18-1859
Mendes Da Costa v. Marcucilli

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

(Filed Oct. 31, 2019)

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**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 31st day of October, two thousand nineteen.**

PRESENT:

ROBERT A. KATZMANN,
*Chief Judge*,
CHRISTOPHER F. DRONEY,
*Circuit Judge*,
JEFFREY ALKER MEYER,*
*District Judge*.

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Jose Antonio Mendes Da Costa,

*Plaintiff-Appellant*,

v. 18-1859

Sergeant Michael Marcucilli, Mount Vernon Police Department, Police Officer Pereira, badge #2064, Mount Vernon Police Department, Police Officer Johnny Camacho, Mount Vernon Police Department, Detective Jesus Garcia, Mount Vernon Police Department, Detective Michael Martins, Town of Eastchester Police Department, Pedro Coelho, Bakery Management, Third Party unlawful businesses with C.M.V., Cecilia Rodrigues, Third Party (in flight), Private Investigator Michael Lentini, City of Mount Vernon Corporate Counsel, Bartender Fernando Marques, Third Party, Carpenter Moacir Castro, Third party and Fernando Marques, Handyman, Attorney Hina Sherwani, Yonkers Corporate Counsel, former Mount Vernon C.C.,

*Defendants-Appellees*.

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* Judge Jeffrey Alker Meyer, of the United States District Court for the District of Connecticut, sitting by designation.

FOR PLAINTIFF-APPELLANT:
Jose Antonio Mendes da Costa, pro se, Mount Vernon, N.Y.

FOR DEFENDANTS-APPELLEES:
No appearance.

Appeal from a judgment of the United States District Court for the Southern District of New York (Seibel, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Appellant Jose Antonio Mendes da Costa, proceeding pro se, appeals the district court's order sua sponte dismissing his complaint and the order issuing a leave-to-file sanction. Appellant also moves for judicial notice of a February 2019 state court decision. Prior to the present case, Appellant had initiated four separate actions in the district court. *See Mendes Da Costa v. Marcucilli*, S.D.N.Y. 10-cv-4125 ("*Mendes Da Costa I*"); *Mendes Da Costa v. Lee*, S.D.N.Y. 10-cv-8564 ("*Mendes Da Costa II*"); *Mendes da Costa v. Marques*, S.D.N.Y. 13-cv-4271 ("*Mendes Da Costa III*"); and *Mendes Da Costa v. Marcucilli*, S.D.N.Y. 15-cv-8500 ("*Mendes Da Costa IV*"). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

As an initial matter, we have jurisdiction over the appeal of both the dismissal order and the sanction order. Because the district court did not set out either order in a separate document, *see* Fed. R. Civ. P. 58(a),

judgment was deemed entered 150 days after each order was docketed, i.e., October 11, 2018 for the dismissal order and November 9, 2018 for the sanction order. Fed. R. App. P. 4(a)(7)(A)(ii). Appellant's notice of appeal was filed on June 20, 2018, and therefore it was timely as to both orders. Fed. R. App. P. 4(a)(2) (providing that a notice of appeal filed before the entry of judgment "is treated as filed on the date of and after the entry"). Although Appellant only delineated the sanction order in his notice of appeal, that was the last order issued by the district court and the order that closed the case; thus, the appeal applies to "all prior orders." *See Elliott v. City of Hartford*, 823 F.3d 170, 173 (2d Cir. 2016) (per curiam). Further, it is evident from his brief that Appellant intended to appeal the dismissal order as well, and no party is prejudiced. *See id.* at 174.

## I. Dismissal Order

District courts have the inherent authority to sua sponte dismiss a fee-paid action as frivolous. *See Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000) (per curiam). The dismissal of a complaint as barred by res judicata is reviewed de novo. *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 157 (2d Cir. 2017). "The doctrine of res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* (internal quotation marks and italics omitted).

The district court properly dismissed the complaint as barred by res judicata. All of Appellant's present claims, including the cover-up claims, are identical in form and substance to the claims raised in *Mendes Da Costa IV*, which was dismissed with prejudice as frivolous and for failure to comply with Fed. R. Civ. P. 8. "[A] dismissal for failure to state a claim operates as a final judgment on the merits and thus has res judicata effects." *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (internal quotation marks omitted); *see also Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986) ("A dismissal with prejudice has the effect of a final adjudication on the merits . . . and bars future suits brought by the plaintiff upon the same cause of action.").

Appellant's addition of one new defendant in this action who was not named in *Mendes Da Costa IV* does not alter the outcome. Appellant fails to make any specific allegations against that defendant throughout the complaint. Instead, he details facts that involve the same set of events as *Mendes Da Costa IV* and does not explain why he could not have brought any such (unspecified) claims against the new defendant in *Mendes Da Costa IV*. *See Burton v. Undercover Officer*, 671 F. App'x 4, 5 (2d Cir. 2016) (summary order) (noting that defendant who was not party to prior lawsuit may invoke collateral estoppel defensively against plaintiff who previously lost on the merits).

Finally, Appellant's argument that the district court was biased against him is unavailing. The district court correctly described Appellant's litigation history, and its decisions dismissing *Mendes da Costa*

*III* and *Mendes Da Costa IV* survived review by this Court. In any event, a district court's decisions typically do not support a claim of judicial bias, and Appellant fails to proffer any other evidence of bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."); *Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009) (per curiam) (same).

## II. Sanction Order

We review the imposition of a leave-to-file sanction for abuse of discretion. *Gollomp v. Spitzer*, 568 F.3d 355, 368 (2d Cir. 2009). A district court may impose a leave-to-file sanction on "litigants who abuse the judicial process," such as by filing "repetitive and frivolous suits." *Shafii v. British Airways, PLC*, 83 F.3d 566, 571 (2d Cir. 1996). Prior to imposing a sanction, a court must give notice and opportunity to be heard, *see Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998) (per curiam), and the sanction must be "appropriately narrow," *Bd. of Managers of 2900 Ocean Ave. Condo. v. Bronkovic*, 83 F.3d 44, 45 (2d Cir. 1996) (per curiam).

Here, the district court did not abuse its discretion in imposing the filing injunction. The court warned Appellant in 2016, in his fourth action in that court and the third action to be dismissed as frivolous, that the filing of future frivolous litigation could result in a leave-to-file sanction. When that warning failed to deter Appellant from filing the present, nearly identical action, the district court ordered Appellant to show cause why a leave-to-file sanction should not issue. The

court thus gave him an opportunity to be heard, and considered his response, prior to imposing the leave-to-file sanction. Further, the filing injunction is "appropriately narrow" because it is limited to civil actions filed in the Southern District of New York. *See Iwachiw v. N.Y. State Dep't of Motor Vehicles*, 396 F.3d 525, 529 (2d Cir. 2005) (per curiam) (finding that a similar leave-to-file sanction was appropriate because "it does not extend to filings in other federal district courts or the New York state courts"). And the sanction is akin to the type of leave-to-file sanctions that we typically impose on similarly vexatious litigants. *See, e.g.*, *Xiu Jian Sun v. Dillon*, 699 F. App'x 90, 91 (2d Cir. 2017) (summary order) (directing litigant to show cause "why he should not be required to seek leave of this Court before filing any appeals or other documents"). Moreover, contrary to Appellant's assertion, the sanction does not violate his First Amendment rights. *See Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1985) (per curiam).

Finally, we deny Appellant's motion for judicial notice as moot.

We have considered all of Appellant's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| JOSE ANTONIO MENDES da COSTA,<br>Plaintiff,<br>-against-<br>M.V.P.D. P.O. PEREIRA, et al.,<br>Defendants. | 18-CV-2948 (CS)<br>BAR ORDER UNDER 28 U.S.C. § 1651<br>(Filed Jun. 12, 2018) |

CATHY SEIBEL, United States District Judge:

Plaintiff filed this action *pro se.* On May 14, 2018, the Court dismissed the action as barred under the doctrine of claim preclusion, noted that Plaintiff had been warned that if he continued such filings he would be subjected to sanctions, and directed Plaintiff to submit a declaration setting forth good cause why the Court should not issue an order barring him from filing new civil actions in this Court without prior permission. Plaintiff filed a declaration on June 6, 2018, but his arguments against imposing the bar order are insufficient.

## DISCUSSION

Plaintiff uses the declaration as another opportunity to challenge actions taken by the defendants and this Court in his prior case, *Mendes da Costa v. Marcucilli*, No. 10-CV-4125 (CS) (S.D.N.Y. Dec. 14, 2012) (*Mendes da Costa I*). He contends that because he is

not attorney who is knowledgeable about the law, his prior pleadings were insufficiently or incorrectly pleaded but that there exist genuine issues of material fact that the Court should consider. Plaintiff asks the Court to grant him another opportunity to amend his claims in *Mendes da Costa v. Marcucilli*, No. 15-CV-8500 (CS) (S.D.N.Y. Jan. 26, 2017) (*Mendes da Costa II*), or alternatively, to consolidate this action with that case. He then proceeds to reassert the same claims – that the defendants in *Mendes da Costa I* fabricated evidence and committed other wrongs – that the Court dismissed in *Mendes da Costa II* and this action. Plaintiff's declaration fails to provide sufficient reason why the Court should not impose a filing bar.

Because of Plaintiff's pattern of repetitive and nonmeritorious litigation, the Court bars Plaintiff from filing any future civil actions in this Court without first obtaining from the Court leave to file. *See* 28 U.S.C. § 1651.

## CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff and note service on the docket. The Court bars Plaintiff from filing future civil actions in this Court without first obtaining from the Court leave to file. *See* 28 U.S.C. § 1651. Any motion for leave to file must be captioned "Application Pursuant to Court Order Seeking Leave to File," and must attach a copy of the proposed complaint and a copy of this order. If Plaintiff violates this order and files an action without

first filing a motion for leave to file, the Court will dismiss the action for failure to comply with this order. Plaintiff is warned that the continued submission of frivolous or nonmeritorious documents may result in the imposition of additional sanctions, including monetary penalties. *See id.* The Clerk of Court is further directed to terminate all other pending matters and to close this action.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: June 12, 2018
White Plains, New York

/s/ Cathy Seibel
Cathy Seibel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| JOSE ANTONIO MENDES da COSTA,<br>Plaintiff,<br>-against-<br>M.V.P.D. P.O. PEREIRA, et al.,<br>Defendants. | 18-CV-2948 (CS)<br>ORDER OF DISMISSAL AND TO SHOW CAUSE UNDER 28 U.S.C. § 1651<br>(Filed May 14, 2018) |

Cathy Seibel, United States District Judge:

Plaintiff, brings this *pro se* action, for which the filing fee has been paid, alleging that Defendants deprived him of his rights in connection with the litigation of a prior federal case and a state-court criminal prosecution. The Court dismisses the complaint for the reasons set forth below.

## STANDARD OF REVIEW

The Court has the authority to dismiss a complaint, even when the plaintiff has paid the filing fee, if it determines that the action is frivolous, *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000) (*per curiam*) (citing *Pillay v. INS*, 45 F.3d 14, 16-17 (2d Cir. 1995) (*per curiam*) (holding that Court of Appeals has inherent authority to dismiss frivolous appeal)), or that the Court lacks subject matter jurisdiction, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). The Court is obliged, however, to

construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (emphasis in original) (internal quotation marks).

## BACKGROUND

In 2010, Plaintiff brought an action under 42 U.S.C. § 1983 against four members of the Mount Vernon Police Department, asserting claims of false arrest and use of excessive force stemming from an incident on November 27, 2008. The case, which was assigned to this Court, ended with a stipulation of settlement and dismissal. *See Mendes da Costa v. Marcucilli*, No. 10-CV-4125 (CS) (S.D.N.Y. Dec. 14, 2012) (*Mendes da Costa I*). In 2015, Plaintiff filed a 312-page complaint against the same defendants that he sued in the first case, attorneys employed by the City of Mount Vernon's Law Department, and four private Mount Vernon citizens. *See Mendes da Costa v. Marcucilli*, No. 15-CV-8500 (CS) (S.D.N.Y. Oct. 28, 2015) (*Mendes da Costa II*). Plaintiff's assertions were largely incomprehensible but made multiple references to *Mendes da Costa I*, indicating deprivation of his rights and criminal conduct arising from the litigation of the case and events after the case was settled. *Mendes da Costa II* was again assigned to this Court, and on November 13, 2015, I directed Plaintiff to file an amended complaint that complied with Rule 8 of the Federal Rules of Civil Procedure. Plaintiff subsequently filed an amended complaint in which he again made references to *Mendes da*

*Costa I* and asserted false arrest, malicious prosecution, and other claims arising out of his state-court prosecution in the Mount Vernon City Court. On January 27, 2016, I dismissed the case as frivolous and for failing to comply with Rule 8. Plaintiff appealed, and on January 10, 2017, the Second Circuit issued a summary order affirming the judgment. *See Mendes Da Costa v. Marcucilli*, 675 F. App'x 15 (2d Cir. 2017).

Plaintiff now brings this action under 42 U.S.C. §§ 1983 and 1985 against 11 defendants, 10 of whom he previously sued in *Mendes da Costa II*. He asserts that the defendants conspired to violate his rights in *Mendes da Costa I* by fabricating "unconstitutional inculpatory evidence" and suppressing evidence favorable to him prior to the settlement of the case. (Doc. 1 at 7-9.) Plaintiff also claims that I maintained "literal bias prejudice" and was complicit with the City of Mount Vernon Law Department in violating his rights. (*Id.* at 8.) He further asserts that he was unlawfully arrested on December 6, 2012, maliciously prosecuted, and that the Defendants' actions led to his May 2015 conviction in the Mount Vernon City Court. Plaintiff seeks monetary damages for the alleged deprivations in *Mendes da Costa I* and the state-court prosecution.

## DISCUSSION

### A. Claim Preclusion

The doctrine of claim preclusion, also known as *res judicata*, limits repetitious suits, establishes certainty in legal relations, and preserves judicial economy. *See*

*Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). Under the doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action to support [a subsequent civil] action." *Proctor v. LeClaire*, 715 F.3d 402, 411 (2d Cir. 2013) (internal quotation marks omitted, first alteration in original). The doctrine applies in a later litigation "if an earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) involving the same parties or their privies, and (4) involving the same cause of action." *In re Adelphia Recovery Trust*, 634 F.3d 678, 694 (2d Cir. 2011) (internal quotation marks omitted). "A party cannot avoid the preclusive effect of *res judicata* by asserting a new theory or a different remedy." *Brown Media Corp. v. Ked, Gates, LLP*, 854 F.3d 150, 157 (2d Cir. 2017) (internal quotation marks omitted).

To determine if a claim could have been raised in an earlier action, courts look to whether the present claim arises out of the same transaction or series of transactions asserted in an earlier action. *See Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001). And "a dismissal for failure to state a claim operates as 'a final judgment on the merits and thus has res judicata effects.'" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (*per curiam*) (quoting *Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009)). Further, although claim preclusion is an affirmative defense to be pleaded in a defendant's answer, *see* Fed. R. Civ. P. 8(c), *res judicata* may be raised

and addressed *sua sponte*. *See, e.g.*, *Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998) (affirming *sua sponte* application of collateral estoppel in motion for summary judgment); *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993) (*per curiam*) ("The failure of a defendant to raise *res judicata* in answer does not deprive a court of the power to dismiss a claim on that ground.").

It is clear that Plaintiff brings this action seeking to relitigate his prior claims in the complaints before this Court. He challenges actions taken by the defendants and this Court in *Mendes da Costa I*, which was dismissed with prejudice on December 14, 2012, based on a settlement agreement reached by all parties. Because *Mendes da Costa I* was dismissed with prejudice, Plaintiff may not bring another action attacking that judgment. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 287 (2d Cir. 2002) ("It is clear that a dismissal, with prejudice, arising out of a settlement agreement operates as a final judgment for *res judicata* purposes.").

Plaintiff further asserts claims of false arrest, malicious prosecution, and other claims arising out of his arrest and prosecution – many of the same claims he sought to bring in *Mendes da Costa II*, which was dismissed as frivolous and under Rule 8.[1] As Plaintiff

[1] Even if Plaintiffs claims were not precluded, they are not viable. His false arrest claim is time-barred because he filed this action outside the three-year statute of limitations period governing § 1983 claims. *See Owens v. Okure*, 488 U.S. 235 (1989); *see also Wallace v. Kato*, 549 U.S. 384, 397 (2007) (holding that false arrest claim accrues at the time the claimant is detained pursuant

seeks to sue many of the same defendants or their privies and asserts the same or variations of the same claims concerning the same transactions, these claims are also precluded. The Court therefore dismisses Plaintiff's complaint as barred under the doctrine of claim preclusion.

District courts generally grant a *pro se* plaintiff an opportunity to amend a complaint to cure its defects, but leave to amend is not required where it would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123-24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Because the defects in Plaintiff's complaint cannot be cured with an amendment, the Court declines to grant Plaintiff leave to amend his complaint.

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to legal process). Further, as Plaintiff admits that he was convicted and he does not allege that the conviction was reversed, expunged, or otherwise declared invalid, his false arrest, malicious prosecution, and other claims challenging his arrest and prosecution are barred by the favorable termination rule set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). As the United States Supreme Court explained:

> a state prisoner's § 1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

*Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (italics in original). Plaintiff therefore fails to state a claim for relief in connection with his December 6, 2012 arrest and subsequent state-court prosecution.

**B. Order to Show Cause**

In addition to *Mendes da Costa I, Mendes da Costa II*, and this action, Plaintiff has filed several other actions in this Court, which were dismissed *sua sponte*. *See Mendes da Costa v. Marques*, No. 13-CV-4271 (LAP) (S.D.N.Y. Dec. 19, 2013) (dismissal for failure to state a claim on which relief may be granted and for lack of subject matter jurisdiction), *appeal dismissed*, No. 14-214 (2d Cir. June 11, 2014); *Mendes da Costa v. Lee*, No. 10-CV-8564 (LAP) (S.D.N.Y. May 2, 2011) (dismissal because the prosecutor-defendants were immune from suit and under the *Rooker-Feldman* doctrine). Because Plaintiff's continued submission of nonmeritorious actions places an undue burden on the Court, I warned him in *Mendes da Costa II* that if he continues to file duplicative or frivolous litigation, I will enter an order barring him from filing new civil actions in this Court without obtaining leave of the Court.

In light of Plaintiff's failure to heed my warning, he is ordered to show cause by declaration why he should not be barred from filing any further actions in this Court without first obtaining permission to file his complaint. *See* 28 U.S.C. § 1651; *see also Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998) (*per curiam*) ("The unequivocal rule in this circuit is that the district court may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard."). Within thirty days of the date of this order, Plaintiff must submit to this Court a written declaration setting forth good cause why the

Court should not impose this injunction upon him. If Plaintiff fails to submit a declaration within the time directed, or if Plaintiff's declaration does not set forth good cause why this injunction should not be entered, he will be barred from filing any future actions in this Court unless he first obtains permission from this Court to do so.

## CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff and note service on the docket. Plaintiff's complaint is dismissed because it is barred under the doctrine of claim preclusion. Plaintiff shall have thirty days to show cause by declaration why an order should not be entered barring him from filing any future action in this Court without prior permission. *See* 28 U.S.C. § 1651. A declaration form is attached to this order.

Although Plaintiff paid the filing fee for this action, the Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: May 14, 2018
White Plains, New York

/s/ Cathy Seibel
CATHY SEIBEL
U.S.D.J.

**APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH & 10TH JUDICIAL DISTRICTS**

Submitted - December 18, 2018 Term

TERRY JANE RUDERMAN, J.P.
BRUCE E. TOLBERT
JERRY GARGUILO, JJ

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The People of the State of New York, Respondent, v Jose Dacosta, Appellant.

DECISION & ORDER

(Filed Feb. 28, 2019)

Appellate Term Docket No. 2015-1433 W CR

Lower Court # 12-4996

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Feldman and Feldman (Arza Feldman and Steven A. Feldman of counsel), for appellant.

Westchester County District Attorney (Jennifer Spencer and William C. Milaccio of counsel) for respondent.

Appeal from a judgment of the City Court of Mount Vernon, Westchester County (Helen M. Blackwood, J.), rendered May 12, 2015. The judgment convicted defendant, after a nonjury trial, of harassment in the second degree, and imposed sentence.

ORDERED that the judgment of conviction is reversed, on the law, and, as a matter of discretion in the interest of justice, the accusatory instrument is dismissed.

Defendant was charged in a superseding information with harassment in the second degree (Penal Law § 240.26 [2]). By order dated January 9, 2013, the City Court ordered a competency hearing pursuant to CPL article 730. However, the court proceeded to trial without having conducted the hearing, following which it found defendant guilty of the charged offense.

It is well settled that once a trial court determines that a competency examination is warranted, the failure to strictly follow the procedures mandated by CPL article 730.30 deprives a defendant of the right to a full and fair determination of his mental capacity to stand trial (*see People v Armlin*, 37 NY2d 167 [1975]; *People v Hussari*, 5 AD3d 697 [2004]; *People v Torres*, 162 AD2d 482 [1990]).

We find that, due to the passage of time (approximately three years and six months) since the judgment of conviction was rendered, and as the People concede that a reconstruction hearing of defendant's mental capacity to stand trial is not possible in this case (*see People v Peterson*, 40 NY2d 1014 [1976]), the judgment of conviction must be reversed (*see People v Torres*, 162 AD2d at 483; *cf. People v Hussari*, 17 AD3d 483 [2005]). Since defendant has served his sentence and no penological purpose would be served in remitting the case for further proceedings, we agree with the People that, under the circumstances, the accusatory instrument should be dismissed (*see People v Kwas*, 54 Misc 3d 138[A], 2017 NY Slip Op 50147[U] [App term, 2d Dept, 9th & 10th Jud Dists 2017]).

Accordingly, the judgment of conviction is reversed, and, as a matter of discretion in the interest of justice, the accusatory instrument is dismissed.

RUDERMAN, J.P. TOLBERT and GARGUILO, JJ., concur.

ENTER:

/s/ Paul Kenny
Paul Kenny
Chief Clerk

CERTIFICATE OF DISPOSITION SEC. 380.60 CPL

STATE OF NEW YORK -MOUNT VERNON
CITY COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

JOSE DACOSTA

DOCKET #: 12-4996 DOB: 10-29-1965

The above named defendant having been brought before Hon. Helen M. Blackwood, Judge of the MOUNT VERNON CITY COURT, charged with:

PL-120.50-03 -AM-, 3-STALKING - 3RD
Red. to PL-240.26 -V -, 2-HARASSMENT 2ND-PHY CONTACT
PL-240.26-02 -V -, 2-HARASSMENT 2ND-FOLLOW PERSO

was thereafter on May 12, 2015 duly disposed of as follows:

PLEAD GUILTY TO REDUCED CHARGE HARASSMENT 2ND (VIOLATION) PL-240.26 01 IN FULL SATISFACTION

IT IS ADJUDGED THAT SUCH DEFENDANT

____ Be imprisoned in the WESTCHESTER County Jail for a term of _____

____ Paid the fine(s) of _____

_X_ Received a CONDITIONAL DISCHARGE.

____ Received an UNCONDITIONAL DISCHARGE.

____ Received _____ probation under the supervision of the WESTCHESTER County Probation Department.

__X__ Pay a Mandatory Surcharge of $95.00 and a Crime Victim Fee of $25.00.

__X__ Other: Performed 30 Hours of Community Service.

Date at the CITY OF MOUNT VERNON on April 4, 2017

/s/ Lawrence E. Darden, Jr.
LAWRENCE E. DARDEN, JR.
CHIEF CLERK

**COUNTY OF WESTCHESTER**

Incident # 12-44659

Non-Family TOP: Vera Almeda

**MISDEMEANOR INFORMATION**

**THE PEOPLE OF THE STATE OF NEW YORK**

**-against-**

**JOSE DACOSTA** 80 Gramatan Ave, Apt #40, Harrison, NY

(DOB: 10/29/1965)
Defendant

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Be it known that the complainant herein Officer PEREIRA, of the City of Mount Vernon Police Department, Westchester County, New York, accuses the defendant named above of the following offenses committed at and near Gramatan Avenue and West Sidney Avenue, City of Mount Vernon, New York on or on and about between the months of October 1, 2012 to December 6th 2012.

**COUNT ONE:** The Offense of STALKING IN THE THIRD DEGREE, a violation of Penal Law PL 120.50.03 AM3

The Defendant(s) at the above date, time and place did with intent to harass, annoy or alarm a specific person, intentionally engage in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury and serious physical injury, the commission of a sex offense against, and the

kidnapping, unlawful imprisonment and death of such person or a member of such person's immediate family.

To wit: At the above date, time and place, and over the course a period of time the defendant has consistently stood in front of Vera Almeda's beauty salon where he curses and makes statements to her like "you are whore, you will die." He has also been following Ms. Almeda around Mount Vernon for awhile when she exits her beauty salon. The defendants' action caused annoyance and alarm to the victim. Said course of conduct directed at the victim was also likely to cause the victim to be placed in reasonable fear of physical injury or serious physical injury.

The above allegations of fact are made by the complainant herein upon information and belief, with the sources of complainant's information and the grounds for her belief being police investigation and supporting deposition.

**NOTICE: PURSUANT TO THE PENAL LAW SECTION 210.45, IT IS A CRIME PUNISHABLE AS A CLASS A MISDEMEANOR TO KNOWINGLY MAKE A FALSE STATEMENT HEREIN.**

December 7, 2012 [Illegible] 2064
Signed

Be it known that the complainant herein Officer, Yant, of the City of Mount Vernon Police Department, Westchester County, New York, accuses the defendant named above of the following offenses committed at and near Gramatan Avenue and West Sidney Avenue,

City of Mount Vernon, New York on or on and about between the months of October 1, 2012 to December 6th 2012.

**COUNT ONE:** The Offense of STALKING IN THE THIRD DEGREE, a violation of Penal Law PL 120.50 03 AM3

**COUNT TWO:** The Offense of HARASSMENT 2ND-PHYSICAL CONTACT, a violation of Penal Law PL2402602 V2

The Defendant(s) at the above date, time and place did with intent to harass, annoy or alarm a specific person, intentionally engage in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury and serious physical injury, the commission of a sex offense against, and the kidnapping, unlawful imprisonment and death of such person or a member of such person's immediate family. The Defendant(s) at the above date, time and place did with intent to harass, annoy or alarm another person, he or she follows a person in or about a public place or places.

To wit: At the above date, time and place, and over the course of nearly two months and beyond, the defendant has consistently stood in front of Vera Almeda's beauty salon where he curses and makes statements to her like "you are whore, you will die." He has also been following Ms. Almeda around Mount Vernon for awhile when she exits her beauty salon. The defendants' action caused annoyance and alarm to the victim and served no legitimate purpose. Said course of conduct

directed at the victim was also likely to cause the victim to be placed in reasonable fear of physical injury or serious physical injury,

The above allegations of fact are made by the complainant herein upon information and belief, with the sources of complainant's information and the grounds for her belief being police investigation and supporting deposition.

**NOTICE: PURSUANT TO THE PENAL LAW, SECTION 210.45, IT IS A CRIME PUNISHABLE AS A CLASS A MISDEMEANOR TO KNOWINGLY MAKE A FALSE STATEMENT HEREIN.**

December 10, 2012 Officer Yant #2097
Signed

****LOST BAIL RECEIPT AFFIDAVIT***

STATE OF NEW YORK:
COUNTY OF WESTCHESTER:
CITY OF MOUNT VERNON:

DOCKET# 12-4996

RECEIPT # 71853

Jose Nogueira being duly sworn, deposes and says:

On 1/22/13 s/he deposited with the Clerk of the City Court of Mount Vernon, the sum of $2000.—— as bail for the appearance of Jose DaCosta in the

City Court of Mount Vernon, N.Y., upon a charge of

PL-120.50 (Stalking-3rd) Jose DaCosta

S/He has lost or misplaced the receipt, therefore S/he states that no part of the $2000.00 has been assigned.

/s/ X Jose Nogueira
Depositor

Sworn to before me this
12th day of May, 2015

/s/ [Illegible]
Clerk of Court

Received from the Clerk of the City of Mount Vernon, N.Y. the sum of $1940.00

representing the return of cash bail deposited.

| 5/12/15 | /s/ X Jose Nogueira |
|---|---|
| Dated | Depositor |

Certificate #: U-000000689-F Page 1 of 1

**MOUNT VERNON CITY COURT**

[SEAL]

2 Roosevelt Square North Floor 2nd,
Mount Vernon, NY 10550
Phone: (914) 831-6440 Fax: (914) 824-5511

**FEE**
**Non-Public**
**Version**

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The People of the State of New York
vs.
**Jose Dacosta**

**Certificate of Disposition**
Docket Number:
**CR-02554-12**
Legacy Docket Number:
**12-4996**

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Defendant DOB: **10/29/1965**
Arrest Date: **12/06/2012**
Arraignment Date: **12/07/2012**

THIS IS TO CERTIFY that the undersigned has examined the files of the **Mount Vernon City Court** concerning the above entitled matter and finds the following:

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**Count 1:**

**Arraignment Charge:** PL 120.50 03 AM Stalking 3rd:Threat Injury **SEALED 160.55**

**Charge Weight:** AM

**Disposition:** Reduced to (Count #2)

**Disposition Date:** 11/17/2014

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**Count 3:**

**Arraignment Charge:** PL 240.26 02 V Harassment-2nd:Follow Person **SEALED 160.55**

**Charge Weight:** V

**Disposition:** Covered by (Count #2)

**Disposition Date:** 11/17/2014

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**Count 2:**

**Incident Date:** 12/06/2012

**Conviction Charge:** PL 240.26 **SEALED 160.55**

**Charge Weight:** V

**Conviction Charge Description:** Harassment-2nd:Phy Contact

**Conviction Type:** Pled Guilty

**Conviction Date:** 11/17/2014

**Sentence Highlights:**

- Conditional Discharge (1 Years)
- Surcharge (MS ($95.00), CVAF ($25.00) - due 05/12/2015)

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**A balance remains due and owing for fines, fees and/or surcharges imposed at sentence.**

Dated: **January 14, 2020** /s/ [Illegible]

**Chief Clerk/Clerk of the Court**

It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation scaled pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant

to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. [Executive Law § 296 (16)]

Conviction charges may not be the same as the original arrest charges.

Arraignment charges may not be the same as the original arrest charges.

CPL 160.55: Official records related to the arrest and prosecution on file with the Division of Criminal Justice Services, police agencies and/or the prosecutor's office are sealed, however, court records remain available for public inspection.

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**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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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 11th day of December, two thousand nineteen.

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Jose Antonio Mendes Da Costa,

Plaintiff - Appellant,

v.

Sergeant Michael Marcucilli, Mount Vernon Police Department, Police Officer Pereira, badge #2064, Mount Vernon Police Department, Police Officer Johnny Camacho, Mount Vernon Police Department, Detective Jesus Garcia, Mount Vernon Police Department, Detective Michael Martins, Town of Eastchester Police Department, Pedro Coelho, Bakery Management, Third Party unlawful businesses with C.M.V., Cecilia Rodrigues, Third Party (in flight), Private Investigator Michael Lentini, City of Mount Vernon Corporate Counsel, Bartender Fernando

**ORDER**

(Filed Dec. 11, 2019)

Docket No: 18-1859

Marques, Third Party, Carpenter
Moacir Castro, Third party and
Fernando Marques, Handyman,
Attorney Hina Sherwani, Yonkers
Corporate Counsel, former
Mount Vernon C.C.,

Defendants - Appellees.

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Appellant, Jose Antonio Mendes Da Costa, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

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