No. 19-1262

In The
Supreme Court of the United States

Steven E. Greer, MD

Petitioner,

vs.

Dennis Mehiel, Robert Serpico,
The Battery Park City Authority

Respondents.

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

PETITION FOR A REHEARING

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Petition for Rehearing

Pursuant to Rule 44 of the Supreme Court of the United States, Petitioner Steven Greer hereby respectfully petitions for a rehearing of this case before a full-bench of nine Justices.

Grounds for Petition

The grounds by which the petition for rehearing is made is an incapacitation of this Court due to medical illnesses of multiples Justices that prevented a full-bench conference to convene on June 18, 2020 when the *writ certiorari* was first heard.

Timeliness

The *writ certiorari* for *Greer v. Mehiel*, 19-1262, was heard on June 18, 2020 and denied on June 22, exactly 25 days prior to the first submission of this motion, thereby making it timely. A letter of deficiency from this Court was mailed on June 23rd granting a 15-day extension of time by which Petitioner could resubmit the motion. This second submission was shipped via FedEx on July 28th in timely fashion to that deadline.

Nature of the Case

The *writ certiorari* of *Greer v. Mehiel*, 19-1262, deals with the underlying case of *Greer v. Mehiel*, 15-cv-6119 SDNY, which is based on First Amendment causes of action. Petitioner was exercising his rights to freedom of the press, freedom of speech, and freedom to petition the state when he was retaliated against in 2014. A collusion of State and private bad actors forced him out of his apartment home in Lower Manhattan where he had lived for 14-years and ran a popular local news website.

The private sector defendants settled the case for an award worth more than $600,000 to Petitioner. The district court awarded summary judgment to the

remaining State defendants. All of the State defendants have been removed from their jobs.

The appeals court upheld the district court award of summary judgment. By doing so, they raised two important constitutional questions and a third federal law question.

The Lozman question

Did the lower courts misapprehend, then ignore completely on appeal, Lozman v. City of Riviera Beach, Fla., 13 8 S. Ct. 1945 (2018) in denying the Rule 60 motion and appeal? Was Greer v Mehiel indeed remarkably similar to Lozman, and therefore the probable cause defense should not have defeated the two First Amendment retaliation claims (i.e. that Greer's rights to petition and to report in the press were violated as well as being retaliated against via eviction)?

The Monell question

Respondent Dennis Mehiel, who was both the CEO and Chair of the Board of the Battery Park City Authority ("BPCA") at the time, was considered by the lower courts as not having "final policymaking authority"? Did the lower courts misapprehend Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and set a dangerous precedent making it virtually impossible for a citizen to sue a government agency unless the board meets and publicly agrees to violate a constitutional right?

Related, if an individual respondent is removed during early stages of motion to dismiss, as Mr. Mehiel was in this case, but then later admits under oath to the acts that violated the First Amendment, should the courts ignore that evidence?

Pertinent Facts to this Motion for Rehearing

Based on statements from Justice Ruth Bader Ginsburg and articles in the press, the judge's Stage-4 pancreatic cancer is progressing. She has been undergoing toxic chemotherapy since May after less toxic immunotherapies failed. The judge has also been hospitalized on more than one occasion this year for treatment of sepsis, including in the month of June.

Petitioner, a medical doctor, is saddened to learn of this. Based on these facts, it is likely that Justice Ginsburg was significantly incapacitated in the month of June when the *writ* was evaluated by the panel.

Likewise, it was reported in the press that Chief Justice Roberts was also seriously ill in the month of June. He reportedly suffered a head injury while walking and was hospitalized overnight. Those facts indicate that Chief Justice Roberts very well could have been mentally incapacitated from concussion syndrome for two-weeks of the month.

Petitioner need not provide more evidence given that the Justices adjudicating this motion know the facts. If Justices Ginsburg and Roberts were indeed unable to be active participants in the review panel of June 18, then Petitioner's *writ* was prejudiced and deserves a rehearing due to the lack of a full-bench hearing.

Importantly, had Petitioner known sooner about the ailments facing those Justices, rather than learning about them months after the facts, he likely would have motioned for the *writ* to have been reviewed at a later panel in the 2020 sessions. Instead, he opposed Respondents' motion for an extension of time, which resulted in the June 18th review date.

In addition to those issues specific to Justices Ginsburg and Roberts, all of the nine Supreme Court Justices, and their law clerks who do the heavy lifting, have been unable to perform their normal duties due to the pandemic rules of court. Courts all over the country are trying to cope with new ways to conduct oral arguments and trials remotely *via* Internet. Cases are backlogging. The Supreme Court is not immune to those pressures. Perhaps not coincidentally, no *writ* was granted on merit from the June 18th review session.

The History of Similar Events

Since the passing of the United States Constitution and then the Judiciary Act of 1789, there have been many instances of Justices who were allowed to serve on the bench despite being incapacitated. Since the 1990's alone, Chief Justice Rehnquist was rumored to have been addicted to opioid medications and Justice Marshall was pressured into retirement by a scathing decision by Justice O'Conner.[1]

Legal scholars, and even former Justices, have questioned whether the framers of the constitution erred by not placing an age limit on federal judges.[2] Congress has made several serious attempts at reforming laws that would allow for incapacitated judges to be removed without having to resort to impeachment. From 1937 through 1955, two major efforts to add a constitutional amendment mandating retirement at age 75 almost came to fruition. Less drastic legislative solutions were then proposed in the 1970's.

Now, the controversial decision by Justice Ginsburg to stay on the bench at age 87, with serious illnesses, is stirring skepticism anew about the ability of the Supreme Court to self-regulate and maintain quality control. There is a revived interest in age limits on the federal benches.

Case Precedent for this Motion for Rehearing

If it is true that one or more Justices were not in their full capacity, or even present at all, for the June 18, 2020 *writ* review conference, then a full-bench did not

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[1] "Eight days after that decision in *Gregory v Ashcroft,* Thurgood Marshall finally announced his retirement from the Court." From The University of Chicago Law Review. Vol. 67, No. 4, Autumn, 2000

[2] "Justice Lewis F. Powell, Jr., retired from the Court at age seventy-nine. Powell told reporters upon announcing his departure that "I believe I said some years ago that it would have been wise for the Founding Fathers to have required retirement of federal judges at a specified age, perhaps
at 75." From The University of Chicago Law Review. Vol. 67, No. 4, Autumn, 2000

assemble. While it is rare for Rule 44 motions to be granted, it is not unusual for rehearing under circumstances when there is not a full-bench.

This Court has often granted rehearings to allow for a full-bench procedure. "[R]ehearing petitions have been granted in the past where the prior decision was by an equally divided Court and it appeared likely that upon reargument a majority one way or the other might be mustered." Stephen M. Shapiro et al., *Supreme Court Practice* § 15.6(a), at 838 (10th ed. 2013). "The small number of cases in which a full Bench can rehear a case decided by an equal division probably amounts to the largest class of cases in which a petition for rehearing after decision on the merits has any chance of success." *Id.* at 839.

Examples of this Supreme Court granting motions for rehearing due to the lack of a full-bench include, *United States* v. *One 1936 Model Ford V-8 De Luxe Coach, 305 U.S. 666 (1938), Pollock v. Farmers' Loans & Trust Co., 158 U.S. 617 (1895).* This Court has also commonly deferred rehearings for months until a full-bench could be assembled. Examples include, *Halliburton Oil Well Cementing Co.* v. *Walker*, 327 U.S. 812, and *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947)

Conclusion

Based on the official statements from this Court regarding recent illnesses of Justices Roberts and Ginsburg, any medical doctor or jury would conclude that they were incapacitated during the month of June when this *writ certiorari* was supposed to have been reviewed by a full-bench. Those facts were not made public until after the review session on June 18, 2020. Had Petitioner known, he would have motioned for a postponement of the June 18th session. Therefore, in order to comply with the standard operating procedure of The Supreme Court, this motion for rehearing should be granted.

Respectfully submitted on July 28th, 2020

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