ms. Lowe and "occupant" on January 2, 1996. (*Id*.)

Apex's agent Fred Berke visited the property between September 21 and November 21, 1995. (Pet. App. at 83a.) No one answered when Mr. Berke knocked on the door. (*Id.* at 93a.) Mr. Berke looked in a window and noticed that the living room had no furniture. (*Id.*) Mr. Berke later testified

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[4] The United States Postal Service also maintained records requiring Ms. Lowe's mail to be held for this reason. (SR II 72, 82-84.)

that he then spoke with Ms. Lowe's next-door neighbor, who said that Ms. Lowe owned the property, but that no one was currently living there. (*Id.* at 94a.) Mr. Berke did not say whether he asked the neighbor where Ms. Lowe was or how she could be reached.

By reviewing a "print out tract search," a deed, and public records, Apex determined that the Starks & Boyd, P.C. law firm had represented Ms. Lowe in connection with the 1993 quitclaim deed, and that First National Bank of Chicago had been a mortgagee. (*Id.* at 94a-95a.) The Sheriff effected service on both parties between October 24 and 26, 1995. (*Id.* at 95a.) Apex determined that Ms. Lowe was registered to vote at her home. (*Id*.) Apex caused the Clerk of the Circuit Court to send notices to Ms. Lowe, Mr. Austin, "occupant," Starks & Boyd, P.C., and First National Bank of Chicago by certified mail on November 8, 2005. (*Id.* at 95a-97a; C 6-10) The first three notices were returned by the Postal Service. (C 16, 547.)

Apex also gave notice by publication in *The Chicago Daily Law Bulletin* on October 11, 12, and 13, 1995. (*Id.* at 96a.) Apex never served Ms. Lowe, who remained hospitalized in at TPMHC, a state mental hospital.

**The Tax Deed Hearing**

On March 6, 1996, Apex filed an Application for an Order Directing the County Clerk to Issue a Tax Deed. (C 18.) On March 18, 1996, the presiding judge, Hon. Marjan Staniec, held an *ex parte* hearing with respect to that application. (Pet. App. at 91a-98a.)

The transcript of the *ex parte* proceeding consists of 9 pages, including the title page. (*Id.* at 91a-98a.) Apex's attorney, Jonathan Smith, called Mr. Berke as his only witness, and Mr. Berke's testimony consists of 34 lines. (*Id.*

at 93a-94a.) Mr. Berke testified that he visited the property and spoke to Ms. Lowe's next-door neighbor, who said that Ms. Lowe was the owner of the property, but that no one was currently living there. (*Id.*) Mr. Berke apparently did not ask the neighbor where Ms. Lowe was, or how she could be reached, and he did not disclose the purpose of his visit. (*Id.*) He did not ask whether anyone else might know about Ms. Lowe's whereabouts or how to contact her. Nor did he inquire about Ms. Lowe's reputation in the neighborhood.

Following Mr. Berke's testimony, Mr. Smith, Apex's lawyer, summarized Apex's attempts at notice. (*Id.* at 94a-97a.) He noted that the Sheriff failed to obtain personal service on Ms. Lowe and Mr. Austin, and that the Sheriff had sent them certified letters. (*Id.* at 95a-96a.) Mr. Smith offered the returned envelopes in evidence, but made no mention of the notations that Ms. Lowe was hospitalized and Mr. Austin was dead. (*Id.*) Mr. Smith further asserted that no incompetents appeared to have an interest in the property. (*Id.* at 97a.) Judge Staniec admitted the envelopes in evidence, but did not inquire about the notations. (*Id.* at 96a.)[5]

Judge Staniec asked one substantive question of Mr. Smith: "[W]hat were the diligent efforts you made to try to locate the whereabouts of Mary Lowe and William Austin, Sr.?" (*Id.* at 96a.) Mr. Smith responded:

> We checked all the city and suburban phone directories and were unable to find any listing or address for Mary Lowe or William Austin. All of our regular efforts proved fruitless and that's why we sent the notice to who we assume to be their attorneys,

[5] Judge Staniec, following his retirement from the bench, gave an affidavit stating that he would not have granted Apex's application if Ms. Hightower's notations had been called to his attention. (C 541-42.)

> Starks and Boyd. We also placed a call to Starks & Boyd, and they would not give us an address, and indicated we should send the notice to them.

(*Id.*)

Judge Staniec concluded that Ms. Lowe's redemption period had expired, that no redemption had occurred, and that Apex had exercised due diligence in ascertaining the identify of interested parties and their whereabouts. (*Id.* at 97a-98a.) Judge Staniec continued the matter to allow Apex to provide a transcript of the proceedings, submit proof of payment with respect to post-1991 property taxes, and draft an appropriate order. (*Id.*)

On May 20, 1996, Judge Staniec entered a written order, finding, "upon proofs and exhibits heard and offered in open court," that Apex had "fully complied with all of the Statutes and the Constitution of the State of Illinois relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto," and directing that a deed be issued vesting Apex with fee-simple title to the property. (Pet. App. 88a-90a.) On the same day, the Clerk issued the deed, which was recorded on June 5, 1996. (EX 68-71.)

**Proceedings to Set Aside the Tax Deed**

On September 5, 1997, Mario and Bruce Lowe, Ms. Lowe's sons, filed a pro se petition asking that the Circuit Court set aside the tax deed, based on Ms. Lowe's hospitalization at TPMHC. (C 23-24.) Judge Staniec then appointed the Cook County Public Guardian as Ms. Lowe's attorney and guardian ad litem. (C 541-44.)

On November 10, 1997, the Public Guardian filed a Petition to Set Aside Tax Deed and Stay Order of Possession under Section 2-1401 of the Illinois Code of Civil Procedure and Section 22-45 of the Property Tax Code. (C 29-32.) On

April 17, 1998, the Public Guardian filed an Amended Petition. (C 46-52.) The Public Guardian asserted that Apex had notice of Ms. Lowe's hospitalization by virtue of Ms. Hightower's notations on the returned letters. The Public Guardian further argued that, in light of Apex's knowledge that Ms. Lowe was hospitalized, and its failure to make any further inquiry of Ms. Hightower or the Postal Service, Apex had failed to undertake the diligent inquiry required by the Fourteenth Amendment and this Court's holding in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). (C 46-51.)

On December 6, 1996, Apex had entered into an installment sale contract with John Herndon, who agreed to pay Apex $10,000 for Ms. Lowe's home. (C 85-92.) On August 12, 1998, John Herndon moved to dismiss the Public Guardian's petition. (*Id.*) On April 14, 1999, the Public Guardian moved for partial summary judgment, seeking a determination that Mr. Herndon was not a bona fide purchaser because his contract remained executory and he had actual notice of Ms. Lowe's claim to the property. (C 161-65.)

Judge Staniec granted the Public Guardian's motion after hearing arguments on behalf of all parties. (R 53-94). In his Memorandum Decision, Judge Staniec concluded that Apex had actual or constructive knowledge, at the time of the March 18, 1996 *ex parte* hearing, that Ms. Lowe was hospitalized and had not received notice. (Pet. App. 82a-87a.) According to Judge Staniec, that knowledge was to be imputed to Mr. Herndon as well. (*Id.* at 86a.) With respect to Apex, Judge Staniec concluded:

> Apex "knew" or "should have known" that respondent was in the hospital. It had either actual or constructive notice of the circumstances. Actual if it

> had exercised due diligence in reviewing the court file before the [March 18, 1996] prove-up, or constructive notice if it failed to exercise due diligence. Apex should or would have noted the Post Office notation on the return envelope -- and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by the Property Tax Code.

(*Id.* at 84a-85a.)

On September 17, 1999, following Judge Staniec's retirement, the Public Guardian moved for summary judgment on its Amended Petition. (C 370-76.) On February 16, 2000, Judge Nancy Arnold denied the motion and set the matter for trial. (Pet. App. 81a.) The case was tried by Judge Edward O'Brien on February 20, 2002. Only the Public Guardian presented evidence.

Dr. Bernard Rubin, an expert in the field of psychiatry, who had examined Ms. Lowe's health records, testified that Ms. Lowe suffered from chronic disorganized schizophrenic disorder, the most severe form of schizophrenia. (SR II, 18, 21-26, 31, 49, 104-105; EX 97-126.) During the period between January 1995 and October 1996, Ms. Lowe "suffered from an insane delusion which prevented her from being fit to handle any social or businesses necessities that arose in her life." (EX 96.) "Even if she had been served," according to Dr. Rubin, she would have been "unfit for any appropriate or realistic response." (*Id.*)

The Public Guardian also called Jewel Hightower, the letter carrier. She testified about Ms. Lowe's mental illness, and described Ms. Lowe's bizarre behaviors, based on personal observations and on conversations with neighbors. (SR II 56-58, 60-61, 82-83, 86-87.)

Ms. Hightower also testified as to how she had marked the letters addressed to Ms. Lowe, Mr. Austin, and "occupant," which Apex later filed with the Circuit Court. (SR II 64-71.) Ms. Hightower further testified that no one ever contacted her or anyone else at the post office concerning the letters. (SR II 74-79.) If someone had asked her, she would have reported that Ms. Lowe was hospitalized at TPMHC, a state mental hospital. (SR II 74-76.) In addition, the same information was available to anyone filling out the proper forms at the branch post office. (SR II 80-81, 84.)

On April 9, 2002, Judge O'Brien denied the Amended Petition. (Pet. App. 63a; 64a-80a.) Judge O'Brien concluded that Ms. Lowe was in fact hospitalized and incompetent, but that Apex could not be charged with knowledge of Ms. Lowe's mental illness simply by virtue of Ms. Hightower's notations. (*Id.* at 71a; 73a-74a.) Judge O'Brien did not upset Judge Staniec's prior finding that Apex was charged with knowledge that Ms. Lowe was hospitalized and had not received actual notice of the tax deed proceeding. (*Id.* at 73a.) Nonetheless, Judge O'Brien concluded that Apex was not required to do anything to follow up on Ms. Hightower's notations. (*Id.*) In Judge O'Brien's view, Ms. Lowe had not been denied due process because Apex had no reason to believe that Ms. Lowe was incompetent. (*Id.* at 70a; 73a-74a.)

**Illinois Appellate Court Proceeding**

On appeal to the Appellate Court of Illinois, First District, the Public Guardian argued that Ms. Hightower's notations certainly put Apex on notice that Ms. Lowe was hospitalized and had not received actual notice, even if they did not show incompetence. According to the Public Guardian, Ms. Lowe's whereabouts were readily

ascertainable, and easily would have been ascertained through the exercise of constitutionally required diligence. (App. Ct. Br. 38-40.)

The Appellate Court affirmed. (Pet. App. 44a-62a.) Like the trial court, the Appellate Court concluded that Apex's knowledge of Ms. Lowe's hospitalization did not provide knowledge as to her mental incapacity. (Pet. App. 54a.) The Appellate Court did not consider whether Apex's knowledge of Ms. Lowe's hospitalization required it to undertake reasonable, additional investigation to ascertain her whereabouts.

**Illinois Supreme Court Proceeding**

On appeal to the Supreme Court of Illinois, the Public Guardian again urged that Ms. Hightower's notations put Apex on notice that Ms. Lowe was hospitalized, that Apex had a duty to investigate further her whereabouts, and that any such investigation would have led to locating Ms. Lowe at TPMHC, the state mental hospital, and providing Apex with knowledge of Ms. Lowe's mental illness. (Ill. Sup. Ct. Br. 38.) The court rejected these arguments. First, the court held that the Public Guardian had not made the showing of fraud or deception required to set aside the tax deed under Illinois statutory law. (Pet. App. 23a.) Second, the court held that it lacked the power under Illinois law to set aside the tax deed on equitable grounds. (Pet. App. 26a.) Third, the court, *sua sponte*, held that the trial court's *ex parte* finding of "diligent inquiry" (based on Illinois state statutory and constitutional standards) precluded any federal constitutional challenge to the sufficiency of Apex's efforts. (Pet. App. 37a.) Finally, the court categorically rejected all of the Public Guardian's other due process claims. (Pet. App. 38a-42a.)

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT HAS GRANTED CERTIORARI TO DECIDE THE QUESTION WHETHER THE DUE PROCESS CLAUSE REQUIRES THE PARTY RESPONSIBLE FOR GIVING NOTICE TO UNDERTAKE ANY ADDITIONAL EFFORT TO LOCATE A HOMEOWNER WHOSE PROPERTY IS ABOUT TO BE SOLD, AFTER A MAILED NOTICE HAS BEEN RETURNED UNDELIVERED.

The first of the three questions presented in this petition is substantially the same as the question presented in *Jones v. Flowers*, No. 04-1477, pet. for cert. granted, Sept. 27, 2005:

> 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?

By granting review in *Jones*, this Court has decided that this is an important question of federal constitutional law warranting review by this Court. For the reasons set forth in the merits briefs filed by the petitioner in *Jones*, petitioner believes that the first question presented in the instant petition should be decided in favor of petitioner.

Because the Court's decision in *Jones* may control the outcome in this case, petitioner respectfully suggests that the Court hold the instant petition pending the Court's decision in *Jones*, at which time the Court may wish to grant certiorari and decide the additional questions presented in this petition, or, alternatively, vacate the judgment of the Supreme Court of Illinois and remand the case to that court for further proceedings consistent with the Court's decision rendered in *Jones*.

**II. WHETHER, EVEN IN THE ABSENCE OF ANY GENERAL DUTY TO MAKE ADDITIONAL EFFORTS TO LOCATE THE HOMEOWNER BEFORE HER PROPERTY IS TAKEN, THE DUE PROCESS CLAUSE IMPOSES SUCH A DUTY WHERE THE RETURNED, UNDELIVERED NOTICE EITHER SHOWS THE HOMEOWNER'S ACTUAL WHEREABOUTS OR CONTAINS INFORMATION, SUCH AS THE FACT OF HER HOSPITALIZATION, WHICH IS REASONABLY LIKELY TO LEAD TO THE DISCOVERY OF HER WHEREABOUTS OR THE FACT OF HER MENTAL INCAPACITY, IS AN IMPORTANT QUESTION WARRANTING REVIEW BY THIS COURT.**

1. In *Jones*, notices repeatedly were sent to the address of the property and returned undelivered. *See* Pet. for writ of cert. No. 04-1477. The same occurred here, but with one significant difference. In *Jones*, the notices were simply returned, with no further clue or comment. In the case at bar, however, the envelopes in which the notices were sent to Ms. Lowe and "occupant" were returned with a notation made by the letter carrier who regularly delivered mail along the route on which the property was located. This notation stated that "Person is Hospitalized" and was accompanied by the letter carrier's initials and route number.[6]

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[6] In addition, Apex, which purchased Ms. Lowe's home for $347.61, based on Ms. Lowe's failure to pay taxes amounting to $110.65, physically inspected the property and determined that neither Ms. Lowe nor anyone else was living there. (Pet. App. at 94a.) Apex's representative apparently talked with a neighbor, but did not ask the neighbor whether he or anyone else either knew Ms. Lowe's whereabouts or how to contact her. (*Id.*) Nor did the representative disclose the reason for his visit. Apex nonetheless sent its notices to the address of

This notation therefore put Apex on notice of three sets of facts: *First*, Ms. Lowe was not at the property to which Apex had sent notice, was not receiving mail sent to that address, and was hospitalized. *Second*, there was a simple means of ascertaining Ms. Lowe's actual whereabouts in that the letter carrier not only informed Apex that Ms. Lowe was hospitalized, but put her initials and route number on the envelope, so that Apex easily could have followed up with the letter carrier, found out where Ms. Lowe was hospitalized, and provided her with actual notice. *Third*, if Apex had followed up with the letter carrier, Apex would have learned that TPMHC, the place of Ms. Lowe's hospitalization, was a state mental institution, and that Ms. Lowe was incompetent and hospitalized for mental illness.[7]

This case therefore presents an additional question not presented in *Jones*, namely, whether the Due Process Clause requires the party giving notice to undertake reasonable additional efforts when the returned notice reveals *on its face* information reasonably likely to lead to the discovery of the owner's actual whereabouts and mental incapacity. In other words, must the party responsible for giving notice respond to additional specific information it receives in its initial attempt at service and undertake some additional effort to locate the homeowner before the property may be taken?

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the property. Ms. Lowe, of course, was confined to a state mental institution at the time.

[7] In addition, it was widely known in the neighborhood that Ms. Lowe suffered from mental illness, that she was periodically hospitalized as a result, and that she was confined to TPMHC during the time Apex attempted to serve notice (SR 56-57, 59-60, 82-83) -- facts that would have been obvious to Apex if it had undertaken any effort to ascertain Ms. Lowe's current location from the neighbors, or the letter carrier, rather than simply attempting to establish that Ms. Lowe was not living at the property Apex hoped to acquire for $347.61.

2. With respect to this second question, the courts are also split. For example, the Arkansas Supreme Court has held that service of notice by mail on a party's last known address is sufficient, and that no further efforts need be taken, even where a mailed notice has been returned with the notation that a forwarding order has expired, thus indicating that a more current address is available. *See Tsann Kuen Enterprises Co. v. Campbell*, 355 Ark. 110, 119-26, 129 S.W.3d 822, 828-32 (2003).

In contrast, the South Carolina Court of Appeals, when confronted with almost the identical situation, held that a party must follow up on a such a notation. In *Benton v. Logan*, 323 S.C. 338, 342, 474 S.E.2d 446, 448 (S.C. Ct. App. 1996), the court held that:

> When the treasurer received back the envelope marked "Forwarding Order Expired," it was quite apparent that Benton had a better address than the one to which the treasurer had sent the notice. We therefore hold the exercise of due diligence under the circumstances of this case required some further inquiry.

*See also McBain v. Hamilton Co.*, 744 N.E.2d 984, 989 (Ind. Ct. App. 2001) (county's notice of tax sale was insufficient under *Mullane* where returned envelope was marked with owners' new address, but was disregarded by county); *Jackson Construction Co. v. Marrs*, 100 P.3d 1211, 1217 (Utah 2004) (imposing a broad duty under *Mullane* to "take advantage of readily available sources of relevant information").

Here, the Supreme Court of Illinois substantially concurred in the Arkansas Supreme Court's understanding of the Due Process Clause. As a matter of state law, the Illinois court thought that Apex had no duty to follow up on Ms.

Hightower's notations, which easily would have led to knowledge that Ms. Lowe was residing at a state mental institution and incompetent. (Pet. App. 22a.) The court apparently thought that federal constitutional law likewise required no further inquiry. (Pet. App. 37a-42a.) Thus, the court effectively held that mailing notice to an interested party at a location that is known to be abandoned constitutes a sufficient effort at providing actual notice under the Fourteenth Amendment, regardless of the fact that information likely to lead to a forwarding address is readily and obviously available. (*Id.* at 37a.)

3. Moreover, the South Carolina decision in *Benton* is consistent with this Court's prior decisions, while the Supreme Court of Illinois's decision and the decision of the Arkansas Supreme Court in *Tsann* are not. *See, e.g., Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983); *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Covey v. Town of Somers*, 351 U.S. 141 (1956); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

In *Mullane*, 339 U.S. at 314-15 (emphasis added), this Court held that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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 objections . . . . But if *with due regard for the practicalities and peculiarities of the case* these conditions are reasonably met the constitutional requirements are satisfied.

Likewise, in *Mennonite Board,* 462 U.S. at 798, the Court held that, unless a party is "not reasonably identifiable,

constructive notice alone does not satisfy the mandate of *Mullane*."

In *Covey,* notice was given and actually received by the homeowner, but the party responsible for giving notice knew that the homeowner was mentally incompetent and incapable of understanding the notice provided. 351 U.S. at 144-46. This Court therefore held that notice was ineffective in the circumstances. *Id*. at 146-47. Similarly, in *Robinson*, the Court found that notice sent by the government to a person's home address was ineffective when the government knew that the person was incarcerated. 409 U.S. at 38-40.

In the circumstances of this case, and giving "due regard" to the fact that Apex could have identified Ms. Lowe's location (and, thus, her mental incompetence as well) through reasonable (indeed, minimal) additional efforts -- simply by following up on the letter carrier's notation, or questioning the neighbors -- the efforts undertaken by Apex were not sufficient to satisfy due process requirements. Not requiring Apex to take such additional steps is hardly consistent with the central meaning of *Mullane*, that is, that the action taken be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. Nor is it consistent in spirit with all of this Court's prior cases, which require that adequate notice be something "more than a feint." *Cf. id.*[8]

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[8] The Supreme Court of Illinois attempted to distinguish *Covey*, holding that Apex's knowledge of Ms. Lowe's hospitalization did not by itself constitute knowledge of her mental incapacity. (Pet. App. 36a.) But that misses the point. If Apex had simply followed up with Ms. Hightower, the letter carrier, Apex would have learned where Ms. Lowe was hospitalized, that the hospital was a state mental institution, and that Ms. Lowe was mentally incompetent. Apex also could have learned that information from the neighbors, as Ms. Hightower did.

In sum, the second question presented in this petition, like the first, presents an important question of federal constitutional law on which the state courts, which are most likely to be responsible for enforcing federal constitutional law in this context, are divided. Depending upon the Court's resolution of the issue presented in *Jones*, the Court may wish to grant the instant petition and afford plenary consideration to the second question presented in this petition. Alternatively, the Court may wish to vacate the judgment and remand the case to the Supreme Court of Illinois for further proceedings not inconsistent with the decision in *Jones*.

## III. WHETHER, CONSISTENT WITH THE DUE PROCESS CLAUSE, A FINDING OF "DUE DILIGENCE," MADE AS A MATTER OF STATE LAW IN AN EX PARTE PROCEEDING, MAY FORECLOSE A HOMEOWNER WHO DID NOT RECEIVE ACTUAL NOTICE OF THE PROCEEDING, FROM CHALLENGING THE SUFFICIENCY, ON FEDERAL CONSTITUTIONAL GROUNDS, OF EFFORTS MADE TO DETERMINE HER WHEREABOUTS, IS AN ADDITIONAL QUESTION WARRANTING REVIEW.

The Supreme Court of Illinois extensively discussed the merits of Ms. Lowe's federal due process claims, but also held (Pet. App. 37a) that the trial court's *ex parte* finding of "due diligence," made as a matter of state law when it granted the tax deed (Pet. App. 88a-90a), was dispositive of Ms. Lowe's federal constitutional claim.[9] The Supreme

[9] The Circuit Court's *ex parte* "finding" could not preclude Ms. Lowe from raising her federal constitutional claim because the Circuit Court did not address that issue. The Circuit Court held only that Apex had "fully

Court of Illinois reached this issue *sua sponte*, without the benefit of briefing by the parties.

Of course, Ms. Lowe could not object at the time of the trial court's *ex parte* hearing, for the simple reason that Apex had not taken adequate steps to ensure that Ms. Lowe received notice of the proceeding. Moreover, this holding of the Supreme Court of Illinois clearly conflicts with this Court's prior decisions, which establish that a party may not constitutionally be deprived of the opportunity to contest the sufficiency of notice by virtue of not having received notice in the first instance. *See Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In sum, this aspect of the decision below is patently in conflict with settled decisions of this Court. If the Court grants plenary consideration of the second question presented, the Court should grant review with respect to this question as well. If the Court vacates and remands based on the other two questions presented, the Court may wish to vacate and remand on this ground as well. Alternatively, the Court may wish to grant summary reversal on this ground.

## CONCLUSION

Petitioner respectfully requests that the Court hold this petition pending the decision in *Jones v. Flowers*. In the event that the Court reverses the judgment of the Arkansas Supreme Court in *Jones*, the Court will wish to vacate the decision below and remand to the Supreme Court of Illinois

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complied with all of the Statutes and the Constitution *of the State of Illinois* relating to sales of real estate for taxes and the issuance of tax deeds pursuant thereto." (Pet. App. 89a) (emphasis added). Contrary to the apparent misunderstanding of the Supreme Court of Illinois (*see* Pet. App. 37a), the Circuit Court made no determination as to the sufficiency of Apex's efforts under the *federal* due process clause.

for further consideration in light of this Court's decision in *Jones*. Alternatively, in the event that the Court should decide to affirm the decision of the Arkansas Supreme Court in *Jones*, the Court may wish either to grant certiorari in this case and consider the additional questions not raised in *Jones*, or to vacate the judgment below and remand the case to the Supreme Court of Illinois, so that court may consider those additional questions in the first instance in light of this Court's decision in *Jones*. Finally, the Court may wish to grant summary reversal with respect to the third question presented.

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