

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL JONES,

PETITIONER,

vs.

FRANK A. SEDITA, ET AL.,

RESPONDENTS.

MOTION DIRECTING THE CLERK TO
FILE OUT OF TIME PETITION FOR
WRIT OF CERTIORARI

The Petitioner asks leave to file an out of time Petition for Writ of Certiorari, and that the Clerk be directed to do so in accordance with Rule 21 of the Supreme Court of the United States. In support of this motion Petitioner states:

1. Daniel Jones, Petitioner herein sought review of the Court of Appeals for the Second Circuit, in **Jones v. Sedita, et al.**, Docket Number 16-3210, entered on January 25, 2017.

2. A motion to extend time to file for reconsideration was granted until March 31, 2017.

3. On May 9, 2017, the Second Circuit denied petition for panel rehearing, and rehearing en banc. Although the Court issued

the order on May 2, 2017 and the mandate issued on May 9, 2017, petitioner had never received or informed of the decision. Petitioner had made several request to the Court's Clerk for months inquiring about the status of his motion, and finally on August 7, 2017 he received a response to his inquiry. The Court Clerk provided only a copy of an updated court docket sheet which reflected that a decision had been rendered on his motion for rehearing and was denied.

4. Based thereon, petitioner immediately addressed a letter to the United States Supreme Court Clerk and annexed exhibits, ~~expressing~~ his concerns and inquiring how to seek appropriate relief from the court as his time to file a writ of certiorari was limited. [Annexed as Exhibits A].

5. Also on August 7 and 8, 2017, petitioner addressed letters to the Clerk of the Second Circuit explaining that he had not received notice of the Court's decision until August 7, 2017, after his time had expired to file for a writ of certiorari to the Supreme Court of the United States. [Exhibit B]. Additionally, on August 7, 2017, petitioner attached thereto a motion to Recall and/or vacate the mandate, and for reconsideration of the decision based on LaMar v. Ebert, 681 Fed. Appx. 279(4th Cir. Mar. 2017, also a determination of whether the Court considered his Rule 59 motion to the district court.

6. On September 4, 2017 after still no receiving a copy of the court's order dated May 2, 2017 which denied relief to petitioner's rehearing motion, again wrote the Clerk for the Second Circuit seeking to obtain a copy of that order. [Exhibit C].

7. The United States Court of Appeals for the SEcond Circuit issued an Order on August 22, 2017, directing that the Mandate be Recalled for the sole purpose of allowing petitioner to petition for a writ of certiorari . The Court also held that it had considered the district court's denial of the Rule 59 motion. [Exhibit D].

8. Petitioner attempted numerous times to file an application for an extension of time to file a petition for a writ of certiorari to a Justice of the United States Supreme Court. Each time the applciation was rejected by the Court Clerk on September 26, 2017 and October 27, 2017.stating that the application is out of time. [Exhibit E].

9. Subsequently, petitioner filed for an extraordinary writ of mandamus. After several attempts the mandamus was acknowleged on January 3, 2018. By letter dated March 22, 2018, petitoner was advised by the Court Clerk that his papers were returned because an extraordinary writ of mandamus may only request the Court to order a lower court to take a particular action. [Exhibit F].

10. Petitioner after speaking with a Court Clerk on March 22, 2018, he filed on May 15, 2018 a motion for permission seeking to have the Clerk file a late petition for a writ of certiorari. On June 6, 2018 petitioner's papers were returned as it did not include the petition for a writ of certiorari.

11. Attached hereto is petitioner's petition for a writ of certiorari.

12. Based on the aforesaid, petitioner has attempted numerous times to place before this Court a writ of certiorari seeking a review of the Court of Appeals judgment. The relief sought is

based on extraordinary circumstances which outside the powers of petitioner. Not only will granting the relief herein aid the Court's appellate jurisdiction, that warrants the exercise of the Court's discretionary power. But will also provide an avenue for a **Pro se** litigate from being denied meaningful access to the Court of review.

13. It is submitted that the motion to the Court of Appeals seeking to have the mandate recalled was appropriate as petitioner was never notified that the lower court denied relief until after the 90 days had expired for filing a writ of certiorari with this Court. As noted petitioner acted with due diligence to bring his concerns to the Courts to protect his interest in have his matter presented to the highest of review.

14. The Court of Appeals for the Second Circuit granted petitioner the right to petition for a writ of certiorari, thereby providing avenue for which to access this Court for review. A motion to recall a mandate may be sought to forestall errors that would vitiate the proceedings. The Court of Appeals possesses an inherent power to recall a mandate in recognition of its authority to use sparingly and only in exceptional circumstances. See, **Taylor v. U.S.**, 822 F.3d 84, 92 (2d Cir. 2016). It is evidence that the Second Circuit determined that there existed extraordinary circumstances to grant a recall of its mandate.

15. In **Wilkins v. U.S.**, 441 U.S. 469 (1979), this Court granted the late filing, even though it was filed 17 months late, because petitioner's court appointed attorney failed to timely file his client's writ of certiorari in a timely manner. Petitioner respectfully

submits that he was acting **Pro se** and have to rely on court official to properly serve him notice of decisions rendered by the court, especially when one is imprisoned. Moreover, petitioner did not wait for months to bring the matter to the court's attention, , rather acted immediately when he discerned the harm that was caused by government officials.

13. Petitioner further submits that appellate court's final adjudication on August 22, 2017 , recalling its mandate re-set the time period allowed for filing his writ to this Court. In accordance with 28 U.S.C. § 2101(c) and Rule 13 of the Supreme Court, the time period ran from the date of denial of review and the issuance of the recall mandate on August 22, 2017. Thus, when I attempted to file a motion for extension of time to file a writ of certiorari should have been considered timely.

14. The principle issue presented first by petitioner is: "What remedy is available when the lower court neglects to inform or provide notice to a **pro se prisoner** in a timely fashion that his motion for rehearing/en banc hearing has been denied" Especially when numerous attempts were made to the court clerk seeking the status of his case? In doing so denied him the opportunity to file a timely writ of certiorari with the Supreme Court.

15. Second: "Whether the Court of Appeals order recalling its mandate re-set the time to file a petition for writ of certiorari"?

16. In the event that either question presented is favorable to Petitioner, the principal issues for certiorari review is:

- A. Whether the lower court erred as a matter of law in dismissing Petitioner's Pro se Complaint sua sponte pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 1915A(b), because it failed to state a claim?
- B. Whether the Second Circuit Court of Appeals Decision conflicts with this Court's ruling in **Osborne** and **Skinner** and other Circuit Court decisions, regarding sufficient post-cpnviction procedural due process rights?
 - I. The question presented under **Osborne** what due process means when petitioner is denied relief under C.P.L. § 440.30(1-a)?
 - II. Whether the **Osborne** Court cited the federal statute as a model for a non-arbitrary DNA statute.
 - III. Whether Petitioner's "as-applied" challenge is barred under **Rooker-Feldman** doctrine?
 - IV. Whether the Second Circuit decision is contrary to **Skinner v. Switzer**, and other Circuit Courts?
 - V. Whether New York's DNA testing statute violates the Equal Protection Clause?

17. Finally, the language of 28 U.S.C. § 2101(c) lacks the peremptory phrase that "no appeal shall be allowed" Instead power is granted to this Court to act to avoid unfairness in extraordinary cases as represented here in petitioner's case. Whereas a request is made to this Court to exercise its supervisory power because the improper acts complained of herein resulted from overt acts of those who occupy judicial functions that petitioner has to rely upon. The time for applying for certiorari was not tolled, and if such, request relief in the interest of justice in providing meaningful access to the courts.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the relief requested herein.

Dated: July 5, 2018

Daniel Jones, C22582
NYPC
9005 River Road
P.O. Box 300
Marcy, New York 13403-0300

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 5, 2018 Daniel Jones

Daniel Jones, 92B1309
Collins Correctional Facility
P.O. Box 340
Collins , New York 14034-0340

August 7, 2017

U.S. Supreme Court
Clerk
Scott S. Harris
U.S. Supreme Court Bldg.
1 First ST. N.E.
Washington, DC 20543

Re: Jones v. Sedita, et al.
Ct of App. 2nd Cir. 16-3210

Dear Court Clerk:

On August 7, 2017 upon obtaining the court docket referenced above, I discerned that my motion for reconsideration/reconsider en banc was denied on May 2, 2017 and the mandate issued on May 9, 2017. Although these events occurred, I never received a copy of the Court of Appeals decision. Based thereon, I have requested a copy from the court.

According to the Supreme Court Rules, I had 90 days to file a Petition for Certiorari. That time has transpired resulting in me now having to file for an Application for Extension of time to Petition for Certiorari.

Could you please provide the necessary application and the rules of the Court to seek appropriate relief from the Court.

Thank you for your consideration to this matter herein.

Very truly yours,

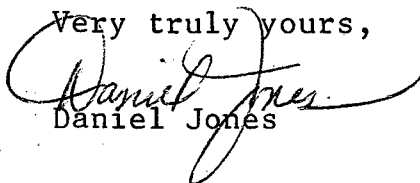

Daniel Jones

Exhibit "A"

Daniel Jones, 92B1309
Collins Correctional Facility
P.O. Box 340
Collins, New York 140343-0340

August 7, 2017

United States Court of Appeals
for the Second Circuit
Clerk of the Court
Foley Square
New York, New York 10007

Re: Jones v. Sedita, et al
Dkt No. 16-3210

Dear Court Clerk:

Please except this letter motion pro se regarding the Court's mandate issued on May 9, 2017, regarding the above referenced matter.

On August 7, 2017, I received a copy of the court's docket sheet in response to my inquiry on July 23, 2017 because of hearing nothing from the court. Upon review I discerned that the court had issued its mandate on May 9, 2017 denying my motion for reconsideration/ reconsider en banc. I was never provided a copy of the court's order then or at present do I have a copy of that decision.

Because of not knowing and being provided a copy of the court's order dated May 9, 2017, the time has expired for me to timely file a Petition for Certiorari to the U.S. Supreme Court. Hence, I am being denied meaningful access to the court to entertain review of my matter.

Additionally, on June 6, 2017, I addressed a letter to the Court concerning the court's docket sheet. My concern was whether both of my appeals had been filed with the court relating to the district court's order and judgment dated August 17, 2016 and the denial of my Rule 59 motion dated September 2, 2017. Copies of the Notice of Appeals were submitted thereto. [Letter attached as Exhibit].

Upon review of the court's docket there is no mention of the

Exhibit "B" (1)

court receiving my letter or addressing my concerns. The Court docket reflects only one (1) notice of appeal was filed. There is nothing demonstrating that the appeals were consolidated and that the court address all the issues raised in both appeals.

Based thereon, I respectfully reuest that the Court recall its mandate or vacate the mandate, as the issues address in my Rule 69 motion was not apparantly received nor addressed by the court, and no action was taken on it.

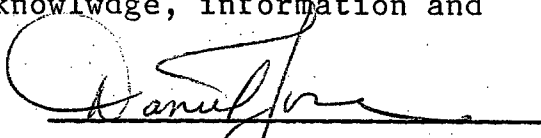
Additionally, the mandate should be recall to protect my right to Petition the Supreme Court in a timely manner as I was not made aware of the mandate until 90 days after this court issued its decision.

I rspectfully submit this pro se motion, as presently I do not have a copy of the court decision dated May 9, 2017 and the time has thus far passed for filing a petition for Certiorari. Further, I do not know whether the court has consolidated both appeals and considered all the issues i raised on appeal.

For the foregoing reasons, the Court should recall, vacate its previous decision, and.or issue an amended decision, and /or provide meaningful relief that is just and proper.

I declare under the penalty of perjury that the foregoing is true and correct, to the best of my knowlwdge, information and belief.

Executed on August 7, 2017



Daniel Jones,
Plaintiff, Pro se

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-3210

Caption [use short title]

Motion for: Recall and/or Vacate

Mandate issued on May 9, 2017

JONES v. SEDITA, et al.

Set forth below precise, complete statement of relief sought:

Recall and/or vacate mandate, determine whether
consideration of Rule 59 motion was done, notice of
appeal filed as court docket does not reflect both
notice of appeals were considered or consolidated. Now
provided court order to timely petition Supreme Court review,
Reconsider based on LaMar v. Ebert, 2017 WL 1040450
(4th Cir, Mar. 17, 2017)

MOVING PARTY: Daniel Jones, pro se

☒ Plaintiff

☐ Defendant

☐ Appellant/Petitioner

☐ Appellee/Respondent

OPPOSING PARTY: Frank A. Sedita, et al.

MOVING ATTORNEY: Daniel Jones pro se

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: N.Y.S. Attorney General

Collins Correctional Facility

P.O. Box 340

Collins, New York 14034-0340

Attorney General Office of N.Y.S.

120 Broadway

New York, NY 10271-0332

Court/Judge/Agency appealed from: U.S. Western District Court (Skretmy)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

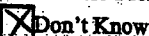


☐ No (explain):

Opposing counsel's position on motion:



Does opposing counsel intend to file a response:



FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?



☐ No

Has this relief been previously sought in this Court?



☒ No

Requested return date and explanation of emergency:

Due to not receiving a timely copy of the
court's order denying relief, deadline for filing
Petition for Certiorari has expired - As of this
date have not received a copy from the court

Is oral argument on motion requested?



(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?



If yes, enter date:

Signature of Moving Attorney:

Daniel Jones

Date: Aug. 7, 2017

Service by: ☐ CM/ECF



[Attach proof of service]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:

JONES

CERTIFICATE OF SERVICE*

Docket Number: 16-3210

v.

Sedita, et al.

I, Daniel JONES, hereby certify under penalty of perjury that
(print name)
on August 7, 2017, I served a copy of Motion & Supporting
(date) declaration for Recall and/or vacate mandate issued May 9, 2017
(list all documents)

by (select all applicable)**

☐ Personal Delivery

☒ United States Mail

☐ Federal Express or other
Overnight Courier

☐ Commercial Carrier

☐ E-Mail (on consent)

on the following parties:

<u>N.Y.S. Attorney General</u>	<u>120 Broadway</u>	<u>New York</u>	<u>N.Y</u>	<u>10271-6332</u>
Name	Address	City	State	Zip Code

<u>N.Y.S. Court of Appeals Clerk</u>	<u>40 Foley Sq.</u>	<u>New York</u>	<u>NY</u>	<u>10007</u>
Name	Address	City	State	Zip Code

Name	Address	City	State	Zip Code

Name	Address	City	State	Zip Code

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

August 7, 2017
Today's Date

Daniel Jones
Signature

Daniel Jones, 92B1309
Collins Correctional Facility
P.O. Box 340
Collins, New York 14034-0340

August 8, 2017

United States Court of Appeal
for the Second Circuit
Clerk of the Court
Catherine O'Hagan Wolfe
40 Foley Sq.
New York, NY 10007

Re: Jones v. Sedita, et al.
Dkt. No. 16-3210

Dear Clerk:

On August 7, 2017, I received a copy of the court's docket sheet in response to my inquiry by letter dated July 23, 2017. Upon review I discerned that the court issued a decision denying my motion for reconsideration on May 9, 2017. At no time was I provided a copy of the order or informed that a decision had been rendered by the court even though I addressed several letters to the court.

On May 8, 2017, I requested an updated docket sheet. That request was never answered, nor is it reflected on the recent court docket sheet. Likewise on June 6, 2017, I again requested an updated docket sheet along with other information. That request too, was not acknowledged, nor is it reflected on the recent court docket. [See, attached Exhibits].

It is only after my time has expired to Petition the Supreme Court for Certiorari that a response is forthcoming, and still have not received a copy of the court's order denying my motion. By such action I am being hindered from timely making an application to the Supreme Court.

Based on these factors I submitted to your attention dated August 7, 2017, the day I received the court docket sheet, a motion to recall and/or vacate the mandate with attached declaration.

Hopefully, this matter can be resolved expeditiously as not to affect my right to access the courts.

Thank you for your attention to this matter herein.

Very truly yours,


Daniel Jones

"B" (5)

C
Daniel Jones, 92B1309
Collins Correctional Facility
P.O. Box 340
Collins, New York 14034-0340

September 4, 2017

U.S. Court of Appeals
for the Second Circuit
Clerk
United States Courthouse
Foley Square
New York, New York 10007

Re: JONES v. Sedita, et al.
Dkt. No. # 16-3218

Dear Clerk:

As of this dated letter, I still have not received a copy of the Court's order, dated May 9, 2017, although I have made this known in several letters to the Court. And, because of such, I had to file a motion to recall the mandate.

Could you please provide me a copy of the Order,
Thank-you.

Very truly yours,

Daniel Jones

Appendix "C"

W.D.N.Y.
16cv398
Skretny, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of August, two thousand seventeen.

PRESENT:

Ralph K. Winter,
José A. Cabranes,
Gerard E. Lynch,
Circuit Judges.

Daniel Jones,

Plaintiff-Appellant,

v.

ORDER

16-3210-cr

Frank A. Sedita, III, Erie County District Attorney,
John Simich, Director of the Erie County Central Police Services Laboratory,
Daniel Derenda, Commissioner of the Buffalo Police Department,
Andrew Cuomo, Governor of New York State,

Defendants-Appellees.

Appellant, *pro se*, moves to recall the mandate so he may file a timely petition for a writ of certiorari and for clarification of whether the Court considered his appeal from the district court's order denying his Rule 59 motion.

IT IS HEREBY ORDERED that the mandate in the above-captioned case is **RECALLED** for the sole purpose of allowing the Plaintiff-Appellant to petition for a writ of certiorari. In dismissing the Plaintiff-Appellant's appeal, we did consider the District Court's denial of his Rule 59 motion.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe

Exhibit "D"

**Additional material
from this filing is
available in the
Clerk's Office.**