

IN THE SUPREME COURT OF ALABAMA

Rosanne L. Wiggins and            )  
Randy E. Wiggins,                )  
                                      )  
                  *Petitioners,*        )            S.C. No. \_\_\_\_\_  
vs.                                    )  
                                      )  
The Frank V. & Penny            )  
S. Turner Investments LP,        )  
                                      )  
                  *Respondent.*        )

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CIRCUIT COURT  
OF LOWNDES COUNTY, ALABAMA  
CIVIL ACTION NO.: CV-2011-900065.00

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PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA COURT OF CIVIL APPEALS

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**PETITION FOR WRIT OF CERTIORARI TO  
THE ALABAMA COURT OF CIVIL APPEALS**

COME NOW, the Petitioners, Rosanne L. Wiggins and Randy E. Wiggins, through undersigned counsel and pursuant to Rule 39 of the Alabama Rules of Appellate Procedure, and petition this Court for a writ of certiorari in the above-styled cause. In support, the Petitioners would show the following:

1. The Court of Civil Appeals affirmed the judgment of the Circuit Court of Lowndes County on August 9, 2013, without written opinion. Exhibit A.

2. In the absence of a written opinion, Petitioners have elected to file this petition in lieu of an application for rehearing. ALA. R. APP. P. 39(b)(1).

3. As grounds, Petitioners submit that the Court of Civil Appeals decided the following issue of first impression under Alabama law: Does the issuance of a land patent issued pursuant to Section 16-20-6 of the Alabama Code operate as a transfer of title or does the land patent only provide evidence of existing title?

4. The Court of Civil Appeals affirmed the lower court's ruling that a land patent does not operate to

transfer title but instead provides evidence of existing title. See Exhibit B.

5. As neither the trial court nor the appellate tribunal cited controlling precedent, see Ex. A and B, and undersigned counsel has not independently uncovered any decisive Alabama precedent, Petitioners respectfully request that this Court grant a writ of certiorari to review this case of first impression. See ALA. R. APP. P. 39(a)(1)(C).

#### **CONCISE STATEMENT OF FACTS**

Pursuant to Alabama Rule of Appellate Procedure 39(d)(5)(C)(i), Petitioners submit the following concise statement of facts:

This case concerns the ownership of Section 16 school lands acquired through adverse possession. Respondent, Frank V. & Penny S. Turner Investments LP ("Turner Investments"), sued the Petitioners, Rosanne L. Wiggins and Randy E. Wiggins (collectively, the "Wiggins"), in the Circuit Court of Lowndes County. (R. at 11). Turner Investments claimed they own title in fee simple to real property located at the East Half of the North East Quarter of Section 16, Township 14 North, Range 13 East, in Lowndes County, Alabama (the "Land"), which they acquired by way of warranty deed from

The Timberlands, L.L.C. (R. at 11, 116). This title originated from a conveyance by Edward Lyon, who adversely possessed the Land under color of title beginning in 1824, when he purchased the Land from the Gordon family. (R. at 80).

The Wiggins disputed Turner Investments' claim to the Land. (R. at 32). The Wiggins maintained that the State of Alabama retained title to the Land until 2005, when it issued a land patent in accordance with Section 16-20-6, Alabama Code (1975), to the children of Edward Lyon. (R. at 32-33). According to the Wiggins, upon the issuance of the land patent, title passed from the State to Francis Lyon and his siblings, all of whom are deceased. (R. at 32). Ms. Wiggins, who descends from Francis Lyon, claimed she obtained title to the Land after this 2005 transfer of title. (R. at 34)

The patent states that Isaac N. Lyon, David G. Lyon, Rosa R. Lyon and Francis Lyon "have made proof that they have been in adverse possession, either personally or with their predecessors in possession of the described land." (R. at 41). The patent provides a legal description of the Land and memorializes certification of the Commissioner of the Department of Conservation and Natural Resources, the Director of Finance, and the Attorney General that the Lyons

were entitled to the issuance of a patent pursuant to Section 16-20-6 and Section 35-4-386 of the Alabama Code. (R. at 41).

The patent grants title in the Lyons in the following terms: "NOW THEREFORE, THE STATE OF ALABAMA grants the tract of land above described with all the appurtenances thereto belonging unto the said Isaac N., David G., Rosa R., and Francis Lyon, their heirs, successors or assigns forever." (R. at 41).

After discovering the land patent in 2007, Ms. Wiggins conveyed her interest in the Land to her husband, Randy E. Wiggins, by quitclaim deed. (R. at 52). The Wiggins subsequently attempted to re-enter and peaceably retake possession of the Land. (R. at 121, 130-131). Turner Investments then filed suit in Circuit Court, where the parties stipulated to the material facts and submitted the matter for judicial determination of the rightful ownership of the Land. (R. at 11-13).

Relying on *Tennessee Coal, Iron and Railway Co. v. Brewer et al.*, 92 F.2d 804 (5th Cir. 1937), the trial court concluded that issuance of the land patent in 2005 did not operate to convey any present title, but instead confirmed that title had already vested by virtue of adverse

possession prior to 1908. See Exhibit B. The court further found that, based on the chain of title in its warranty deed, Turner Investments owned the Land. (R. at 52).

The Court of Civil Appeals affirmed that decision. This timely petition follows.

**REASONS FOR GRANTING THE WRIT**

This Court should grant a writ of certiorari to clarify the legal effect of the issuance of a land patent under Section 16-20-6, Alabama Code. In 1915, the Alabama Legislature "sought to clear up confusion in the public records touching the existing status of sixteenth section school lands, and remove clouds on the title of citizens who have acquired unencumbered legal titles under the laws of Alabama." *State v. Michie*, 222 Ala. 682, 683, 133 So. 734, 735 (1931).

The resulting statute, now codified at Section 16-20-6, Alabama Code (1975), provides as follows:

When a person is in possession of any sixteenth section lands under color of title, and has been in such possession for more than 20 years prior to the first day of May, 1908, and neither the state, nor any department thereof, holds any note, bond, obligation or other contract of anyone for the purchase money of such land, and the Commissioner of the Department of Conservation and Natural Resources and the Director of Finance shall so

certify, and the Attorney General shall certify that proof of adverse possession, by the person now in possession, or coupled with his predecessor in possession, for 20 years prior to May 1, 1908, under color of title, has been made, which proof is satisfactory to the Attorney General. The Governor must cause a patent to issue to said land under the seal of the state to the person entitled thereto. Notwithstanding the foregoing provisions of this section, if the Attorney General is satisfied with the proof of color of title for 20 years prior to 1908 by the person now in possession or coupled with his predecessors in said color of title, the Attorney General shall not require affidavits of adverse possession for the period prior to 1908, except in cases of boundary line disputes, to establish said adverse possession.

Ala. Code § 16-20-6 (1975). By its terms, the statute confers authority on the Executive Branch to determine whether an adverse possessor can marshal sufficient evidence to satisfy the statutory prerequisites for the issuance of a land patent. If so, the Governor is required to issue the patent.

A "patent possesses the highest verity," *Crommelin v. Minter*, 9 Ala. 594, 601 (1846), and unless a patent has been fraudulently obtained or otherwise improvidently granted, the grant of land is "conclusive" and "not open to relitigation in the court." *Johnson v. Drew*, 171 U.S. 93, 100 (1898). The holding in *Johnson v. Drew* flows from the "firmly embedded" principle that "contemporaneous

construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts." *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

Here, the Executive Branch, in construing Section 16-20-6, had to have found the pre-patent transfers of real property were void. Otherwise, it would have transferred the property to The Timberlands, L.L.C., the party "in possession" of the property at the time of its issuance. Ala. Code § 16-20-6 (1975). There is ample authority for the conclusion that title to land does not pass prior the issuance of a patent. See, e.g., *Masters v. Eastis*, 3 Port. 368, 371 (Ala. 1836) (A certificate of sale does not declare that the title "passes the fee of the land: this can be done only by the patent."); *Harmon v. Steinman*, 9 Iowa 112, 113 (1859); *Ski Roundtop Inc. v. Wagerman*, 556 A.2d 1144, 1147 (Md. Ct. App. 1989); see also 2 PATTON AND PALOMAR ON LAND TITLES § 295 ("The legal title to land sold by the state does not pass till a patent is executed in a manner prescribed by the statute"); 73B C.J.S. PUBLIC LANDS §



139. Thus, the Executive Branch likely<sup>1</sup> interpreted the statute to require it to issue the patent to the adverse possessors rather than the party then "in possession" of the Land at the time of issuance. See Ala. Code § 16-20-6 (1975).

Nevertheless, the trial court failed to give any weight whatsoever to the determination of the Executive Branch regarding the rightful ownership of the property. As argued below, this is error.

More importantly, in the affirming the ruling of the trial court, the Court of Civil Appeals effectively divests the Executive Branch of its authority to determine (1) the sufficiency of the evidence required for the issuance of a patent; or (2) the entity who is properly "in possession" of the subject property. See Ala. Code § 16-20-6 (1975). If, as the courts below ruled, the legal effect of the issuance of a patent is only to provide formal recognition that title has already passed, then the patent itself is empty paper, and the discretionary determination of the

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<sup>1</sup> Because Turner Investments never sued the State, which is "generally a necessary party to an action to set aside such a deed or patent," 73B C.J.S. PUBLIC LANDS § 139, the record does not reveal the Attorney General's rationale in issuing the patent to the Lyons.

Executive Branch in interpreting the statute bears no weight at all.

As noted, the Executive Branch found that the Lyons owned the property and duly issued a patent granting them title to the Land. Yet, instead of deferring to the decision of the Executive Branch under Section 16-20-6 of the Alabama Code, the lower courts found the express transfer of title in the patent to have no effect.

Thus, through this decision, the Judicial Branch arrogated to itself authority vested by statute in the Executive Branch. This raises serious separation of powers concerns. See ALA. CONST. 1901, § 43 (courts "shall never exercise the legislative and executive powers, or either of them"); see also *Ex parte James*, 836 So. 2d 813 (Ala. 2002) ("separation of powers is not merely an implicit 'doctrine' but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns"). This Court should grant the writ of certiorari to resolve the proper operation of Section 16-20-6 of the Alabama Code and the legal effect of the issuance of a patent under this statute.

It is important to emphasize, by way of conclusion, that the issue presented is not just one of paramount importance; it is one of first impression. The only authority cited by the trial court, *Tennessee Coal, Iron and Railway Co. v. Brewer et al.*, 92 F.2d 804 (5th Cir. 1937), is a federal decision that does not bind this Court. The cases cited by the Court of Civil Appeals in the affirmance either (1) do not directly reach the issue presented, see *Board of School Commissioners of Mobile County v. Architects Group, Inc.*, 752 So. 2d 489, 491-92 (Ala. 1999); *Rogers Foundation Repair, Inc. v. Powell*, 748 So. 2d 869, 871 (Ala. 1999); *State v. Inman*, 239 Ala. 348, 352, 195 So. 448, 451 (1940); *State v. Michie*, 222 Ala. 682, 683, 133 So. 734, 735 (1931); *State v. Schmidt*, 180 Ala. 374, 374-81, 61 So. 293, 293-94, *aff'd sub nom. Alabama v. Schmidt*, 232 U.S. 168 (1914); or (2) predate the 1915 enactment of the predecessor to Section 16-20-6, see *Tennessee Coal, Iron & R.R. Co. v. Linn*, 123 Ala. 112, 128-130, 26 So. 245, 248-49 (1899); *Miller v. State*, 38 Ala. 600, 602-04 (1863); and *Long & Long v. Brown*, 4 Ala. 622, 628-29 (1843).

Accordingly, pursuant to Rule 39(a)(1)(C), the Petitioners respectfully ask that this Court grant a writ

of certiorari to resolve this issue of first impression.

DATED this 23<sup>rd</sup> day of August, 2013.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of forgoing has been filed through the Alafile system, this the 23<sup>rd</sup> day of August, 2013, which will automatically provide service upon the following counsel of record. However, if the Alafile system indicates that service needs to be perfected by other means, service will be provided by first-class mail as follows:

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