21-1419

No.

IN THE

Supreme Court of the United States

HONG TANG

Petitioner

V.

KURT L. SCHMOKE, et al.

Respondents

On Petition For Writ of Certiorari

To The United States Court Of Appeals For The

Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

HONG TANG

Pro Se Petitioner

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QUESTION PRESENTED

1. Whether in 42 U.S.C. § 1983 proceedings, when the lower court even specifically stated in the initial *per curiam* opinion and judgment that "[t]he court's dismissal of a plaintiff's case because the plaintiff lacks jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction or otherwise curing the jurisdictional defect"[1], *federal equitable tolling* rather than *borrowed* Maryland state limitations and tolling rules should apply to the subsequently re-filed claim and lead to a different outcome of this case.

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[1] *Tang v. Univ. of Baltimore*, Case No. 19-1146 (4th Cir. 2019)

2. Whether the lower courts should apply Maryland state statutory-interpretation principles, rather than the statutory-interpretation principles for interpreting *federal* statute, to the interpretation of Maryland state "saving statute" (Md. Rules 2-101(b)(1) and 3-101(b)(1)), which lead to a different outcome of this case.

3. Whether the lower courts' rigid application of state law, resulting in a second-time dismissal of this 42 U.S.C. § 1983 claim without any determination of the merits, contravenes 42 U.S.C. § 1988 and *Hardin v. Straub*, 490 U.S. 536, 538-539 (1989).

PARTIES TO THE PROCEEDING AND RELATED CASE

The *Pro Se* Petitioner to the proceeding is Hong Tang.

The Respondents to the proceeding are Kurt L. Schmoke, Darlene Brannigan Smith, Joseph S. Wood, Kathleen Anderson, Roger E. Hartley, Christy Lee Koontz, and Patria de Lancer Julnes, in their official and/or individual capacities.

Related Cases:

Tang v. Univ. of Balt., Civil No. JKB-18-2200 (D. Md. Dec. 21, 2018)

Tang v. Univ. of Balt., No. 19-1146 (4th Cir. 2019)

Tang v. Univ. of Balt., No. 20-1810 (4th Cir. 2021)

Tang v. Univ. of Balt., 140 S. Ct. 2765, 206 L. Ed. 2d 938 (2020)

Tang v. Univ. of Balt., 141 S. Ct. 197, 207 L. Ed. 2d 1145 (2020)

Pending case:

Hong Tang v. Kurt L. Schmoke, et al., Civil Action No. JKB-22-341 (United States District Court for the District of Maryland)

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This suit was brought by *pro se* litigant Hong Tang against Kurt L. Schmoke, Darlene Brannigan Smith, Joseph S. Wood, Kathleen Anderson, Roger E. Hartley, Christy Lee Koontz, and Patria de Lancer Julnes, in their official and/or individual capacities, pursuant to 42 U.S.C. § 1983.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment on August 5, 2021.

The court of appeals denied the petitioner's petition for rehearing and rehearing en banc on September 27, 2021.

Chief Justice John G. Roberts granted the petitioner's application for an extension of time on December 16, 2021.

ISSUES AND REASONS

The underlying 42 U.S.C. § 1983 claim/action was initially filed in the U.S. District Court for the District of Maryland on July 18, 2018 under Civil Action No. JKB-18-2200. The case was dismissed for lack of jurisdiction and the mandate was issued by the U.S. Court of Appeals for the Fourth Circuit on

October 9, 2019. *Tang v. Univ. of Balt.*, No. 19-1146 (4th Cir. 2019)

Subsequent to the initial dismissal for lack of jurisdiction, Plaintiff refiled the instant claim/action again in the U.S. District Court for the District of Maryland on October 10, 2019 under Civil Action No. SAG-19-2965, within the period of limitations prescribed by Maryland law (Md. Rules 2-101(b)(1) and 3-101(b)(1)). But the second case was dismissed because the action was barred by the statute of limitations required to be applied by the lower federal courts, and the second mandate was issued by the U.S. Court of Appeals for the Fourth Circuit on October 12, 2021. *Tang v. Schmoke,* Nox. 20-2308; 21-1243 (4th Cir. 2021) In particular, among other things, the lower federal courts applied the

statutory-interpretation principles for interpreting *federal* statute to the interpretation of Maryland state "saving statute" (Md. Rules 2-101(b)(1) and 3-101(b)(1)), prematurely ended the essential interpretive inquiry,[2] and thus applied the statute of limitations without the application of Maryland state "saving statute" (Md. Rules 2-101(b)(1) and 3-101(b)(1)) in the case. *Id.*

Issue 1: Federal Equitable Tolling

The Court of Appeals for the Fourth Circuit's initial *per curiam* opinion and judgment specifically stated that "[t]he court's dismissal of a plaintiff's case because the plaintiff lacks jurisdiction is not a

[2] ECF No. 35 at 3, *Tang v. Schmoke*, No. 1:19-cv-02965-SAG (D. Md. Mar. 3, 2021)

determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction or otherwise curing the jurisdictional defect"[3].

Nevertheless, the lower courts erroneously refused to apply *federal equitable tolling* to the instant refiled suit, which was properly filed just one day after the Fourth Circuit issued the mandate in the initial suit.

Given the Court of Appeals' aforementioned statement in its initial *per curiam* opinion and judgment[4], *federal equitable tolling* rather than *borrowed* Maryland state limitations and tolling rules should have applied to the subsequently re-filed

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[3] *Tang v. Univ. of Baltimore*, Case No. 19-1146 (4th Cir. 2019)

[4] *Id.*

claim (instant action) and lead to a different outcome of this case.[5]

Issue 2: Maryland State "Saving Statute"

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[5] *See also* ***Cf.*** *Parker v. Blauvelt Volunteer Fire Company, Inc.*, 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647 (N.Y. 1999) ("In addition, Supreme Court dismissed the civil rights claims 'without prejudice to [plaintiff's] commencement of the appropriate plenary action.' It would be inequitable to preclude a party from asserting a claim under the principle of res judicata, where, as in this case, '[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action' (Restatement [Second] of Judgments § 26[1][b]). Thus, a rigid application of res judicata in this instance, rather than preventing plaintiff from obtaining two days in court, would unjustly 'deprive him of one' (Matter of Reilly v. Reid, supra, 45 N.Y.2d, at 28).")

Maryland Rule 2-101(b) states:

"After Certain Dismissals by a United States District Court or a Court of Another State.

Except as otherwise provided by statute, if an action is filed in a United States District Court or a court of another state within the period of limitations prescribed by Maryland law and that court enters an order of dismissal (1) for lack of jurisdiction, (2) because the court declines to exercise jurisdiction, or (3) because the action is barred by the statute of limitations required to be applied by that court, an action filed in a circuit court within 30 days after the entry of the order of dismissal shall be treated as timely filed in this State.".

As already clearly demonstrated in the lower courts' proceedings, the Maryland state statutory-interpretation principles contradictorily prohibit the courts from prematurely ending the interpretive inquiry, and lead the contrary outcome of this case.

As already noted above, the lower federal courts erroneously applied the statutory-interpretation principles for interpreting *federal* statute to the interpretation of Maryland state "saving statute" (Md. Rules 2-101(b)(1) and 3-101(b)(1)), prematurely ended the essential interpretive inquiry,[6] and thus erroneously applied the statute of limitations without the application of Maryland state "saving

[6] ECF No. 35 at 3, *Tang v. Schmoke*, No. 1:19-cv-02965-SAG (D. Md. Mar. 3, 2021)

statute" (Md. Rules 2-101(b)(1) and 3-101(b)(1)) in the case.

Additionally, given the Maryland state "saving statute" (Md. Rules 2-101(b) and Md. Rules 3-101(b)), if this case was even re-filed in a Maryland state circuit court rather than in the U.S. District Court, the instant suit should have been considered timely and not barred by the statute of limitations.

Moreover, this Court has already ruled that " '[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be

construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1. ". *See Foman v. Davis,* 371 U.S. 178, 181-182, 83 S. Ct. 227 (1962) Thus, although the *pro se* petitioner is a New York-barred lawyer, the petitioner should not be punished or deprived of the benefit of the state "saving statute" (Md. Rules 2-101(b) and Md. Rules 3-101(b)), merely for his re-filing the 42 U.S.C. § 1983 suit in a U.S. District Court in the State of Maryland rather than in a Maryland state circuit court or a Maryland state district court.

Issue 3: 42 U.S.C. § 1988 and *Hardin v. Straub*, 490 U.S. 536, 538-539 (1989)

As already noted above, the underlying 42 U.S.C. § 1983 claim/action was initially filed in the district

court on July 18, 2018, but was dismissed on jurisdictional grounds only. The next day subsequent to the initial dismissal for lack of jurisdiction, the petitioner refiled the instant claim/action again in the same court. But the instant second case was dismissed on statute of limitations grounds only. The lower courts now twice dismissed this 42 U.S.C. § 1983 claim/action without any determination of the merits, which is against the well-settled strong public policy in favor of deciding cases on the merits[7].

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[7] *See Hernandez v. City of El Monte*, 138 F.3d 393 (9th Cir. 1998) (noting that "[the] policy favoring resolution on the merits 'is particularly important in civil rights cases.' " (quoting *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987))); *See also Foman v. Davis*, 371 U.S. 178, 181-182, 83 S. Ct. 227 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957))

The lower courts' rigid application of Maryland state statute of limitations and state tolling rules to this refiled claim, which again led to the disposition of this civil rights claim without any determination of the merits, contravened settled federal policy. Thus, the lower courts' such rigid application of state law to this refiled 42 U.S.C. § 1983 claim is "inconsistent with the Constitution and laws of the United States"[8] and should be barred[9] and reversed.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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[8] 42 U.S.C. § 1988

[9] *See also Hardin v. Straub*, 490 U.S. 536, 538-539 (1989)

Respectfully submitted,

Dated: February 22, 2022

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APPENDIX