IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE $46,523 IN U.S. CURRENCY;
2010 CHEVROLET CAMARO REG. AZ/BJK1323

No. 2 CA-CV 2017-0034
Filed February 28, 2018

Appeal from the Superior Court in Pinal County
No. S1100CV201502397
The Honorable Richard T. Platt, Judge Pro Tempore

REVERSED AND REMANDED

COUNSEL

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Counsel for Appellants

Kent Volkmer, Pinal County Attorney
By James W. Fritz, Deputy County Attorney, Florence
Counsel for Appellee

OPINION

Presiding Judge Staring authored the opinion of the Court, in which Judge Eppich concurred and Judge Brearcliffe dissented.

S T A R I N G, Presiding Judge:

¶1 Jose Silva and Ramon Rangel ("claimants") appeal from the trial court's order granting the state's application for forfeiture of property seized from them during a traffic stop. The court found the claimants'

answers to the state's forfeiture complaint were untimely. However, because we conclude claimants did not receive constitutionally sufficient notice of the forfeiture complaint, we reverse.

Factual and Procedural Background

¶2 "We accept the court's factual findings unless they are clearly erroneous." *In re $2,390 U.S. Currency*, 229 Ariz. 514, ¶ 5 (App. 2012). In December 2015, during a traffic stop in Pinal County, an Arizona Department of Public Safety officer seized cash totaling $40,160 and a 2010 Chevrolet Camaro from Silva, and $6,363 in cash from Rangel. On the date of the seizure, the state personally served claimants with notice of its intent to proceed with forfeiture of the property. Claimants timely filed claims for the seized property, representing they would "accept future mailings from the court or attorney for the [s]tate" at one address, which was the office of their attorney.

¶3 On February 1, 2016, the state filed a complaint against the seized property. On the same day, the state sent two copies of a summons and the complaint in one envelope by certified mail to the address claimants had provided. On February 29, the envelope was returned to the state marked "unclaimed." The following day, the state sent a facsimile to claimants' attorney, stating:

> Complaint filed on February 1, 2016. Mailed to you on February 1, 2016. Certified mail returned as "Unclaimed" (see face of envelope, page two of this fax). Pursuant to A.R.S. §§ 13-4311(A) and 13-4307(1)(b) service is effective upon the mailing of the complaint. Time to file an answer has expired. I will be filing an application for forfeiture pursuant to A.R.S. [§] 13-4311(G).

Claimants filed their answers the next day, on March 2. The state filed an application for order of forfeiture on March 3, averring it had served claimants by certified mail.

¶4 Claimants objected to the state's application, arguing it had failed to properly serve claimants with the complaint. Claimants' attorney asserted he only became aware of the complaint when he received the March 1 facsimile from the state. Claimants also moved to dismiss the complaint for insufficient process and service of process pursuant to Rule 12(b)(4), (5), Ariz. R. Civ. P.

¶5 The trial court set the matter for oral argument. Prior to oral argument, claimants obtained new counsel, who submitted a pre-hearing brief arguing the state's service of the complaint failed to satisfy the requirements of due process. In a ruling issued after oral argument, the court entered factual findings and concluded the state's service was complete upon mailing and claimants' answers were untimely, granting the state's application for forfeiture.

¶6 Claimants timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶7 "We review the trial court's application of the forfeiture statutes de novo." *$2,390 U.S. Currency*, 229 Ariz. 514, ¶ 5. We also review constitutional claims de novo. *In re Estate of Snure*, 234 Ariz. 203, ¶ 5 (App. 2014).

¶8 Before the state may deprive an individual of life, liberty, or property it must accord due process. U.S. Const. amend. XIV, § 1. Essential to due process is notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Claimants argue the constitutional requirement of due process required the state "to provide notice by some other means when its sole notice by certified mail was returned 'unclaimed.'"

¶9 Under A.R.S. § 13-4311(A), the state has two options for serving a forfeiture complaint: (1) "in the manner provided by [A.R.S.] § 13-4307," or (2) "by the Arizona rules of civil procedure." If the state elects to serve the complaint according to § 13-4307, and "the owner's . . . name and current address are known," then the state may serve the complaint by "[p]ersonal service," or by "[m]ailing a copy of the notice by certified mail to the [known] address." § 13-4307(1).

¶10 Under Rule 5(c), Ariz. R. Civ. P., "personal service is not required when . . . the party to be served has already appeared in the case." *In re 2000 Peterbilt Tractor & Trailer*, 240 Ariz. 450, ¶ 8 (App. 2016). "A party appears when he 'take[s] any action, other than objecting to personal jurisdiction, that recognizes the case is pending in court,'" such as the filing of a claim. *Id.*, *quoting Kline v. Kline*, 221 Ariz. 564, ¶ 18 (App. 2009) (alteration in *Peterbilt*).

¶11 "Once a party has appeared in a forfeiture case, service is governed by Rule 5(c) and . . . § 13-4307." *Id.* ¶ 9. "If a party is represented

by an attorney, service . . . must be made on the attorney," unless otherwise required by the court or by rule. Ariz. R. Civ. P. 5(c)(1). "A document is served . . . by . . . mailing it by U.S. mail to the [attorney's] last known address—in which event service is complete upon mailing." Ariz. R. Civ. P. 5(c)(2)(C); *see also* § 13-4307 ("Whenever notice of pending forfeiture is required under this chapter it . . . is effective at . . . the mailing of written notice . . . .").

¶12 Claimants appeared in this matter by filing claims pursuant to § 13-4311(D), which included the address at which they "w[ould] accept future mailings from the court or attorney for the [s]tate." Accordingly, to effect service on claimants, the state was required to serve the complaint on their attorney of record. *See* Ariz. R. Civ. P. 5.3(a)(1) (once attorney appears as attorney of record, attorney deemed responsible as party's attorney of record). And, by rule and by statute, service was complete upon mailing the complaint to the address provided. *See* §§ 13-4307(1)(b), 13-4311(A); Ariz. R. Civ. P. 5(c)(2)(C). The state filed its complaint on February 1, and mailed copies to claimants' attorney by certified mail. Thus, claimants' answers, filed on March 2, were not timely. *See* § 13-4311(G) (claimant "shall file and serve the answer to the complaint" within twenty days of service); Ariz. R. Civ. P. 6(c) ("When a party may or must act within a specified time after service and service is made under Rule 5(c)(2)(C) . . . 5 calendar days are added after the specified period would otherwise expire."); *In re $47,611.31 U.S. Currency*, 196 Ariz. 1, ¶¶ 13-14 (App. 1999) (time extending provisions of civil procedure rules apply in civil forfeiture context).

¶13 Ordinarily, that would be the end of the matter. *See Dusenbery v. United States*, 534 U.S. 161, 169-70 (2002) (state required to *attempt* to provide actual notice, but not required to actually do so). In this case, however, the mailed copies of the complaint were returned to the state marked "unclaimed." And, although the state knew of the failed service, it made no further attempts to serve the complaint on claimants before applying to the trial court for an order of forfeiture. *See* A.R.S. §§ 13-4311(G), 13-4314(A). Relying, in part, on *Jones v. Flowers*, 547 U.S. 220 (2006), claimants assert the state's failure to attempt any other means of notice before proceeding with forfeiture deprived them of due process. We agree.

¶14 In *Jones*, the Arkansas Commissioner of State Lands mailed a certified letter to a property owner notifying him he was delinquent on the payment of taxes on his real property but that he had a right to redeem the property. 547 U.S. at 223. Because no one was home to sign for the letter and no one attempted to retrieve it at the post office, it was returned

unopened and marked "unclaimed." *Id.* at 223-24. Two years later, the state undertook to sell the property, sending a letter by certified mail to the owner stating that if he failed to pay the delinquent taxes, his property would be sold. *Id.* at 224. Again, the letter was returned marked "unclaimed," and the state proceeded with the sale. *Id.*

¶15 The Supreme Court observed that it had "never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." *Id.* at 227. It then found the "Commissioner's effort to provide notice to [the owner] of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of th[e] case." *Id.* at 239. It also concluded the Commissioner would have done "more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done," had there been a true desire to alert the owner "he was in danger of losing his house." *Id.* at 238. Thus, while the state was not required to make "heroic efforts" to assure the notice's delivery, *Dusenbery*, 534 U.S. at 170, its "knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation . . . to take additional steps to effect notice," *Jones*, 547 U.S. at 230. When "exerting extraordinary power against a property owner[,] . . . [i]t is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed."[1] *Id.* at 239.

¶16 Undoubtedly, the due process requirements of *Jones* apply when no claim has been filed in forfeiture proceedings. *See $2,390 U.S. Currency*, 229 Ariz. 514, ¶ 12; *cf. Estate of Snure*, 234 Ariz. 203, ¶¶ 7-10. The state argues, however, *Jones* is inapplicable after a claim has been filed and claimants are "active litigants in the underlying action, represented by an attorney."

¶17 Although the filing of a claim constitutes an appearance, *2000 Peterbilt Tractor & Trailer*, 240 Ariz. 450, ¶ 8, the effect of a complaint filed by the state is the same for both claimants and non-claimants: it initiates forfeiture proceedings, *see* § 13-4311(A). If the state files a complaint, an answer must be timely filed, regardless of whether a claim has been filed. *See State v. Jackson*, 210 Ariz. 466, ¶¶ 23-28 (App. 2005). If an answer is not timely filed, the court proceeds with "the functional equivalent of a default

[1]At oral argument in this case, the state conceded that forfeiture can be an extraordinarily significant remedy in certain cases.

judgment."[2] *Id.* ¶ 13. This is because failure to file an answer triggers the state's application for an order of forfeiture. *See* § 13-4311(G); *State ex rel. Horne v. Anthony*, 232 Ariz. 165, ¶ 19 (App. 2013). Because the effect of an untimely answer is the same for claimants and non-claimants, we cannot conclude the filing of a claim relieves the state of its obligation to provide notice in accordance with the dictates of due process.[3]

¶18 Here, that meant "do[ing] more when the attempted notice letter was returned unclaimed, and there was more that reasonably could [have been] done." *Jones*, 547 U.S. at 238. For example, the state could have sent "notice of forfeiture by regular mail." *$2,390 U.S. Currency*, 229 Ariz. 514, ¶ 12. Instead, here, as in *Jones*, upon learning the claimants "had not received notice that [they were] about to lose [their] property, the [s]tate did—nothing." *Jones*, 547 U.S. at 234.

¶19 Further, although § 13-4307 provides notice is "effective at the time of . . . the mailing of written notice," *Jones* requires "the government [must] consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." 547 U.S. at 230. Ordinarily, "[m]ailing a copy of the notice by certified mail to the [known] address," of a claimant will be effective. *See* § 13-4307. But where, as here, the state unquestionably knows its attempted notice was ineffective, it must take "additional reasonable steps to notify" claimants. *Jones*, 547 U.S. at 234 ("What steps are reasonable

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[2]*Compare* § 13-4311(G) (if answer not filed within twenty days, state proceeds with default with ten days' notice to claimants) *with* Ariz. R. Civ. P. 12(a)(1)(A) (answer must be filed within twenty days of service) *and* 55(a)(1), (3), (4) (party may obtain entry of default where opposing party has failed to answer; must provide notice of default; default effective ten days after entry).

[3]Although an attorney of record is "responsible for keeping advised of the status of, and the deadlines in, pending actions in which that attorney has appeared," Ariz. R. Civ. P. 5.3(b), that does not excuse the government's "constitutional obligation of notice before taking private property" when notice is due, *Jones*, 547 U.S. at 232-33. *See also Estate of Snure*, 234 Ariz. 203, ¶ 9 ("[T]he Court in *Jones* found that a person who is entitled to notice of a proceeding is entitled regardless of whether the information is available elsewhere or whether the person has been diligent in her attention to her property.").

in response to new information depends upon what the new information reveals.").

¶20 The state argues sending a facsimile informing claimants the complaints had been returned "[u]nclaimed," the "[t]ime to file an answer ha[d] expired," and the state would "be filing an application for forfeiture," satisfied the requirements of *Jones*. We disagree. An after-the-fact facsimile informing claimants that their failure to respond to ineffective notice has resulted in the forfeiture of their property does not constitute due process. *See Mullane*, 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process.").

¶21 Further, as the state conceded during oral argument, nothing in the forfeiture statutes divests the state of discretion to permit a claimant to file an answer after the twenty-day deadline, particularly when, as here, it knows its original attempt at providing notice failed and it has yet to apply to the court for an order of forfeiture. Although § 13-4311(G) states that if an answer is not "timely filed, the attorney for the state shall proceed as provided in §§ 13-4314 and 13-4315 with ten days' notice to any person who has timely filed a claim that has not been stricken by the court," this provision could only reasonably be read to mean that the state shall proceed in accordance with the procedures set forth in §§ 13-4314 and 13-4315, not that it *must* proceed immediately. Reading "shall" to require the state to proceed immediately and without discretion would lead to absurd results. For example, even if the state learned it lacked a good-faith basis to continue an action against property, it could not refuse to do so if an untimely answer was filed. *See Bilke v. State*, 206 Ariz. 462, ¶ 11 (2003) (we apply the plain meaning of a statute "unless application of the plain meaning would lead to impossible or absurd results"); *cf.* § 13-4314(A) (state's application for forfeiture includes "notice and facts sufficient to demonstrate probable cause for forfeiture"); Ariz. R. Sup. Ct. 42, ER 3.3(a)(1) (lawyers shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"); Ariz. R. Sup. Ct. 42, ER 3.8(a) (prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").[4]

[4]The state does not argue it would be prejudiced in any meaningful way if it were required to provide additional notice or grant claimants an extension of time to file an answer in circumstances such as these. Claimants would merely obtain the opportunity to have the matter resolved

¶22 Our dissenting colleague, however, asserts "there was nothing that the state could do after it learned that the complaints were unclaimed that would have . . . made a difference," and that "claimants were already in default" at that time. *Infra* ¶ 37. He also asserts, "The only way the state could correct the matter of service to forestall the statutory deadline would have been to reverse the laws of time and space to go back to before February 27, 2016, when the claimants would *not* have been in default." *Infra* ¶ 37. The dissent ignores, however, that nothing in the statutes automatically declares a claimant is in default upon failure to file a timely answer. *See* § 13-4314(A) (requiring "the state's written application" before court "shall order the property forfeited"); *cf.* Ariz. R. Civ. P. 55(a)(2) (party seeking entry of default "must file a written application"); *Estate of Lewis v. Lewis*, 229 Ariz. 316, ¶¶ 27-28 (App. 2012) (no default where party did not apply for an entry of default).

¶23 Our dissenting colleague also believes *Dusenbery* controls and that *Jones* only "expanded on *Dusenbery* and *Mullane* . . . under the particular facts of the case." *Infra* ¶ 34. The facts of *Dusenbery*, however, distinguish it from the situation at hand. There, the government attempted to serve Dusenbery notice by certified mail to the address where Dusenbery was incarcerated, his former residence, and his mother's residence. 534 U.S. at 164. In addition, the government published notice on three consecutive Sundays in a newspaper in the judicial district where the forfeiture proceeding was brought. *Id.* The salient fact missing from *Dusenbery*, but present both here and in *Jones*, is knowledge by the government that notice was ineffective. *See id.* at 164-66, 169; *see also Jones*, 547 U.S. at 224, 227 ("But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed.").

¶24 *Jones* makes clear that the due process calculus is changed by a party's knowledge of failed notice. *See* 547 U.S. at 230 ("knowledge that notice pursuant to the normal procedure was ineffective trigger[s] an obligation . . . to take additional steps to effect notice").[5] Those were the facts in *Jones* and those are the facts here. Those were not the facts in *Dusenbery*. *See id.* at 238 ("In *Dusenbery*, the Government was aware that

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on its merits. *See Addison v. Cienega, Ltd.*, 146 Ariz. 322, 323 (App. 1985) (law favors resolution of cases on merits).

[5]In *Jones*, had Arkansas not been made aware of its failed attempts at notice, there might not have been a due process violation.

someone at the prison had signed for the prisoner's notice letter . . . . In this case, of course, the notice letter was returned to the Commissioner, informing him that his attempt at notice had failed.") (citation omitted).

¶25 We have previously concluded that *Jones* "creat[ed] a bright-line rule that where a party is entitled to notice and the notice provided is known to be defective, due process requires that additional reasonable steps must be taken to provide notice." *Estate of Snure*, 234 Ariz. 203, n.2. In this instance, the state attempted to notify claimants at their provided address by certified mail, but upon learning its efforts had failed, did nothing more. Due process requires notice to be provided by means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Jones*, 547 U.S. at 238, *quoting Mullane*, 339 U.S. at 315. That was not done here.

Attorney Fees

¶26 Claimants have requested attorney fees pursuant to Rule 21(a), Ariz. R. Civ. App. P., but have "failed to separately articulate an appropriate statutory basis for that request." *Grubb v. Do It Best Corp.*, 230 Ariz. 1, ¶ 17 (App. 2012), *quoting Fid. Nat'l Title Co. v. Town of Marana*, 220 Ariz. 247, ¶ 17 (App. 2009). Accordingly, we deny their request. *See id.* However, as the prevailing parties, they are entitled to taxable costs pursuant to A.R.S. § 12-341, subject to their compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶27 For the foregoing reasons, we reverse the trial court's ruling and remand this matter to that court for proceedings consistent with this opinion.

B R E A R C L I F F E, Judge, dissenting:

¶28 The majority's opinion correctly states that each claimant was properly served with a complaint in forfeiture by certified mail and that each claimant failed timely to file an answer. The opinion also correctly states that "[o]rdinarily[] that would be the end of the matter." *Supra* ¶ 13. But because the opinion does not end the matter there, I respectfully dissent.

¶29 Given the facts here, this case is controlled by *Dusenbery v. United States*, 534 U.S. 161 (2002), and not, as the majority reasons, by *Jones*

v. Flowers, 547 U.S. 220 (2006) or by *In re Estate of Snure*, 234 Ariz. 203 (App. 2014). *Dusenbery* requires that we affirm, and neither *Jones* nor *Estate of Snure* justifies reversal.

¶30 In *Dusenbery*, the Court addressed the adequacy of service of notice of forfeiture on a federal prisoner. 534 U.S. at 163. Under the forfeiture statute involved there, the Federal Bureau of Investigation (FBI), as the seizing agency, was required to send written notice of the impending forfeiture of property—cash and a car—to each known, interested party and to publish notice in the newspaper. *Id.* at 163-64. The FBI both sent the notice by certified mail to the claimant, then a prisoner, "[in] care of" the federal prison, and also published notice in the newspaper. *Id.* at 164. When no response was received, the FBI "declared" the cash and car administratively forfeited and, ultimately, turned the cash over to the United States Marshal's Service. *Id.* About five years later, the claimant filed a motion for return of his property. *Id.* at 164-65. The district court rejected the claimant's challenge to the adequacy of service of the notice of forfeiture and the Sixth Circuit Court of Appeals affirmed, concluding that notice had "comported with due process even in the absence of proof that the mail actually reached" the claimant. *Id.* at 166.

¶31 Affirming the circuit court's decision, the Supreme Court stated the principle that, under the Fifth Amendment's Due Process Clause, those whose property interests are at stake are entitled to notice and an opportunity to be heard before the taking. *Id.* at 167. The Court analyzed the matter under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which it had held that, to be adequate, notice must be "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 168, *quoting Mullane*, 339 U.S. at 314. The Court further recognized that it had never required actual notice to a potential claimant. *Id.* at 170. The Court reasoned that the use of "the mail addressed to" the claimant in that case "was clearly acceptable for much the same reason we have approved mailed notice in the past." *Id.* at 172. So long as the method of sending the notice is reasonably calculated to provide notice of the proceedings, "[d]ue process requires no more." *Id*. at 172-73. Actual, received notice is not constitutionally required. *Id*. at 162.

¶32 Here, as expressly required and allowed by statute, the state made similar efforts reasonably calculated to give the claimants notice of the pendency of this action, though it did not achieve actual notice. The state filed the forfeiture complaints on February 1, 2016, and served copies of them on the claimants the same day by certified mail as required by

A.R.S. § 13-4307, and as allowed by A.R.S. § 13-4311(A) and *Dusenbery*. The complaints were sent by certified mail to the address the claimants themselves provided—that of the office of their attorney of record. Under § 13-4307, service of copies of a complaint is effective upon mailing; thus, the claimants here are deemed to have received—and thus to have been served with—the complaints on February 1, 2016. Because that is so, under § 13-4311(G), the claimants' respective answers to the complaint were due on February 26, 2016.[6] The complaints, however, were unclaimed at the claimants' attorney's office after, apparently, three distinct attempts at delivery. The state did not learn, however, that the complaints were unclaimed until February 29, 2017, three days after the claimants' statutory twenty-day deadline to answer had passed. *See* § 13-4311(G). By the time the claimants' statutory deadline to answer had passed, the state had fulfilled both its statutory obligation and also its constitutional, due process obligation under *Dusenbery* to provide notice. By the time the state learned that the claimants had not received actual notice of the forfeiture complaint, the claimants were already in default, and *no* notice thereafter sent by the state would make the filing of an answer timely under the statute. The claimants were in default on February 27, on February 28, on February 29, on March 1, and on March 2, when they finally filed their answers.

¶33 Rather than respecting and stopping at the statute and *Dusenbery*, under which the claims here would be barred as untimely, the majority concludes that the answers were not untimely because the Supreme Court's decision in *Jones* required the state to do more. In *Jones*, a real property foreclosure case, the State of Arkansas attempted to notify the property owner of a tax-lien foreclosure by certified mail, but this notice was returned as unclaimed, and, two years later, the state foreclosed on the property. 547 U.S. at 223-24. The owner subsequently learned about the foreclosure and filed suit, claiming that the state's failure to provide him with notice of his redemption right violated due process. *Id.* at 225. The Arkansas Supreme Court disagreed, holding that "attempting to provide notice by certified mail satisfied due process" and "that due process does not require actual notice." *Id.* The United States Supreme Court observed that "when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so." *Id.* at 230. Therefore, "when mailed notice . . . is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property

[6] This date assumes that the claimants should be granted an additional five calendar days to answer due to service by mail. *See* Ariz. R. Civ. P. 6(c); Ariz. R. Civ. P. 5(c)(2)(C).

owner before selling his property, if it is practicable to do so." *Id*. at 225. Because the state did not take such steps, as a constitutional matter, it reversed the state court. *Id.*

¶34 To the extent the Court in *Jones* expanded on *Dusenbery* and *Mullane*, it did so under the particular facts of the case. In *Jones*, the state had sufficient time after it learned of the non-delivery to give the second notice and still allow the claimant to act to forestall foreclosure. *Id.* at 223-24. *Jones* does not stand for a broad new principle applicable to every case in which the first attempt to give notice fails. The Court made it clear that it was not announcing a new rule: "[W]e disclaim any 'new rule' that is 'contrary to *Dusenbery* and a significant departure from *Mullane*.'" *Id.* at 238. Because any required second effort must be practicable and reasonable, the Court went on to say that "if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, [the state] cannot be faulted for doing nothing." *Id.* at 234.

¶35 This court had its turn to apply the *Jones* principles in *Estate of Snure,* 234 Ariz. 203. In that probate case, the estate properly mailed a notice of disallowance of claim to an estate creditor but the notice was returned to the estate unclaimed and thus was never actually received. *Id.* ¶ 3. Under the law, the creditor had sixty days in which to challenge the disallowance. *Id*. ¶ 7. Because she did not receive actual notice of the disallowance, the creditor missed her statutory deadline. *Id*. ¶ 4. After she later attempted to assert her claim, the trial court barred it. *Id*. On appeal, the creditor asserted that the notice was constitutionally inadequate under the Due Process Clause "because the estate knew she had not received it." *Id*. ¶ 5. We concluded that, despite the fact that the estate had mailed the notice of disallowance as required by law, because it knew that notice had been returned as unclaimed, it was required then to take further steps to provide the notice. *Id*. ¶¶ 3, 10. We stated that "[p]roof that notice was sent either by certified or regular mail will be sufficient to comply with due process" and that "[i]t is only because the estate had actual knowledge that the notice had not been received and had reasonable steps available to provide notice that we find a constitutional violation." *Id*. at n.5. Because the estate did not take those steps, this court, as a constitutional matter, reversed the dismissal of the claim. *Id*. ¶ 13.

¶36 Both *Jones* and *Estate of Snure* are factually distinguishable from this case. In each, the sending party learned that the notice was unclaimed, and thus not actually received, *in time* for additional notice to be sent and have an effect. In *Jones*, the State of Arkansas learned that the

notice of tax sale was unclaimed well before the two-year period passed for the owner to take action to save his property. 547 U.S. at 223-24. In *Estate of Snure*, though not stated in the opinion, it appears that the estate learned the notice to the creditor was unclaimed well before the sixty-day period to challenge the disallowance had passed. 234 Ariz. 203, ¶¶ 5-11. That is, in each case, once the first method of service failed, the further reasonable steps that the courts demanded of the sender could have been effective in allowing the receiving party to act to prevent the forfeiture or loss of claim.

¶37 *Jones* requires that the state take reasonable and practicable steps in giving the follow-up notice if available. Here, unlike in *Jones* and *Estate of Snure*, there was nothing that the state could do after it learned that the complaints were unclaimed that would have provided any notice to the claimants that would have made a difference.[7] The claimants were already in default when the state learned of the unclaimed complaints. The only way the state could correct the matter of service to forestall the statutory default would have been to reverse the laws of time and space to go back to before February 27, 2016, when the claimants would *not* have been in default. That would be, to say the least, impracticable. The Due Process Clause does not require heroic efforts, *Dusenbery*, 534 U.S. at 170, let alone superhuman ones.

¶38 The forfeiture statute here has far shorter deadlines than those in *Jones* or the *Estate of Snure*. An answer to a forfeiture complaint is due twenty days after service of the complaint, service of the complaint may be made by certified mail, and there is a legal effect to missing the statutory deadline. *See* §§ 13-4311(G), 13-4307.[8] A twenty-day deadline combined

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[7]The majority's opinion conflates what the state *could* do as a matter of grace or courtesy, by granting an extension or delaying its forfeiture proceeding, with what it *must* do as a constitutional requirement.

[8]Contrary to the majority's point that a non-answering party is not "automatically" in default because the state must apply for forfeiture, how the forfeiture proceeds is solely dependent upon whether or not the claimant has timely filed an answer. It is effectively an "automatic default." If a potential claimant fails to file an answer to a forfeiture complaint, the state is required to proceed as if the complaint were uncontested, in accordance with A.R.S. §§ 13-4311(G) ("If no proper answer is timely filed, the attorney for the state shall proceed as provided in §§ 13-4314 and 13-4315 . . . ."), 13-4314(A) ("If no . . . claims are timely filed . . . , the attorney for the state shall apply to the court for an order of forfeiture and allocation of forfeited property pursuant to § 13-4315."), and 13-4315(A) ("Any

with the vagaries of mail delivery can result in a party entitled to notice not getting it in time. But it is not for the courts to fashion relief from the harsh effects of statutory deadlines. *Cf. Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 9 (App. 2008) ("Although the result [of missing a deadline] may be harsh . . . , we do not second-guess the legislature's policy decision."). Some states, as the *Jones* Court noted, have amended their laws to require personal service or actual notice. *See* 527 U.S. at 228 n.2. The Arizona legislature has not yet done so, and it is not for this court to compensate for that failure or refusal. *See Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, ¶ 22 (2017) (observing it is not the role of courts to rewrite statutes).

¶39 No case of which this court is aware does what the majority's opinion does here—retroactively extend a deadline that had passed by the time the sender learned of the failure of actual notice. One of our sister court's decisions, however, suggests that a statutory deadline should not be extended where actual notice is received after the deadline has passed. *Session v. Director of Revenue*, 417 S.W.3d 898 (Mo. Ct. App. 2014). Session was sent a notice of a final decision suspending his driver license by certified mail on December 2, 2011. *Id.* at 901. Under the relevant statute, Session had thirty days from service of that decision in which to file his appeal. *Id.* at 901. Because of the New Year's Day holiday, that due date fell on January 3, 2012. *Id.* Ultimately, the envelope with the notice was returned to the sender marked "Unclaimed." *Id.* The notice envelope showed three dates of attempted certified mail delivery. *Id.* at 901, 904. The notice was then sent by first-class mail on January 3, 2012, the day Session's appeal was due. *Id.* at 901. Consequently, Session did not receive actual notice by that first-class mail delivery until after his January 3, 2012, deadline had passed, and he filed his appeal on January 11, 2012. *Id.* The lower court dismissed the appeal as untimely. *Id.*

¶40 Among Session's other arguments, he contended that because the letter was returned as unclaimed, the state was required to take additional steps, which it did, but that he should have been given thirty days from the date he received actual notice in which to file his appeal. *Id.* at 904-05. That is, his appeal period should have been tolled. *Id.* at 905. The effect of not tolling Session's appeal period was that he did not receive additional time in which he could cure the untimeliness. The court refused

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property . . . forfeited to the state . . . shall be transferred as requested by the attorney for the state . . . .").

to toll the deadline despite the fact that the timing of the second notice gave Session no practical way to act and file his appeal on time. *Id.* at 905.

¶41 After considering *Jones*, the Missouri Court of Appeals stated that it could not "conclude that Session was denied due process because the thirty-day appeal period . . . was not suspended, or tolled, until he received notice via regular mail after his certified mail was returned unclaimed" and "[w]e cannot conclude that Session was denied due process because he received actual notice of the . . . final decision after the thirty-day time for appeal expired." *Id*. at 905-06. "[T]he [sender] made efforts reasonably calculated to apprise Session of its final decision and afford him an opportunity to contest." *Id*. at 906. The court found "no evidence in the record that the State unreasonably delayed delivery or acted with 'malfeasance' in its manner of providing notice." *Id*. at 904. Here, the claimants are similarly asking that the time for filing their answers be tolled from the date their answers were due until, at least, the date they received actual notice. *Jones* did not compel such tolling in *Session* and neither *Jones* nor *Estate of Snure* compels such tolling here.

¶42 Two principles from *Jones*, one from the majority and one from the dissent, do fit here: "if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing," 547 U.S. at 234, and "[t]he State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware," *id.* at 245-46 (Thomas, J., dissenting). The sender's fault in acting unreasonably is a feature of both *Jones* and *Estate of Snure*.[9] At its base, each of those cases concludes that standing by with knowledge of the lack of actual notice and doing nothing is a constitutionally unfair thing to do. It is not good, it is not right, and it ought not be encouraged. It is therefore key that, as in *Session*, what is missing in this case is any element of fault. There is no claim that the state stood by and did nothing knowing that the complaints had been timely served but not actually received. The state was completely unaware that there was not actual notice until after the answer period passed. It was not that the state

[9] *See Jones*, 547 U.S. at 237, 239 (the state cannot "simply ignore" information prior to the taking and sale of the owner's property, nor is it "too much to insist that the State do a bit more to attempt to let [the owner] know about it when the notice letter . . . is returned unclaimed"); *Estate of Snure*, 234 Ariz. 203, n.5 ("It is only because the estate had actual knowledge that the notice had not been received and had reasonable steps available to provide notice that we find a constitutional violation.").

did nothing; it was that there was, statutorily, nothing to do. Any fault here may lie in many places—in the post office, in the claimants' attorney, even in the legislature for the twenty-day deadline for filing an answer—but it does not lie with the state.

¶43 This court in *Estate of Snure* did not extend *Jones*. Today's decision now does so, discounts *Dusenbery*, and goes beyond what the Constitution commands. I respectfully disagree and would affirm.