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COMMENTS

DELINQUENT TAX PROPERTIES, TAX SALES, AND DUE PROCESS REQUIREMENTS TO INTERESTED PARTIES

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I. INTRODUCTION

A recent Oklahoma Supreme Court ruling, *Crownover v. Keel*,¹ jeopardizing tax rolls for counties that follow the “letter of the law” has some worried.² The decision seems to implement a new and higher standard of the constitutional requirement of due process notice of property tax sales because it requires the State to do more than is mandated by statute.³

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1. 2015 OK 35, 357 P.3d 470.

2. *See id.* ¶ 19, 357 P.3d 470, 476 (holding that “[t]he notice requirement of due process is not satisfied where . . . notice sent via certified mail is returned undelivered and no further action is taken,” voiding a tax sale); *Rep. David Perryman Concerned State High Court Ruling Could Void County Tax Sales*, CAPITOLBEATOK (June 16, 2015)[hereinafter CAPITOLBEATOK], <http://www.capitolbeatok.com/reports/rep-david-perryman-concerned-state-high-court-ruling-could-void-county-tax-sales> [https://perma.cc/X5B7-JUFA].

3. *See Crownover*, 2015 OK 35, ¶¶ 17, 19, 357 P.3d at 475–76; CAPITOLBEATOK, *supra* note 2.

But is this 2015 decision really a departure from the court's previous stance on the state statute's due notice standard or just a crystallization of its prior holdings with regard to whether the state statute is sufficient in meeting an Oklahoman's right to due process? Based on Oklahoma case law, lawmakers should not be surprised because this court has consistently ruled the state statute is insufficient.⁴ Furthermore, this author agrees with the Oklahoma Supreme Court in its clearer definition of what is required by the state for sufficient and adequate due notice. But more needs to be addressed.⁵

This court decision may provide a perfect opportunity for legislators to consider amending the state statute to incorporate modern technology. Few can deny that technology, such as text and email, is a major part of our lives or has not allowed us to communicate more effectively and faster than ever.⁶ It may be time for states to incorporate that fact and provide notice using today's technology, such as email, to minimize the risk of overburdening the state and to increase the success rate of meeting the constitutional standard of due process.

II. PROCEDURAL DUE PROCESS

Due process is a federal right granted to the people by the Constitution and extended to the states via the Fourteenth Amendment.⁷ In 1950, the U.S. Supreme Court stated that procedural due process requires service of process to attempt whatever notice is "reasonably calculated . . . to apprise interested parties of the pendency of the action."⁸ Since then our legal system has been riding a fine line between the constitutionality of state statutes on real property auctions and what is deemed reasonable diligence under the statute in giving notice to the property owner.⁹

In 2015 the Oklahoma Supreme Court made it abundantly clear in

4. See *Crownover*, 2015 OK 35, ¶ 22, 357 P.3d at 477.

5. See *CAPITOLBEATOK*, *supra* note 2 ("In *Crownover v. Keel* the Oklahoma Justices did not specify what steps would be sufficient to satisfy the notice requirement . . .").

6. See Outlook.com, *The Forty-One-Year History of Email*, MASHABLE (Sept. 20, 2012) [hereinafter *Forty-One-Year History of Email*], <http://mashable.com/2012/09/20/evolution-email/#NDvLUvqjwuqP> [<https://perma.cc/B63C-FNLB>] (highlighting the increased use of email since 1971).

7. U.S. CONST. art. V, U.S. CONST. amend. XIV.

8. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

9. See Ashley Warshell & Terrell Monks, *Due Process in Tax Sales*, 86 OKLA. B.J. 2346, 2349 (2015) ("The status of the law on these issues, whether described in terms of due process or reasonable diligence, is both well-developed and in need of clarification.").

Crownover v. Keel that more needs to be done by the state to provide property owners with due process when it comes to selling delinquent tax properties at auction.¹⁰ More specifically, the court held that if the State knew that actual notice was not achieved after it followed the statutory procedure, then the State had an obligation to send another notice to attempt actual notice.¹¹ While the full effects of this judicial decision are not yet known, governmental officials may be concerned that this will induce legislators to change statutory requirements to implement a higher standard of notice which may result in challenges to, or the overturning of, prior tax sales.¹²

The *Crownover* decision follows previous Oklahoma cases dealing with due process notice for tax sales.¹³ Therefore, *Crownover* is a solid basis for determining the responsibilities of all parties concerned in a potential tax sale auction: the State in providing adequate notice, the delinquent property owner in providing contact information, the property buyer in ensuring the property owner was notified, and any third parties who also have a right to due notice.¹⁴

Technology may offer a simple and cost-effective approach to resolve the current gap between the Oklahoma statute and the *Crownover* ruling because it may give all parties concerned a better chance to achieve actual notice without overburdening the State, while making it more difficult for delinquent taxpayers to evade notice. In 2012, there were more than three billion email accounts and approximately 294 billion emails sent per day.¹⁵ “The total number of worldwide email accounts is expected to increase from nearly 3.9 billion accounts in 2013 to over 4.9 billion accounts by the end of 2017.”¹⁶ Email is a reliable and widely accepted form of communication, not only for individuals, but also for businesses,¹⁷ public

10. See *Crownover v. Keel*, 2015 OK 35, ¶¶ 27–29, 357 P.3d 470, 478–79.

11. *Id.* ¶ 28, 357 P.3d at 479.

12. See CAPITOLBEATOK, *supra* note 2 (stating that Oklahoma Rep. David Perryman “requested an interim legislative study” into changing Oklahoma statutes regarding notice for tax sales and tax deeds).

13. *Crownover*, 2015 OK 35, ¶ 18, 357 P.3d at 475.

14. See Kraettli Q. Epperson, *Statute, Practices on Tax Sale Notices Raise Concerns*, OKLA. BANKER, June 1995, at 9, 10 (providing an overview of Oklahoma case law regarding tax-sale notices).

15. *Forty-One-Year History of Email*, *supra* note 6.

16. THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2013-2017 (2013) <http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf> [<https://perma.cc/9UC2-BV7U>].

17. *Id.*

organizations, and the government.

III. HISTORY OF DUE PROCESS REQUIREMENTS

“Due notice,” also termed “adequate notice” and “legal notice,” is defined in *Black’s Law Dictionary* as “[s]ufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular circumstance.”¹⁸ “Procedural due process” was defined in 1934 as being “[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, esp[ecially] if the deprivation of a significant life, liberty, or property interest may occur.”¹⁹ What do these definitions really mean?

The U.S. Supreme Court ruled that reasonableness of notice was the standard, particularly when it involved unknown addressees and unknown parties in *Mullane v. Cent. Hanover Bank & Trust Co.*²⁰ However, there is a limitation to this reasonableness standard; the state is not required to use “heroic efforts” to ensure actual notice per the U.S. Supreme Court case of *Dusenbery v. United States*.²¹ The issue in *Dusenbery* was how to provide adequate notice to an inmate regarding the forfeiture of cash seized during his arrest.²² But *Dusenbery* left the burden of determining what exactly “heroic efforts” are to the state courts.

Even after *Jones v. Flowers*²³ in 2006, the U.S. Supreme Court failed to explicitly distinguish what is reasonable versus what is heroic.²⁴ Oklahoma courts continue to deal with this issue and have done so recently in *Crownover*.²⁵ The standard still is not entirely clear. In Justice Winchester’s dissenting opinion in this key Oklahoma Supreme Court case, he noted that “other reasonable methods” may include anything from consulting phone books or searching the internet for alternative addresses if notice by certified mail is returned undeliverable.²⁶

18. *Due notice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

19. *Procedural due notice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

20. 339 U.S. 306, 307, 315 (1950).

21. 534 U.S. 161 (2002).

22. *Id.* at 170.

23. 547 U.S. 220 (2006).

24. *See id.* at 238 (stating that states must determine what service is sufficiently reasonable).

25. *Crownover v. Keel*, 2015 OK 35, ¶ 10, 357 P.3d 470, 473.

26. *Id.* ¶ 6 n.3, 357 P.3d at 481 n.3 (Winchester, J., dissenting).

A. Oklahoma's Historical Interpretation

The Oklahoma Supreme Court in *Crownover* sought to be more clear in determining reasonableness, quoting *Jones*: “[W]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.”²⁷ In *Crownover*, the court ruled that due process was not met when the State took no further steps to provide notice of a tax auction to a delinquent property tax payer when it sent notice by certified mail per title 68, section 3106, which was returned undeliverable.²⁸ This state statute was found inadequate by the *Crownover* Court since it mandates notice simply by mail and newspaper publication once a week for two weeks and does not invalidate the tax sale if notice is not achieved.²⁹ It is interesting that this statute does not require certified mail, only regular mail, as shown by its actual language:

The county treasurer, according to the law, shall give notice of delinquent taxes and special assessments by publication once a week for two (2) consecutive weeks at any time after April 1, but prior to the end of September following the year the taxes were first due and payable, in some newspaper in the county to be designated by the county treasurer. Such notice shall contain a notification that all lands on which the taxes are delinquent and remain due and unpaid will be sold in accordance with Section 3105 of this title, a list of the lands to be sold, the name or names of the last record owner or owners as of the preceding December 31 or later as reflected by the records in the office of the county assessor, which records shall be updated based on real property conveyed after October 1 each year and the amount of taxes due and delinquent. . . . In addition to said published notice, the county treasurer shall give notice by mailing to the record owner of said real property as of the preceding December 31 or later as reflected by the records in the office of the county assessor, which records shall be updated based on real property conveyed after October 1 each year, a notice stating the amount of delinquent taxes owed and informing the owner that the subject real property will be sold

27. *Id.* ¶ 19, 357 P.3d at 476 (majority opinion) (quoting *Jones*, 547 U.S. at 225).

28. *Id.* ¶¶ 3, 27–28, 357 P.3d at 471, 478–79.

29. *See id.* ¶¶ 27–28, 31, 357 P.3d at 478–79.

as provided for in Section 3105 of this title if the delinquent taxes are not paid and showing the legal description of the property of the owner being sold. Failure to receive said notice shall not invalidate said sale.³⁰

Furthermore, the *Jones* Court stated that the property owner's failure to keep his address updated (as required by statute) does not forfeit his right to constitutionally sufficient notice.³¹ In *Crownover*, the Oklahoma Supreme Court expressly agreed when it overturned the lower court's ruling in favor of the State and instead found that the delinquent property owner was not responsible for failure to update his address.³²

While *Crownover* crystallizes the Oklahoma Supreme Court's view on due process and tax sale notice, it is not an entirely new approach for the court.³³ In fact, the Oklahoma Supreme Court has stated on numerous occasions that without adequate notice the sale is nullified, which goes beyond the statute's provision that failure of notice does not invalidate the sale.³⁴

In *Garcia v. Ted Parks, L.L.C.*,³⁵ the Oklahoma Supreme Court found that if the statute purports to allow a tax sale even absent actual notice to the resident property owner, the statute conflicts with due process.³⁶ This court reached that conclusion citing both *Wells Fargo Credit Corp. v. Ziegler*,³⁷ which held in 1989 that certified mail notice returned unclaimed was insufficient to allow a tax sale to proceed,³⁸ and *Luster v. Bank of*

30. OKLA. STAT. tit. 68, § 3106 (2010), amended by S.B. 91, 56th Leg., 1st Sess. (Okla. 2017). This statute as amended goes into effect on November 1, 2017. The amended statute does not change the original text but adds additional language:

If personal property taxes become delinquent on a manufactured home which is located on property not owned by the owner of the manufactured home and the county treasurer provides notice pursuant to Sections 3102 and 3103 of this title, such notice shall also be sent to the last-known address of the owner of the real property on which the manufactured home is located.

S.B. 91, 56th Leg., 1st Sess. (Okla. 2017).

31. *Jones*, 547 U.S. at 232.

32. *Crownover*, 2015 OK 35, ¶¶ 30–31, 357 P.3d at 479.

33. *See id.* ¶ 23, 357 P.3d at 477.

34. *Id.* ¶ 18, 357 P.3d at 475.

35. 2008 OK 90, 195 P.3d 1269.

36. *See id.* ¶ 15, 195 P.3d at 1273.

37. *Wells Fargo Credit Corp. v. Ziegler*, 1989 OK 113, 780 P.2d 703.

38. *Garcia*, 2008 OK 90, ¶ 14, 195 P.3d at 1273 (citing *Wells Fargo*, 1989 OK 113, ¶ 6, 780 P.2d at 705–06).

Chelsea,³⁹ which held in 1986 that a tax resale deed was void because the treasurer failed to mail notice to the property owner.⁴⁰

Similarly, in the year prior to *Garcia*, the Oklahoma Court of Civil Appeals in *Franks v. Noble*⁴¹ decided that failure to mail notice to two of the owners of a multi-owned property invalidated the tax sale of their interests in the property.⁴² The court also held that mailing notice to a forwarding address after the initial certified mailing was returned is obligatory.⁴³

B. Consideration of Other Interested Parties

Kraettli Q. Epperson, an Oklahoma attorney and adjunct professor at Oklahoma City University School of Law, has expressed concern about adequate notice not only to property owners but also to their lenders.⁴⁴ Lenders may be caught off guard if they receive notice that land they hold a lien on may be sold within thirty days of notice for substantially below the market value at a county tax sale, which would eradicate any lien the lender has on the property.⁴⁵ This situation would only occur, however, if adequate notice was sent to the property owner. This is not the case for the lender; in 1995, the prevalent practice by county treasurers was to not provide advance warning of tax delinquencies to lenders by mail prior to the thirty-day notice.⁴⁶ In fact, many counties required only publication notice even if a mailing address for the lender was available.⁴⁷ Therefore, if the lender attempted to retain the property prior to the sale, the lender was responsible for not only the delinquent taxes but also the accrued interest, cost, and penalties.⁴⁸

Epperson has argued that this violates the constitutionally adequate notice standard as established by *Mullane* because it does not provide all interested persons the same level of notice.⁴⁹ In the 1983 U.S. Supreme

39. *Luster v. Bank of Chelsea*, 1986 OK 74, 730 P.2d 506.

40. *Garcia*, 2008 OK 90, ¶ 14, 195 P.3d at 1273 (citing *Luster*, ¶ 18, 730 P.2d at 510).

41. *Franks v. Noble*, 2007 OK CIV APP 39, 159 P.3d 302.

42. *Id.* ¶¶ 13-14, 159 P.3d at 306-07.

43. *Id.* ¶¶ 18, 21, 159 P.3d at 307-08.

44. *See Epperson, supra* note 14, at 9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.* (“This condemnation of the use of publication notice to owners and lenders was established initially in a general way by the U.S. Supreme Court in [*Mullane*] . . .”).

Court case *Menonite Board. of Missions v. Adams*,⁵⁰ as well as in the 1984 Oklahoma Court of Civil Appeals case *United States v. Malinka*, the courts held that notice by publication is inadequate to alert all interested parties to an impending sale.⁵¹

Afterwards, the Oklahoma legislature amended the statute regarding tax resales and provided for a thirty-day notice to lenders using certified mail.⁵² However, it neglected to require any kind of notice for the initial tax sale stage after two years of delinquent taxes that would alert the lender that there is a tax problem in time to remedy the situation before it reaches the latter thirty-day-notice stage after a minimum of one year later.⁵³

In the meantime, one Oklahoma attorney has urged lenders to be diligent about monitoring their debtors' payment of taxes and to be aware that if notice is received, the lender should act immediately instead of assuming there is a two-year buffer.⁵⁴

IV. CROWNOVER V. KEEL

A. Facts

The owner of real property in McIntosh County, Oklahoma, who recorded his warranty deed in 2001, was delinquent on his property taxes after he paid them for the last time in 2006.⁵⁵ The County complied with title 68, section 3106 by sending notice of the impending tax sale to the property owner, Crownover, using certified mail and publication in a local newspaper.⁵⁶

Subsequently, the County received a certified mail receipt marked undeliverable.⁵⁷ Instead of attempting another notice, the County proceeded with the tax sale auction with the defense that any additional notice was not required by state statute and that it would be burdensome for the County to take on the onus of finding a different address.⁵⁸

50. 462 U.S. 791 (1983).

51. Epperson, *supra* note 14, at 9 (citing *Menonite*, 462 U.S. 791 (1983); *Malinka*, 1984 OK CIV APP 7, 685 P.2d 405).

52. Epperson *supra* note 14, at 10; H.B. 1816, 39th Leg., 2d Reg. Sess. (Okla. 1984).

53. Epperson, *supra* note 14, at 10; *see also* H.B. 1816, 39th Leg., 2d Reg. Sess. (Okla. 1984).

54. Epperson, *supra* note 14, at 10.

55. *Crownover v. Keel*, 2015 OK 35, ¶¶ 2–3, 357 P.3d 470, 471.

56. *Id.* ¶ 3, 357 P.3d at 471.

57. *Id.* ¶ 5, 357 P.3d at 480 (Winchester, J., dissenting).

58. *See id.* ¶ 6, 357 P.3d at 472 (majority opinion).

The buyer of the property, Keel, received the tax deed and he phoned Crownover after finding Crownover's number to express his interest in buying a boat and trailer located on the property.⁵⁹ Crownover, unaware of the sale, immediately filed a claim seeking to void the sale arguing improper notice.⁶⁰

B. Procedural History

The plaintiff and delinquent property owner, Crownover, filed suit in district court against Keel, the holder of the tax resale deed, as well as the county treasurer of McIntosh County and the Board of County Commissioners in 2010.⁶¹ He alleged that he was the true owner of the property and that the tax deed was void due to inadequate notice by the county treasurer.⁶² While he conceded that the certified mail notice was sent to the correct address on file that he provided, he no longer lived at that address.⁶³ In seeking to quiet title to the property, he alleged that had notice been served at his correct present address, he would have paid his tax debts and prevented the tax sale.⁶⁴

In 2013, both Crownover and the County moved for summary judgment: Crownover contending that inadequate notice was provided by the treasurer and the County arguing that it complied with the notice statute mandating the statutory notice standard by sending certified mail and publishing notice in a local newspaper.⁶⁵ The trial court granted summary judgment in favor of the County in 2014.⁶⁶

Crownover immediately appealed after summary judgment was granted to the County, eliminating his claims against all parties.⁶⁷ The Oklahoma Court of Civil Appeals affirmed the trial court's decision, holding that failure to obtain notice did not invalidate the sale and stating that Crownover provided no evidence that the envelope was marked "not deliverable as addressed unable to forward."⁶⁸

59. *Id.* ¶ 4 & n.1, 357 P.3d at 471–72, 472 n.1.

60. *See id.* ¶ 5, 357 P.3d at 472.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* ¶ 6, 357 P.3d at 472.

66. *Id.* ¶ 7, 357 P.3d at 472.

67. *Id.* ¶ 8, 357 P.3d at 472–73.

68. *Id.* ¶ 9, 357 P.3d at 473.

Crownover petitioned for certiorari.⁶⁹ He asserted that after the County was aware he was not served notice, it should have taken additional steps to locate his current address and send a subsequent notice.⁷⁰ After all, Crownover was successfully and easily contacted by the new owner by phone.⁷¹ In 2015, the court granted the petition for certiorari.⁷²

C. Reasoning

The outcome of *Crownover* reflects the court's agreement with Crownover that the State should have done more to provide adequate notice—notwithstanding the ease or lack of ease of obtaining actual notice.⁷³ The Oklahoma Supreme Court reversed the summary judgment of the lower court, vacated the Court of Civil Appeals's opinion, and remanded to the trial court, declaring that the County provided inadequate notice.⁷⁴ Now Oklahomans must wait and see the repercussions of this state supreme court decision.⁷⁵

This decision should come as no surprise to Oklahomans. While reasonable efforts to provide actual notice is the due process standard, actual notice has never been required in order to meet the due process standard.⁷⁶ In fact under *Dusenbery*, “the Due Process Clause does not require such heroic efforts by the Government; it requires only that the Government's effort be ‘reasonably calculated’ to apprise a party of the pendency of the action.”⁷⁷

Therefore, the reasoning of the majority in *Crownover*, which required that the County do more after it received an undeliverable notice of certified mail, must be placed in the light of what has historically been

69. *Id.* ¶ 10, 357 P.3d at 473.

70. *Id.*

71. *Id.* ¶ 4 n.1, 357 P.3d at 472 n.1.

72. *Id.* ¶ 10, 357 P.3d at 473.

73. *Id.* ¶ 30, 357 P.3d at 479.

74. *Id.* ¶ 31, 357 P.3d at 479.

75. *See id.* (stating that the Oklahoma Supreme Court remanded the case to the trial court). In a judgment filed in May 2017, the trial court ruled in favor of Crownover, voiding Keel's resale tax deed. *Crownover v. Keel*, No. CV-2010-47 (Dist. Ct. McIntosh Cnty., Okla. May 9, 2017).

76. *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (“It does not say that the State *must provide* actual notice, but that it *must attempt to provide* actual notice.”).

77. *See id.* at 170–71 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) (using a reasonableness test)).

considered constitutionally deficient notice.⁷⁸ In his dissent, Justice Winchester (with Justice Taylor, joining) noted that service by mail and publication are only inadequate when the government knows its efforts will fail, such as when the recipient is in jail or incompetent without a guardian.⁷⁹ Justice Winchester further stated that the standard has always been a good faith standard rather than an actual notice standard.⁸⁰ This means that a “not deliverable as addressed” receipt simply reflects that actual contact was not made with the property owner, not that a good faith attempt at notice was not completed.⁸¹

A new question arises: At what point in providing due process notice does it become burdensome for the State to perform? Justice Winchester warns that counties may now be “at the mercy of delinquent taxpayers,” who may use all kinds of “evasive antics” to avoid being served.⁸² The County and State cannot afford to hunt these types of evaders down.⁸³

V. ANALYSIS

Crownover caps a long line of judicial opinions in Oklahoma dating back to the 1980s that have consistently deemed the state statute to be insufficient under the due process standard.⁸⁴ This discrepancy between the legal interpretations of the Oklahoma judicial branch and the legislative branch leaves many lawmakers, such as Oklahoma State Representative David Perryman (D-Chickasha), uncomfortable.⁸⁵ “The issue is not only critical, it’s complicated,” he pointed out, according to a 2015 *Capitol Beat OK* staff report.⁸⁶

In addition, the state statute may need to be redrafted because under *Crownover* there may be no limit to how far the government must go to

78. See *Crownover*, 2015 OK 35, ¶ 4, 357 P.3d at 480 (Winchester, J., dissenting) (stating that past cases requiring the State go beyond publishing and mailing notice arose from “the implicit requirement . . . [of] good faith—not from any requirement that county treasurers must always take steps to ensure actual notice.”).

79. *Id.*

80. *Id.*

81. *Id.* ¶¶ 4–5, 357 P.3d at 480.

82. *Id.* ¶ 7, 357 P.3d at 481.

83. *Id.*

84. See CAPITOLBEATOK, *supra* note 2 (quoting *Crownover*, 2015 OK 35, ¶¶ 22, 24, 357 P.3d at 477).

85. See *id.* (expressing concern that tax sales and tax deeds will be voided across the state after *Crownover*).

86. *Id.*

effectuate satisfactory notice.⁸⁷ Even more worrisome is the threat of voiding previous tax sales throughout the state because the counties did not sufficiently meet due process notification based on *Crownover*.⁸⁸

In the end, the Oklahoma judiciary has made it clear that it finds the State statute unsatisfactory to ensure due process is met when it comes to tax auction sales.⁸⁹

First, neither *Crownover* nor any other Oklahoma judicial holding specified exactly what steps, in addition to those outlined in the state statute, “would be sufficient to satisfy the notice requirement.”⁹⁰ However, the court made it clear that the State was “required to do more under these circumstances than simply shrug and claim it complied with the notice statute.”⁹¹ The courts have consistently held that the balance of the State’s interest must be weighed against the interest of the delinquent property owner so that the State is not overburdened in providing adequate notice.⁹² More specifically, the U.S. Supreme Court in *Jones v. Flowers* “stopped short of requiring the state to search elsewhere for an address for the property owner, noting that an open-ended search for a new address would unduly burden the State.”⁹³ However, the *Jones* Court suggested that posting notices on property doors and using regular mail may be alternative, reasonable measures.⁹⁴ Yet, even with a clearer judicial opinion of what is expected of the State to meet due process, a state statute on the books that does not correlate with the judicial stance may leave the State with little assurances that tax sales and tax deeds are not voidable.⁹⁵

Second, it is uncertain if the *Crownover* decision will invalidate other previous tax sales, especially those “that occurred under similar

87. See CAPITOLBEATOK, *supra* note 2 (explaining that Rep. Perryman proposed “an interim legislative study” to determine whether the *Crownover* decision would retroactively void tax deeds and sales).

88. *See id.*

89. *Crownover*, 2015 OK 35, ¶ 28, 357 P.3d at 479.

90. *Id.*; *see also Crownover*, 2015 OK 35, ¶¶ 19, 23–29, 357 P.3d at 476–79.

91. *Crownover*, 2015 OK 35, ¶ 22, 357 P.3d at 477.

92. *See Crownover*, 2015 OK 35, ¶ 2, 357 P.3d at 480 (Winchester, J., dissenting) (promoting balancing “the State’s interest in efficiently managing its administrative system and an individual’s interest in adequate notice”).

93. *Id.* ¶ 21, 357 P.3d at 477 (majority opinion) (citing *Jones v. Flowers*, 547 U.S. 220, 236 (2006)).

94. *Id.* (quoting *Crownover*, 2015 OK 35, ¶ 21, 357 P.3d at 477 (citing *Jones v. Flowers* 547 U.S. 220, 236 (2006))).

95. *Id.*

circumstances.⁹⁶ Representative Perryman questions whether the decision is to be applied only to future tax sales or whether past tax sales will be challenged and invalidated, and if so, how far back in time will prior sales be affected.⁹⁷ These fears are acute for Oklahoma lawmakers because the decision may result in fewer tax dollars returning to the county budgets since treasurers are hindered by an ill-defined due process notice standard.⁹⁸ This means that at a time when county governments are already stretched thin to repair roads and infrastructure, tax-supported services like education and fire departments may unduly suffer.⁹⁹

Third, by requiring a higher standard of due process from the State, delinquent property owners may have greater opportunities to dodge actual notice attempts, thereby prolonging notice actions and causing additional expenses, which may overly burden the State.¹⁰⁰

These quandaries are not unique to Oklahoma.¹⁰¹ Other states are also grappling with the same issues.¹⁰² And they are responding in different ways.¹⁰³ For example in *Nigro Family Partnership, LP v. Frey*,¹⁰⁴ Missouri recently reiterated that its due process standard meets the constitutional standard of *Jones*.¹⁰⁵ Per Missouri law, there is no statutory mandate to provide a secondary notice if the certified mail does not provide actual notice, so long as the state is unaware of its failure to serve.¹⁰⁶ Actual notice is not required.¹⁰⁷ Instead, notice must be “reasonably calculated”

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* *Crownover v. Keel*, 2015 OK 35, ¶ 7, 357 P.3d at 470, 481 (Winchester, J., dissenting) (arguing that under the majority’s holding “tax evaders could simply avoid contact with process servers standing on their doorsteps, or move to a different address and neglect to tell the county treasurer”).

101. *See* *Nigro Family P’ship v. Frey (In re Foreclosure of Liens for Delinquent Land Taxes)*, 328 S.W.3d 728, 734 (Mo. Ct. App. 2010) (“That does not end our inquiry, however. Compliance with the technical statutory requirements for providing notice does not relieve the County of its overarching obligation to ensure that its efforts to provide notice satisfy the requirements of due process.”).

102. *See id.*

103. *See id.* (requiring that notice be “reasonably calculated”).

104. 328 S.W.3d 728.

105. *See id.* at 734 (quoting *Jones*, 547 U.S. at 226 (stating that actual notice is not required but must be “reasonably calculated”).

106. *See id.*

107. *Id.* (quoting *Jones v. Flowers*, 547 U.S. 220, 226 (2006)).

to reach the delinquent property owner.¹⁰⁸ This includes notice by certified mail addressed to the person according to the collector's records, per Missouri's land tax collection law.¹⁰⁹

The standard was also applied in a 2009 Missouri case where the property owner attempted to dodge the certified mail receipt.¹¹⁰ Missouri did not stick to its earlier decisions regarding the constitutional sufficiency of certified mail.¹¹¹ Instead, citing *Jones*'s mandatory authority, the court declared in *Schlereth v. Hardy*,¹¹² "Even though the addressee in this quiet title proceeding admits receiving two delivery notifications . . . [if] certified mail is returned unclaimed, due process requires the state to take additional reasonable steps to notify the property owner."¹¹³

Other state statutes predate *Jones* and as such are not in alignment with the U.S. Supreme Court's decision. As a result, several states, including South Carolina, Nebraska, Maryland, and Delaware, have modified their statutes to allow email using a USPS Electronic Postmark or other certifying authority as an equivalent substitute for certified, return-receipt mail.¹¹⁴

Oklahoma may consider making revisions like these to its notice statute. By revising the statute, Oklahoma would clarify its due process standard by explicitly outlining the steps necessary to effectuate adequate notice—steps that don't unduly burden the State.¹¹⁵ It would inform the judiciary that the new notice standard would be incorporate modern technology. And finally, it may stem evasion of service by delinquent taxpayers.¹¹⁶

The time is ripe to make these or other changes to the Oklahoma statute.¹¹⁷ According to Sheppard F. Miers, Jr., shareholder at

108. *Id.* (quoting *Garzee v. Sauro*, 639 S.W.2d 830, 832 (Mo. 1982)).

109. *Id.*

110. *Schlereth v. Hardy*, 280 S.W.3d 47, 49 (Mo. 2009).

111. *See id.* at 51-53, 51 n.3 (following the *Jones* and *Mullane* notice requirements).

112. 280 S.W.3d 47.

113. *Id.* at 49, 52-53.

114. *See Trustifi Postmarked Email as a Substitute for USPS Certified Mail Service*, TRUSTIFI CORP., at 5, [hereinafter TRUSTIFI] <https://www.trustifi.com/dl/Trustifi%20Postmarked%20Email%20Legal%20Brief.pdf> [<https://perma.cc/8CQZ-FRBB>] (stating that some states use USPS postmarked e-mails instead of certified mail to deliver notice).

115. *See* CAPITOLBEATOK, *supra* note 2 (stating possible hinderances to Oklahoma that the *Crownover* decision may produce).

116. *See id.* at 3-4 (arguing that postmarked email may fulfill the Uniform Electronic Transactions Act's notice-sending requirements).

117. *See* Paula Burkes, *Question and Answer with Sheppard F. Miers, Jr.: High Court*

GableGotwals, an Oklahoma law firm, “[A] legislative study done following the court’s [*Crownover*] decision indicates changes in state statutory law may be proposed to help clarify what’s required for a proper tax sale notice to be given to an owner in Oklahoma.”¹¹⁸ One potential change that may be considered is to add email as an option to achieve adequate notice. Postmarked emails could provide a legal proof of sending, content, and opening; a datacenter archive; and an encryption to guard privacy.¹¹⁹ They are increasingly being considered over USPS certified mail-return receipts by both government and corporations due to the high cost of certified mail, reported as “\$5.75 per piece not including printing, paper, and overhead.”¹²⁰

Trustifi PostMarked Email, as one example of a potential alternative means of notice, operates as follows:

1. It provides proof of sending.¹²¹
2. It offers proof of content, in that all the content of the email, as well as all attachments, are digitally signed and locked.¹²² Authorship is proven and the message contents are unalterable and remain unchanged in transit.¹²³ In addition, the digital time stamp is assigned to all of the communication’s recipients.¹²⁴
3. Proof of opening is a way to show return receipt. When the postmarked email is opened, this evidence is captured by the service.¹²⁵
4. The service provides a datacenter archive with assurances to the reliability, accountability, and security of its service by adhering to multiple compliance frameworks such as “FISMA, PCI DSS, ISO 27001, and SOC 1/SSAE 16/ISAE 3402.”¹²⁶
5. While probably not a current need in the context of constitutionally and statutorily sufficient notice, postmarked emails include the ability to encrypt the content of the email, which means the sender can code

Ruling Imposes Added Notice for Tax-Auction Property, THE OKLAHOMAN, December 17, 2015, at 4C (suggesting that tax-notice law may change in the upcoming years).

118. *Id.*

119. See marketing materials for Trustifi PostMarked Email at *Trustifi*, *supra* note 114, at 1, for an example of one available product to effectuate service by email.

120. *Id.*

121. *Id.*

122. *Id.* at 2.

123. *See id.*

124. *Id.* at 2.

125. *Id.* at 1.

126. *Id.*

the email so that only the designated recipient has the ability to read the email.¹²⁷

If Oklahoma decides to change the notice statute, it should consider postmarked emails as a lower-cost secondary notice. Some states, however, explicitly disallow them.¹²⁸ For example, in *Leatherbury v. Greenspun*,¹²⁹ the Delaware Supreme Court held that its state statute reference to “certified mail” can only mean US Postal Service’s certified mail.¹³⁰ *Leatherbury* held that certified mail provided by private carrier, such as Federal Express, would not be recognized as sufficient notice,¹³¹ leaving doubt that a private provider of postmarked emails would be recognized either. However, Oklahoma’s statute has not identified any such restrictions to providing adequate notice.¹³²

Furthermore, tax auction property buyers may be liable for any expenses and liens if the sale is invalidated due to improper notice.¹³³ In order to protect themselves before they extend a purchase offer, the onus should be on property buyers to determine whether the county treasurer provided adequate notice to the property owner.¹³⁴ In a recent Oklahoma newspaper article, Oklahoma attorney Sheppard F. Miers, Jr. provided suggestions to Oklahomans who intend to buy property at a tax sale on how to go about receiving confirmation that adequate notice was given to the delinquent property owner.¹³⁵ He recommended that the potential buyers may request a signed, written statement from the county treasurer’s office that delineates the steps taken by the county treasurer to provide notice.¹³⁶ This written confirmation should show that if the county treasurer’s office received a returned certified mail marked undeliverable, then the county treasurer took additional steps by sending another notice by regular mail, posting a sign on the property, or looking for a different

127. *Id.*

128. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1288, 1293 (Del. 2007) (stating that notice requires certified mail, not notice by a private carrier).

129. 939 A.2d 1284 (Del. 2007).

130. *Id.* at 1289, 1293.

131. *Id.* at 1288.

132. OKLA. STAT. tit. 68, § 3106 (2011).

133. *See Burkes*, *supra* note 117 at 4C.

134. *See id.* (“For buyers intending to buy property at a tax sale in Oklahoma, the decision seems to make it advisable to get specific details as to whether actual notice has been given to an owner before the sale.”).

135. *Id.*

136. *Id.*

address for the property owner.¹³⁷

VI. CONCLUSION

Given the Oklahoma courts' consistent view of the due process standard in providing notice to delinquent property tax payers regarding impending tax sales auctions,¹³⁸ it seems the courts are sending a wake-up call to legislators to amend the state statute. The Oklahoma courts evidently find the state statute to be inadequate in providing sufficient notice to property owners which also affects other interested parties.¹³⁹

This disconnect between the state statute and the courts' holdings creates a chasm with regard to effectively delivering notice by county treasurers in a cost effective, timely way so that tax sales can proceed unhindered or so that delinquent tax payers and lenders can remedy the situation before the tax sale takes place.

Oklahoma is not alone in this predicament.¹⁴⁰ Yet, other states have already responded to this dilemma by amending their notice statutes and incorporating modern technology into their due process standard.¹⁴¹

Now may be the perfect time for Oklahoma to consider updating its statute to include modern technology, such as email. All parties concerned in the tax sale auction—the property owner, the buyer, the lender, and the county treasurer—may all breathe a little easier because due process may be more effectively met with a lesser burden on the state.

137. *Id.*

138. *See* Epperson, *supra* note 14, at 9–10 (highlighting United States and Oklahoma case law regarding tax sale notices).

139. *See id.*

140. *See Trustifi*, *supra* note 114, at 5 (noting states who use electronic postmarks).

141. *See id.*