

No. _____

IN THE
Supreme Court of the United States

KIMBERLY COLLINS,

Applicant,

v.

GWENDOLYN THORNTON, PH.D.,

Respondent.

**APPLICATION FOR AN EXTENTION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the Fourth Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, applicant Kimberly Collins respectfully requests a 30-day extension of time, up to and including Wednesday, January 15, 2020, to file a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review of that court's judgment in this case.

2. The Fourth Circuit entered its judgment on August 13, 2019. Copies of the Fourth Circuit's opinion and judgment order are attached as **Exhibits A** and **B**.

Collins then filed a petition for panel rehearing or rehearing en banc. The Fourth Circuit denied the petition on September 16, 2019. A copy of the Fourth Circuit’s denial order is attached as **Exhibit C**. As such, unless extended, the time to file a petition for certiorari will expire on December 16, 2019.¹ Pursuant to Supreme Court Rule 13.5, this application is being filed more than ten days before a petition for certiorari would otherwise be due. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

3. This case raises an important and pronounced Circuit-split involving Rule 4(m) of the Federal Rules of Civil Procedure. According to the Rule:

If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED.R.CIV.P. 4(m). The Circuit split relates to whether district courts have discretion to enlarge the period of time to complete service in the absence of a showing of good cause.

4. On the one hand is the Fourth Circuit, which says “No.” In its 1995 decision in *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995), the Court of Appeals applied

¹Pursuant to Supreme Court Rule 30.1, one day has been added to this calculation to move the due date from Sunday, December 15, 2019 to the “next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed,” namely December 16, 2019.

the predecessor to Rule 4(m) and held that “if the complaint is not served within 120 days after it is filed, the complaint *must be dismissed* absent a showing of good cause.” *Id.* at 78. (emphasis added). Thus, the Fourth Circuit says that under Rule 4(m), a district court has no discretion to extend the time for a plaintiff to complete service if good cause could not be shown.

5. On the other hand are holdings from the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits ² that say “Yes” – that is, that district courts *do* have discretion to enlarge the time for a plaintiff to complete service in the absence of good cause. These holdings are consistent this Court’s decision in *Henderson v. United States*, 517 U.S. 654 (1996). Albeit in *dicta*, this Court in *Henderson* explained that under the 1993 amendments to the Federal Rules, under Rule 4, “courts have been accorded discretion to enlarge the 120-day period ‘even if there is no good cause shown.’” *Id.* at 662 (emphasis added) (quoting Advisory Committee’s Notes on Fed. Rule Civ. Proc. 4). Thus, in the words of at least one lower court judge in the Fourth Circuit, “the Supreme Court thinks *Mendez* is wrong.” *Robinson v. G.D.C. Inc.*, 193 F. Supp.3d 577, 582 n. 1 (2016).

² See, e.g., *Zapata v. City of N.Y.*, 502 F.3d 192, 196 (2d Cir. 2007); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1304 (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 (7th Cir. 1996); *Adams v. Allied Signal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1995); *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003); *Espinoza v. United States*, 52 F.3d 838, 840 (10th Cir. 1995); and *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1133 (11th Cir. 2005).

6. Ever since *Mendez* was handed down, “courts and commentators are virtually unanimous in the view that *Mendez* is wrong” as to its view that Rule 4(m) affords district courts no discretion to enlarge the time in which to effect service absent a showing of good cause. *Robinson*, 193 F. Supp.2d at 582. Even the Fourth Circuit itself, in unpublished decisions, has suggested that *Mendez* is not good law. *See, e.g., Hansan v. Fairfax Cty. Sch. Bd.*, 405 Fed.Appx. 793, 793-94 (4th Cir. 2010) (stating rule contrary to *Mendez*); *Giacomo-Tano v. Levine*, 1999 WL 976481, at *1 (4th Cir. Oct. 27, 1999) (same); *Scruggs v. Spartanburg Reg’l. Med. Ctr.*, 1999 WL 957698, at *2 (4th Cir. Oct. 19, 1999) (“[W]e regard the [Supreme] Court’s statement [in *Henderson*] as persuasive as to the meaning of Rule 4(m). Accordingly, we believe that the district court, in its discretion, could have extended the time for proper service of process.”). However, it has never officially abrogated the “no discretion” rule of *Mendez*.

7. The Fourth Circuit’s inaction as to *Mendez* has led to the proliferation of dozens of irreconcilably inconsistent district court decisions as to whether they have discretion to extend the service period under Rule 4 in the absence of good cause. The inconsistency has raged for years and is alive and well even in 2019. *Compare Addison v. Amica Mut. Ins. Co.*, 2019 WL 2191795, at *3 (D.S.C. May 21, 2019) (applying *Mendez* and holding that, as such, “the court cannot avail itself the option that appears to be offered by Rule 4(m)—that is, directing Plaintiff to effect

service by a certain time—unless good cause is shown for the failure to timely serve Defendant”) and *Martin v. S.C. Dep't of Corrs.*, 2019 WL 2124957, at *3 (D.S.C. Apr. 23, 2019) with *Mason v. Lewis Contracting Services, LLC*, 2019 WL 2395492 at *2 (W.D.Va. June 6, 2019) (citing *Giacomo-Tano* and *Henderson* and stating that “the court may exercise discretion to extend the service period even in the absence of good cause.”) and *Escalante v. Tobar Constr. Inc.*, 2019 WL 109369, at *4 (D. Md. Jan. 3, 2019) (“*Mendez* no longer controls the analysis.”).

8. To say that this inconsistency has jeopardized the integrity of the rule of law as to Rule 4 is an understatement. Not only is the Fourth Circuit’s precedential pronouncement as to Rule 4 completely at odds with the law of nine other Circuits, it regularly creates internal havoc *within* the Circuit itself. Perhaps recognizing this problem, *this* Court granted certiorari in *Chen v. Mayor & City Council of Balt.*, 135 S. Ct. 475 (2014) on the following question:

“[w]hether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause, as the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether the district court lacks such discretion, as the Fourth Circuit has held?”

Id. It then later dismissed the petition because the self-represented petitioner missed a briefing deadline. *Id.* 135 S. Ct. 939 (2015). We submit this Court should again grant certiorari on this question and, as well, define the parameters of the discretion a district court may enjoy under the Rule.

9. Given the complexity of the legal issues, Collins respectfully requests a 30-day extension of time, up to and including Wednesday, January 15, 2020, to file a petition for a writ of certiorari. A 30-day extension will allow counsel sufficient time (i) to fully survey all of the Circuits in order to explain the Circuit split as to Rule 4(m); and (ii) to fully survey and analyze the vast array of decisional law *within* the Fourth Circuit showing the volume and scope of inconsistent district court decisions over the last two decades. In addition, undersigned counsel has a number of other pending matters, including a Reply Brief in the Fourth Circuit that is due on December 13, 2019, that will interfere with counsel's ability to file the petition on or before December 16, 2019.

WHEREFORE, for the reasons stated above, Collins requests that an order be entered extending the time to file a petition for a writ of certiorari to January 15, 2020.

Dated: December 4, 2019.

Respectfully submitted,

By: /s/ Richard F. Hawkins, III
Richard F. Hawkins, III
Virginia Bar Number: 40666
THE HAWKINS LAW FIRM, PC
2222 Monument Avenue
Richmond, Virginia 23220
(804) 308-3040 (telephone)
(804) 308-3132 (facsimile)

Counsel for Kimberly Collins