No. 13-10400

In the Supreme Court of the United States

BOBBY CHEN,

Petitioner,

v.

MAYOR & CITY COUNCIL OF BALTIMORE, MARYLAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## PETITION FOR REHEARING

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#### **PETITION FOR REHEARING**

Pursuant to Supreme Court Rule 44, petitioner respectfully petitions this Court for rehearing of its January 9, 2015 order dismissing the writ of certiorari in this case. On November 7, 2014, this Court granted petitioner's *pro se* petition for certiorari to resolve an open and acknowledged circuit split that still persists regarding the proper interpretation of Federal Rule of Civil Procedure 4(m). Due to an unfortunate series of circumstances, however, petitioner remained unaware for the next two months that his petition had been granted and that he had an opening brief due. By the time petitioner discovered as much, the Court had dismissed his case after it was unable to get in touch with him and the default deadline for filing his opening brief passed.

Petitioner's inadvertent failure to respond to this Court's communications or comply with its briefing schedule can and should be excused. Petitioner had no intention of abandoning his case; to the contrary, he diligently attempted to monitor its status by e-mail when he unexpectedly was away from his home for two months. When he learned of the dismissal, petitioner promptly set about trying to get his case reinstated. Petitioner has now retained counsel to assist him in all proceedings before this Court in this matter going forward, which should alleviate any concerns about his ability to comply with the Court's rules in the future. Under the circumstances, the Court should exercise its discretion to reinstate the case and restore the exceedingly rare opportunity petitioner secured when he successfully persuaded this Court to grant his pro se petition for certiorari.

#### FACTUAL & PROCEDURAL BACKGROUND

#### A. Proceedings Below

On November 10, 2011, petitioner filed a pro se complaint in the U.S. District Court for the District of Maryland alleging that the Mayor and City Council of Baltimore, three other municipal employees, and the City's private contractor violated his rights under state law and the U.S. Constitution by demolishing his three-story house and destroying his personal property. Pet.App.3a, at 3-4.\* The District Court subsequently directed the Clerk of Court to prepare a summons for each defendant and provide petitioner with instructions on how to effect proper service. *Id.* at 4. Petitioner did not receive those summonses or instructions, however, and believed that the U.S. Marshals would complete service on his behalf in light of his pro se status. Id. at 4-5. Petitioner therefore awaited a responsive pleading to his complaint. See id.

On March 22, 2012, after the 120-day service period had expired, the District Court issued a showcause order directing petitioner to explain why his case should not be dismissed without prejudice. Pet.App.4a. Petitioner responded to the order, explaining that he was previously unaware that the court had issued summonses and believed that court officials would effectuate service for him in any event. Pet.App.3a, at 5. Persuaded by this explanation, the court reissued the summonses and granted petitioner

<sup>\*</sup> All pincites following citations to "Pet.App.3a" refer to the page numbers of the District Court's February 22, 2013 memorandum opinion.

a 60-day extension to perform service. Pet.App.5a. Petitioner thereafter timely served the defendants before the 60-day extension expired. *See* Resp.App.A.

In the meantime, petitioner's case was transferred to a new judge. Resp.App.A. And after being served, the defendants moved to dismiss, arguing that petitioner had failed to show good cause for his failure to effect service within the 120-day time period. Pet.App.3a, at 5-6. The District Court agreed that petitioner failed to show good cause, and also concluded that it could not extend the time-period without good cause, and therefore dismissed the complaint. Id. at 18. In doing so, the court adhered to the Fourth Circuit's holding in Mendez v. Elliot, 45 F.3d 75 (4th Cir. 1995), that courts have no discretion under Rule 4(m) to extend the 120-day limit absent a showing of good cause. Pet.App.3a, at 7-11. Although the District Court noted that Mendez "contradicted every other circuit that had interpreted Rule 4(m)," as well as the Advisory Committee's Notes to Rule 4(m), *id.* at 8, the court nonetheless deemed itself bound by *Mendez* to dismiss the complaint, *id.* at 11.

Petitioner filed a timely notice of appeal, and the Fourth Circuit summarily affirmed in an unpublished *per curiam* opinion that adopted the District Court's reasoning in its entirety. Pet.App.1a. Petitioner filed a timely petition for rehearing en banc, which the Fourth Circuit denied on December 16, 2013. *Id*.

## **B.** Proceedings Before This Court

Still proceeding *pro se*, petitioner timely filed a petition for a writ of certiorari and motion for leave to proceed *in forma pauperis* in this Court. The Court requested a response to the petition, and respondents

filed a brief in opposition on September 26, 2014. In late October 2014, petitioner sought an update on the status of his case and learned that it was still pending. Shortly thereafter, petitioner left his New York home for a business trip to California. Although petitioner had planned to be in California only for a short time, he suffered from a slip-and-fall injury that postponed his return to New York until late January. Petitioner had any mail delivered to his New York address collected while he was away but did not have that mail forwarded to California since he planned to return shortly. Petitioner was unaware that he could check the status of his case on this Court's website, but he attempted to monitor his case by checking on a weekly basis the e-mail account that he had created for any communications from the Court. When he found no messages from the Court, he believed his petition remained under consideration.

In fact, unbeknownst to petitioner, two days before he left for California, this Court granted his petition for certiorari and motion to proceed *in forma pauperis*. Although the Court attempted to contact petitioner to advise him of this, and also to inform him of the deadline for filing his opening brief, petitioner received none of those communications. Accordingly, when petitioner returned to New York on January 22, 2015, he was surprised and dismayed to learn that his petition had been granted but subsequently dismissed on January 9, 2015, after the Court's efforts to contact him proved unsuccessful.

Petitioner promptly contacted the Supreme Court Clerk's Office, which informed him that he could file a petition for rehearing of the Court's dismissal order. Petitioner began preparing a rehearing petition on his own but ultimately decided to retain counsel to assist him. To that end, on January 27, 2015, petitioner reached out via telephone to the undersigned law firm, which agreed to represent him in all future proceedings before this Court in this matter.

## **REASONS FOR GRANTING THE PETITION**

This Court granted the petition for certiorari to resolve an acknowledged circuit split on whether a district court has discretion under Rule 4(m) to extend the time for service of process absent a showing of good cause. Compare Zapata v. City of New York, 502 F.3d 192, 196-97 (2d Cir. 2007); Petrucelli v. Bohringer & Ratzinger, GMBH, 46 F.3d 1298, 1305 (3d Cir. 1995); Thompson v. Brown, 91 F.3d 20, 21 (5th Cir. 1996); Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340-41 (7th Cir. 1996); In re Sheehan, 253 F.3d 507, 513 (9th Cir. 2001); Espinoza v. United States, 52 F.3d 838, 840-41 (10th Cir. 1995); Horenkamp v. Van Winkle & Co., 402 F.3d 1129, 1131-32 (11th Cir. 2005), with Mendez, 45 F.3d at 78-79; Pet.App.1a. That circuit split still persists and continues to have real consequences for litigants. See Malibu Media, LLC v. Doe, No. 14-cv-288, 2014 WL 7507259, at \*4 (D. Md. Dec. 24, 2014).

The unusual circumstances that led to the dismissal of this ideal vehicle for resolving that circuit split should not prevent the Court from reinstating this case and answering the question on which it previously granted certiorari. Petitioner had no intention of abandoning his case when he failed to respond to this Court's attempts to communicate with him. Instead, petitioner was simply unaware that his case had been granted. That is both understandable and excusable under the circumstances at hand. As an unsophisticated *pro se* litigant who had never before been involved in proceedings in this Court, petitioner was unaware of details such as how to check the Court's online docket or its schedule for when his petition would be distributed for conference. Petitioner thus did not know that his trip to California coincided with this Court's consideration of his petition.

Petitioner also did not anticipate a need to have his mail forwarded because he did not expect to be in California for as long as he was. Moreover, he believed that he would learn of any developments in his case through the special e-mail account he had created and given this Court for case-related communications. For whatever reason, petitioner never received any emails at that address, and thus learned that his petition had been granted only after it had already been dismissed. Petitioner responded by immediately contacting the Court to see how he could go about getting his case reinstated, and then retaining counsel to assist him in doing so. Accordingly, there can be no serious doubt that petitioner's failure to respond to this Court's communications or file an opening brief was entirely unintentional.

Particularly given the leniency typically afforded *pro se* litigants, that unfortunate series of events should not deprive petitioner of his day in this Court. As the Court has recognized on several occasions, "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *see also*,

e.g., Erickson v. Pardus, 551 U.S. 89, 94 (2007) (emphasizing that "[a] document filed pro se is 'to be liberally construed""); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (same); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (same). That is no less true of the process before this Court. Accordingly, this Court can and should excuse inadvertent failures to comply with the Court's rules when they result from the difficulties inherent in proceeding pro se. Cf. Schacht v. United States, 398 U.S. 58, 64 (1970) ("The procedural rules adopted by the Court for the orderly transaction of its business ... can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.").

And there is no reason not to do so here. Any concerns the Court may have about petitioner's ability to comply with its rules in the future should be obviated by his retention of experienced Supreme Court counsel. So, too, should any concerns the Court may have about communicating with petitioner going forward, as all communications may now be directed to both petitioner and his counsel. Respondents will suffer no prejudice from reinstatement of a case that the Court already determined worthy of consideration on the merits. And the Court need not worry that excusing petitioner's inadvertent failure to comply with its rules will set any kind of precedent for future cases, as the unusual events that led to that failure are exceedingly unlikely to repeat themselves.

In short, there is no reason not to reinstate this case and every reason to do so. Convincing this Court to review a case is no mean feat for any petitioner, let alone for a petitioner proceeding *pro se*. It would be both unfortunate and inequitable to deny one of the few petitioners who managed to do so the rare opportunity to have his case heard by the Supreme Court of the United States.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing, vacate the order dismissing the writ of certiorari, and restore this case to its merits docket.

Respectfully submitted,

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February 3, 2015

# **CERTIFICATE OF COUNSEL**

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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