NO. 04-1477

IN THE
Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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The opinion of the Arkansas Supreme Court will be published in the S.W.3d reporter. The opinion is available at 2004 WL 2609800 and is reproduced in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a. The Arkansas Supreme Court's unreported order denying rehearing is reproduced at Pet. App. 14a. The trial court's unreported order granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment is reproduced at Pet. App. 12a.

JURISDICTION

The Arkansas Supreme Court entered its judgment on November 18, 2004 and denied a timely petition for rehearing on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file the petition for a writ of certiorari to May 6, 2005. The petition was filed on May 5, 2005 and granted on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

Petitioner Gary Kent Jones lost his house in a tax sale because he did not receive notice until it was too late to redeem the property. The State had sent two notices by certified mail to Mr. Jones at an address where he did not reside. Both letters were returned unclaimed. Although the State knew that its attempts to provide notice by certified mail had failed, and

although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no other effort to contact Mr. Jones before taking his property.

Once Mr. Jones learned that his house had been sold to respondent Linda K. Flowers, he brought this action against Ms. Flowers and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and constitutional due process. The Arkansas Supreme Court affirmed, holding that even after the State learned that it had failed to notify Mr. Jones by mail, due process did not require that the State do anything more to try to provide effective notice before taking the property. As explained below, that holding cannot be reconciled with this Court's due process rulings and, therefore, should be reversed.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment in Little Rock. Mrs. Jones continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. Joint Appendix (JA) 10.

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. In April 2000, the State mailed a certified letter to Mr. Jones at

the Bryan Street address in an attempt to notify him of the delinquency and his right to redeem the property by paying his back taxes. *Id.* The notice stated that, unless redeemed, the property would be subject to a public sale two years later, on April 17, 2002. *Id.* Because the notice was addressed to Mr. Jones alone and sent only to the Bryan Street address and not to his apartment, Mr. Jones did not receive it. The post office returned the notice to the State marked "unclaimed." *Id.*

Prior to the public sale date, the State purchased a title report to identify those with an interest in the property. The title report confirmed that Mr. Jones was the owner. JA 12. On April 1, 2002, a notice of the public sale was published in a newspaper. Pet. App. 2a.

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Flowers submitted a purchase offer to the State. *Id.* As part of its standard process for negotiated sales, the State visited the Bryan Street property and viewed the house, but it did not contact the occupants or post a notice of the pending sale. JA 13; Record (R) 110.

On February 19, 2003, the State sent a certified letter addressed solely to Mr. Jones at the Bryan Street address to attempt to notify him that his house would be sold if the taxes and penalties were not paid. Pet. App. 2a. Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter was returned to the State unclaimed. *Id.* Although the State knew that Mr. Jones had not received the two notices it sent by certified mail to the Bryan Street address, the State made no effort to determine Mr. Jones's correct mailing address, even though his current address could have been discovered with minimal effort.

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale.[1] Pet. App. 2a. Even then, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, Ms. Flowers had an unlawful detainer notice delivered to the property. The notice was served on Cindy Edrington (the daughter of Mr. and Mrs. Jones) who contacted Mr. Jones, providing him his first actual notice of the tax sale. Pet. App. 2a-3a; JA 5; R 11.

B. Proceedings Below

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

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's

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[1]The parties have stipulated that the fair market value of the property was about $80,000. R 224.

[2]After Ms. Flowers filed her counterclaim, Mr. Jones's estranged wife joined the suit as a plaintiff because she was living in the house. Pet. App. 3a.

motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the applicable tax sale statute, Ark. Code Ann. § 26-37-301, complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property.[3] Pet App. 3a.

Mr. Jones appealed the trial court's order, and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. The Arkansas Supreme Court affirmed the trial court's decision. It found that the State had complied with the statutory scheme for tax sales, Ark. Code Ann. § 26-37-301, and held that "the constitutional dictates of due process" do not require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. at 6a. The court recognized that this Court has held that due process requires "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 7a (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Nevertheless, the court rejected Mr. Jones's argument that "it is unreasonable for the State not to attempt to locate a property owner's correct address" when the State knows that the original effort at notice has failed. *Id.* at 11a.

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[3]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require personal service of process on the owner of a homestead, if the State fails to receive proof that the notice sent by certified mail was received by the owner. *See* 2003 Ark. Laws Act 1376. As the court below recognized, the amendment has no effect on this case. Pet. App. 9a-10a.

SUMMARY OF THE ARGUMENT

The decision below should be reversed because Mr. Jones was deprived of his property without due process of law. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that such parties may protect their interests. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, the State *knew* that its initial effort to provide notice by certified mail had failed. Under the circumstances, a reasonable person actually desiring to provide notice would have searched available records for Mr. Jones's correct mailing address and would have contacted the occupants of the property. Such efforts would have resulted in effective notice to Mr. Jones without undue burden on the State because Mr. Jones's address was readily and inexpensively ascertainable from a variety of sources, including records maintained by the State. Because the State made no effort to attempt to provide actual notice to Mr. Jones following return of its mailed notices, the State violated the Fourteenth Amendment by failing to take reasonable steps to notify Mr. Jones of the imminent loss of his property.

ARGUMENT

WHERE THE GOVERNMENT KNOWS THAT ITS ATTEMPT TO PROVIDE NOTICE HAS FAILED, DUE PROCESS REQUIRES THAT IT TAKE FURTHER REASONABLE STEPS TO NOTIFY THE OWNER BEFORE TAKING THE PROPERTY.

In *Mullane*, this Court held that "[a]n 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." 339 U.S. at 314. The Court explained:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . .

Id. at 315. This Court has "regularly turned to [*Mullane*] when confronted with questions regarding the adequacy of the method used to give notice," *Dusenbery v. United States*, 534 U.S. 161, 168 (2002), and "has adhered unwaiveringly to the principle announced in *Mullane*." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983).

Petitioner recognizes that the *Mullane* due process standard does not invariably require *actual* notice before property interests may be extinguished. Determining what is reasonable "under all the circumstances" requires an inquiry into the efforts made by the State in attempting to effect notice, the likelihood that additional efforts would provide notice, and the burden of making additional efforts in light of the value and importance of the property interest at stake. Part A below shows that, under this Court's precedents, when mailed notice is returned undelivered, the State has a duty to take further reasonable steps to locate the addressee so that it can provide him with notice that the State proposes to deprive him of his property. Part B demonstrates that simple, inexpensive, and effective additional means of notifying Mr. Jones were readily available to the State, and that the property interest at issue—Mr. Jones's

$80,000 house—was one deserving of considerable due process protection. Finally, in Part C, petitioner explains that the State's conduct after return of the first mailed notice did not discharge its due process obligations.

A. The Return Of Mailed Notice Triggers A Duty To Take Further Reasonable Steps To Inform The Interested Party.

It may have been reasonable for the State first to attempt to notify Mr. Jones by certified mail sent to the Bryan Street address. However, the circumstances changed when the first certified letter was returned to the State unopened. Once the State knew that Mr. Jones had not received the certified letter, the State had an obligation to take further reasonable steps to attempt to provide effective notice.

In a series of cases beginning with *Mullane*, the Court has endorsed the use of mail as a means of providing notice where the interested party's name and address is known or can be determined through reasonable means. *Mullane* held that publication was a constitutionally inadequate means to provide notice to beneficiaries of a common trust whose identities and addresses were known to the trustee, but that mailed notice would constitute "a serious effort" to inform the beneficiaries of the proceeding. 339 U.S. at 318-19 (recognizing that mail is "an efficient and inexpensive means of communication").[4] In

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[4]Indeed, the Court has required mailed notice even where the number of interested parties was staggering and the individual property interests at stake relatively small. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), the Court held in a class action maintained under Fed. R. Civ. P. 23(b)(3) that "[i]ndividual notice must be sent to all class members whose names and addresses may

(continued...)

Greene v. Lindsey, 456 U.S. 444, 453-54 (1982), the Court found that posting a notice of forcible entry and detainer proceedings on the subject premises did not satisfy due process under the circumstances and suggested that "the mails provide an 'efficient and inexpensive means of communication' . . . upon which prudent men will ordinarily rely in the conduct of important affairs." *Id.* at 455. In *Mennonite*, the Court concluded that if a mortgagee of property subject to a tax sale "is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." 462 U.S. at 798. *Mennonite* emphasized that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition" to the tax sale if the interested party's "name and address are reasonably ascertainable." *Id.* at 800. In *Mennonite*, the mortgagee's address was not on file, but the Court "assume[d] that the mortgagee's address could have been ascertained by reasonably diligent efforts." *Id.* at 798 n.4. Most recently, the Court upheld the adequacy of mailed notice where it was sent by certified mail and actually received at the institution where the interested party was incarcerated. *Dusenbery*, 534 U.S. at 164-65. Thus, notice by mail can satisfy due process where,

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[4](...continued)
be ascertained through reasonable effort," even though there were 2.25 million such individuals, most of whom held small claims. The Court's decision was based on the requirements of Fed. R. Civ. P. 23(c)(2), but the Court found that its conclusion was reinforced by the Advisory Committee's Note showing that the Rule incorporates the *Mullane* due process standard. *Eisen*, 417 U.S. at 173-175; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (where individual claims averaged only $100, due process required individual notice to each member of class).

under the circumstances, it is "reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315.

Here, however, the State knew that the mailed notices had not informed Mr. Jones of anything, because the letters were returned to the State unopened. In circumstances where the sender knows that an attempt to provide notice has failed, this Court has found the notice inadequate.

In *Robinson v. Hanrahan*, 409 U.S. 38 (1972), for instance, the State initiated proceedings to forfeit Mr. Robinson's car while he was in jail awaiting trial. Instead of mailing the forfeiture notice to the jail, the State mailed the notice to Mr. Robinson's home address. *Id.* at 38. As a result, Mr. Robinson did not receive the notice until after the proceeding was over. *Id.* at 39. The Court held that the State had failed to comply with *Mullane* because "the State knew that [Mr. Robinson] was not at the address to which the notice was mailed." *Id.* at 40. The Court found that "[u]nder these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise [Mr. Robinson] of the pendency of the forfeiture proceedings." *Id.*

Likewise, in *Covey v. Town of Somers*, 351 U.S. 141, 147 (1956), the Court held that where the government knew that its attempts to provide notice had been ineffective, those attempts could not satisfy due process. In *Covey*, notice of a tax sale was provided to the property owner by mail, posting, and publication. *Id.* at 144. Even though the notice was received, the Court found that it was constitutionally inadequate under the circumstances because town officials knew that the property owner was mentally incompetent and lacked the capacity to understand the notice. *Id.* at 147.

Robinson and *Covey* establish that where the government *knows* that it has failed to provide effective notice, due process

requires further reasonable steps to inform an interested party before taking the property. Thus, *Robinson* and *Covey* demonstrate that once the notice to Mr. Jones was returned to the State, the State had a duty to attempt to notify Mr. Jones by other reasonable means. The Fourth Circuit recently applied *Mullane*, *Robinson*, and *Covey* in a situation where mailed notice was returned undelivered and came to the same conclusion: "[W]hen prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005).

B. The State Could Easily Have Provided Effective Notice To Mr. Jones.

Once the State's duty to take further reasonable steps to provide notice is triggered—as it was here—the question then is whether means were available to the State that would have been reasonably calculated to provide effective notice, and whether the burden of using such means is justified by the value of the property interest at stake. In this case, the undisputed facts demonstrate that the State could have easily provided effective notice to Mr. Jones, and given that Mr. Jones lost real property worth $80,000, the State cannot credibly argue that such means were not justified.

The State knew Mr. Jones was the owner of the property. JA 12. With very little effort, the State could have found Mr. Jones's correct mailing address after return of the notices sent to the Bryan Street address. Mr. Jones was not missing; he continued to live in the City of Little Rock, Pulaski County, Arkansas. JA 10. Mr. Jones's new address was listed in the then-current edition of the Little Rock telephone directory. *Id.*

The then-current Pulaski County voter registration rolls listed Mr. Jones at his new address. *Id.* Mr. Jones had used his new address when paying his state income taxes, and Mr. Jones had notified his long-time employer of his new mailing address. *Id.* In short, Mr. Jones was open about where he was staying, and anyone actually wanting to find Mr. Jones's correct address could have done so in minutes. Indeed, given the proliferation of Internet search engines and on-line directories, the State could have located Mr. Jones's correct address with just a few keystrokes. Alternatively, the State could have sought a current address through a credit bureau, the State's own driver's license and automobile registration records, or from utility companies. The State cannot credibly claim that use of such methods would have imposed an unreasonable burden, especially where Mr. Jones's correct address appeared in the State's own records.

After a notice letter is returned undelivered, "[w]hat additional efforts are reasonable will depend on the circumstances of the particular case." *United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003). Thus, it is not possible to draft a definitive list of the means that must be employed in any given situation. However, many courts have suggested that the telephone directory and Internet searches that the State could have used to find Mr. Jones would have been useful to satisfy due process under similar circumstances. *See, e.g., Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 285 (6th Cir. 2005) (due process satisfied where, after return of mailed notice, government made significant efforts to ascertain a valid address by searching the phone book and the Internet); *Plemons*, 396 F.3d at 577 ("[C]hecking the local telephone directory may be reasonable in a given situation."); *Small v. United States*, 136 F.3d 1334, 1338 n.3 (D.C. Cir. 1998) (suggesting that, before giving up after the return of mailed notice, a reasonable person would try other ways of locating an interested party, such as

checking telephone listings); *United States v. Rodgers,* 108 F.3d 1247, 1252 (10th Cir. 1997) (telephone and utility company listings are among the sources the government can consider in determining where to send notice after initial mailing is returned undelivered); *United States v. 125.2 Acres of Land,* 732 F.2d 239, 242 (1st Cir. 1984) (due process not satisfied where "[p]ossessed of knowledge of [land owner's] name and town, and with access via the telephone book to his street address, the government could easily have notified him of the court proceeding by mail or other direct means"); *Montgomery v. Beneficial Consumer Disc. Co.*, No. 04-2114, 2005 WL 497776, at *6 (E.D. Pa. Mar. 2, 2005) (due process satisfied where settlement notice was sent to each class member's last known address and, where mail was returned undelivered, an Internet search was conducted and notice sent again). Similarly, many courts have required that the party charged with notice must at least examine governmental records that could provide current information, such as the state and county records that would have revealed Mr. Jones's correct address had they been checked in this case. *See, e.g., Plemons*, 396 F.3d at 578 (reasonable diligence required search of "all publicly available county records"); *Foehl v. United States*, 238 F.3d 474, 480 (3d Cir. 2001) (after return of mailed notice, government should have obtained correct address from "obvious sources" including the driver's license bureau); *Rodgers,* 108 F.3d at 1252 (due process required that government search its own records after mailed notice was returned).

In addition, the State could have provided notice to Mr. Jones by contacting the occupants of the house, either in person or by mail, or by posting a notice at the property. Such steps would not have been unduly burdensome. Either effort would have resulted in actual notice to Mr. Jones, as the facts of this case show. In the end, it was the unlawful detainer notice left

at the property that provided Mr. Jones his first actual notice of the sale of his house. Pet. App. 2a-3a; JA 5; R 11. Moreover, State personnel visited the property to perform negotiated sale research. JA 13; R 110. Dropping off a letter or posting a notice at that time would have been simple to do.

The Court has recognized that notice to the occupants or caretakers of real property can be an effective means of providing notice to the owner. *Mullane*, 339 U.S. at 316. In this case, Mrs. Jones was an occupant. Pet. App. 2a. Although she was not the record owner, she had lived in the Bryan Street house for nearly forty years. Thus, Mrs. Jones—not wanting to have to find another place to live—would have had a strong incentive to convey to Mr. Jones any notice indicating that the property was about to be lost. Mrs. Jones's interest in avoiding the forfeiture of her home belies respondents' suggestion that it was her "deliberate ignorance, or steadfast indifference" that led to the loss of the property. Respondents' Brief in Opposition to the Petition (BIO) at 14. Mrs. Jones should not be blamed for not claiming the certified letters. Nothing in the record suggests that Mrs. Jones had any knowledge of the contents of the letters or even who they were from. The letters were not addressed to Mrs. Jones. Rather, they were addressed solely to someone who had moved from the property seven years earlier and whose current address was readily ascertainable to anyone who desired to find it.

C. The State Did Not Fulfill Its Constitutional Duty, And Whether Mr. Jones Could Have Better Protected His Interest Is Irrelevant.

Although the argument was not made in the courts below, respondents asserted for the first time in their brief in opposition that the State, after the first mailed notice came back "unclaimed," had tried to find Mr. Jones by purchasing a title

report and conducting "negotiated sales research." BIO 12-13. Nothing in the record suggests that these efforts were part of an attempt to locate and then notify Mr. Jones. To the contrary, neither step was intended to ascertain Mr. Jones's correct mailing address after the State learned that its attempts to provide notice by mail had failed. First, the title search was designed to reveal changes in ownership or the existence of any liens against the property, but not to ascertain Mr. Jones's correct address. R 103. Indeed, nothing in the record suggests that the title company that prepared the report looked for Mr. Jones's address in any records other than those pertaining to the Bryan Street property. Second, the "negotiated sales research" involved a viewing of the Bryan Street address to verify that the property still existed as described in the deed records and to provide a description of the house and immediate vicinity, but it was not in any way calculated to discover Mr. Jones's correct address or to provide notice to Mr. Jones through the occupants. R 110. Thus, the title search and negotiated sales research did not fulfill the State's obligation to take reasonable steps to notify Mr. Jones.

Likewise, the publication of a tax sale notice in the newspaper was insufficient to satisfy due process. Publication is a means of providing constructive notice, and constructive notice satisfies due process only "where it is not reasonably possible or practicable to give more adequate warning." *Mullane*, 339 U.S. at 317; *accord Mennonite*, 462 U.S. at 798 & n.4 (constructive notice does not satisfy *Mullane* if the interested party's address "could have been ascertained by reasonably diligent efforts"); *Robinson*, 409 U.S. at 40 ("[N]otice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable."); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (same). In this case, because Mr. Jones's correct

address was readily available with almost no burden on the State, constructive notice by publication was insufficient.

Finally, in concluding that due process requires no further effort to locate the correct address of an interested party after the initial notice is returned, the court below erred by relying on an Arkansas statute that obligates a property owner to notify the tax collector of any change of address. Pet App. 10a (citing Ark. Code Ann. § 26-35-705). This Court has held that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide effective notice. *Mennonite*, 462 U.S. at 799. Thus, the State's failure to provide adequate notice to Mr. Jones cannot be excused by reference to a state law that purports to shift the burden to the taxpayer.

CONCLUSION

Because the State failed to provide Mr. Jones constitutionally adequate notice before taking his house, the decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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