

20-8281

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

DEC 18 2020

OFFICE OF THE CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES

---

Dominic M. FRANZA - PETITIONER

vs.

James STINSON, Superintendent - RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

**ORIGINAL**

Dominic M. Franza  
92A3659  
Fishkill Corr. Facility  
P.O. Box 1245  
Beacon, N.Y. 12508

### QUESTION PRESENTED

Was it an abuse of discretion for the Second Circuit to deny Petitioner's Recall of the Mandate motion when the Second Circuit's very own decisions reveal Petitioner was entitled to a Recall of the Mandate under exact circumstances.

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### APPLICATION OF PETITIONER

The Petitioner, Dominic M. Franza, respectfully requests that this Court grant Certiorari, and reverse the judgment of the United States Court of Appeals for the Second Circuit denying a Recall of the Mandate for abuse of discretion. Calderon v. Thompson, 523 U.S. 538, 549 (1998).

### OPINIONS BELOW

The initial Decision of the United States Court of Appeals for the Second Circuit denying Petitioner's application to file a Second or Successive habeas petition, the mandate issuing, denying Petitioner's application (Pet. App. 1a) is not reported. The decision of the United States Court of Appeals for the Second Circuit (Pet. App. 2a) denying Petitioner's application for a Recall of the Mandate is not reported.

### JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision (Pet. App. 2a) denying a Recall of the Mandate on October, 13, 2020. This Court has jurisdiction pursuant to Calderon v. Thompson, 523 U.S. 538 (1998); 28 U.S.C. § U.S. Sup. Ct. Rule 13(1)(3).

### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall ... be deprived of life, liberty, or property, without due process of law.

Section 2244(b)(3)(A) of Title 28, U.S. Code, provides:

Before a second or successive application permitted by this sections is filed in

the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

#### STATEMENT OF THE CASE

Petitioner made a motion, in the Second Circuit, seeking a Recall of the Mandate which the Second Circuit filed on 7/27/2020, due to the Second Circuit's supervening change in governing law that calls into serious question the correctness of the Second Circuit's previous decision, presenting an extraordinary circumstance (Pet. App. 3a-4a), outlining the facts as follows (Pet. App. 4a-6a):

On July 31st of 1998, Petitioner's writ of habeas corpus was filed (Pet. App. 4a).

On June 30th of 1999, the district court issued an order denying Petitioner's habeas corpus petition (Pet. App. 4a).

Thereafter, Petitioner filed a COA application with the Second Circuit, denying such on July 25th of 2000 (Pet App. 5a).

However, before the Second Circuit denied Petitioner's COA application, Petitioner filed an application for leave to file a "Second or Successive" petition in the Second Circuit, raising Napue v Illinois, 360 U.S. 264 (1959) and Miller v. Pate, 386 U.S. 1 (1967) Constitutional violations, which the Second Circuit denied on August 30th of 1999 under 28 U.S.C. §2244(b), issuing the mandate on said date as well, Case Number 99-3588 (Pet. App. 5a, 8a).

Thereafter, the Second Circuit in Ching v. U.S., 298 F.3d 174 (2d Cir. 2002) held, Ching's August 25th of 1998 petition was not Second or Successive within the meaning of 28 U.S.C. §2244(b) as

the adjudication of the initial motion was not yet complete as Ching's initial motion was still ongoing during the period of appellate review. Under the circumstances the Second Circuit holding (Pet App. 5a):

For the foregoing reasons, we dismiss the motion for leave to file a second or successive § 2255 motion as unnecessary, and transfer this matter to the district court for proceedings consistent with this opinion. id., at 182.

Thereafter, the Second Circuit in Whab v. U.S., 408 F.3d 116 (2nd Cir. 2005) following Ching held (Pet. App. 5a-6a):

We noted further in Ching that until the adjudication of an earlier petition has become final, its ultimate disposition cannot be known. Id., at 178-179. Thus, so long as appellate proceedings following the district court's dismissal of the initial petition remains pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for "second or successive" petitions. id., at 118.

In the instant case, Petitioner's motion for a COA with respect to the denial of his initial petition remained pending in this court at the time he sought leave of this court to file the present petition. For that reason, the subsequent petition was not "second or successive" within the meaning of § 2255, and the gatekeeping authorization of the court of appeals was not required. Petitioner was accordingly free to prosecute his petition in the district court without need for our approval. id., at 118.

[T]his court's denial of a COA has not made the adjudication of the earlier petition final; that adjudication will not be final until petitioner's opportunity to seek review in the Supreme Court has expired. id., at 120.

For the foregoing reasons, we find petitioner's application is unnecessary and moot and transfer his petition to the district court for whatever further proceedings are appropriate. id., at 120.

Based upon the above facts and law, Petitioner asked for the same relief (Pet App. 6a):

Wherefore, for all the foregoing reasons Petitioner prays that this Court Recall its Mandate and afford Petitioner the same relief as Wabb and Ching received on his 1998 motion as the governing law is unquestionably inconsistent with the Court's decision and for the reason the equities strongly favor relief.

Petitioner also filed a Memorandum of Law in support (Pet App. 10a-15a).

Petitioner, within the Memorandum of law, reiterating the same facts within the motion (Pet. App. 10a-12a). Outlining the standard of review for a Recall of the Mandate under Calderon v. Thompson, 523 U.S. 538, 549 (1998); Christian Loubouton S.A. v. Yves Saint Laurent American Holding, Inc., 709 F.3d 140, 142 (2d Cir. 2013); Bottone v. U.S., 350 F.3d 59, 62 (2d Cir. 2003); Mancuso v. U.S., 166 F.3d 97, 100 (2d Cir. 1999), claiming to have met the threshold for a Recall of the Mandate (Pet. App. 12a-13a).

Petitioner thereafter made argument, claiming the Second Circuit's decisions in Ching and Whab call into serious question the correctness of the Court's decision in denying Petitioner's 1999 second or successive application, thereby interfering with Petitioner's ability to file a second or successive habeas corpus petition before the expiration of the time to seek Supreme Court



review. Such amounting to a grave and unforeseen contingency an extraordinary circumstance warranting a Recall of the Mandate and a transfer of the application to the district court for further proceedings (Pet. App. 13a):

THE INTERVENING DECISIONS OF THIS COURT IN Whab v. U.S., AND Ching v. U.S. CALL INTO SERIOUS QUESTION THE CORRECTNESS OF THIS COURT'S SEPTEMBER 30TH 1999 DECISION DENYING PETITIONER'S LEAVE APPLICATION TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION AS THE APPLICATION WAS NOT A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION ACCORDING TO THIS COURT'S VERY OWN DECISIONS THEREBY INTERFERING WITH PETITIONER'S ABILITY TO FILE ANOTHER HABEAS CORPUS PETITION BEFORE THE EXPIRATION OF TIME TO SEEK SUPREME COURT REVIEW AMOUNTING TO A GRAVE AND UNFORESEEN CONTINGENCY AN EXTRAORDINARY CIRCUMSTANCE WARRANTING THE RECALL OF THE MANDATE AND A TRANSFER OF THE APPLICATION TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS

Petitioner reiterated the decision in Ching, which held, Ching's August 25th, 1998, petition was not Second or Successive within the meaning of §2244 as the adjudication of the initial motion was not yet complete, as Ching's initial motion was still ongoing during the period of appellate review. The Court transferring the matter to the District Court for further proceedings (Pet. App. 14a).

Petitioner reiterated the decision in Whab, which held, Whab's subsequent petition was not Second or Successive, as Wabb's motion for a COA with respect to the initial petition remained pending at the time Whab sought leave of the Court of Appeals for the Second Circuit to file the petition. Further holding, an adjudication is not deemed final until petitioner's

opportunity to seek review in the Supreme Court has expired. The Second Circuit transferring the matter to the district court for further proceedings (Pet App. 14a).

Petitioner asserted, judged by the subsequent timeline, according to Ching and Whab, Petitioner's 1999 leave application was not a Second or Successive petition, even more so for the fact Ching's 1998 petition was not held to be a Second or Successive petition. That, under the circumstances, Petitioner should be afforded the same relief as in Ching and Whab, warranting a Recall of the Mandate as the governing law is unquestionably inconsistent with the Court of Appeals Second Circuit's earlier decisions, the equities strongly favoring relief, clearly overriding factors 2 and 3 of Christian, 709 F.3d, at 142 (Pet App. 14a).

Petitioner asserting, what transpired was a grave and unforeseen contingency and should be corrected. Requesting a Recall of the Mandate and a transfer to the district court for further proceedings (Pet. App. 14a-15a).

Prior to the decision of the Court, on July 27th, 2020, the Court informed (Pet App. 19a):

When originally commenced this case was assigned docket number 99-3588.

IT IS HEREBY ORDERED that this case, which was mandated under the original docket number on September 30, 1999, is reassigned docket number 20-2339, in order to migrate the case to the CM/ECF database.

All submissions to the Court after this date must comply with the Court's local rules pertaining to electronic filing and

bear the new docket number.

Thereafter, the Court of Appeals for the Second Circuit, on October 13th of 2020, held (Pet App. 20a):

Petitioner moves to recall the mandate for the proceeding docketed under 2d Cir. 99-3588 and to transfer the proceeding to the district court. Upon due consideration, it hereby ORDERED that the motion is DENIED, since Petitioner has not demonstrated the existence of exceptional circumstances. See *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996). Among other reasons, Petitioner's arguments are virtually identical to those he asserted in his 2008 motion to recall the mandate, which this Court denied; he has not identified any intervening rule of law that would support the requested relief; he has not explained his delay in making this new motion; and he has not shown that the claim presented in his 1999 motion merit relief.

#### REASONS FOR GRANTING THE PETITION

In *Ching v. U.S.*, 298 F.3d 174, 177-179, 182 (2d Cir. 2002), the Court of Appeals stated, "The AEDPA does not define what constitutes a 'second or successive' ... motion." However finding, *Ching's* 1998 petition was not a 'second or successive' petition, "and transfered [*Ching's*] matter to the district court for proceedings consistent with [the Court of Appeals] opinion."

In *Whab v. U.S.*, 408 F.3d 116, 118-120 (2d Cir. 2005), the Court of Appeals did not depart from *Ching*. Finding, *Whab's* "adjudication will not be final until [*Whab's*] opportunity to seek review in the Supreme Court has expired," coinciding with this Court's decision in *Bell v. Thompson*, 545 U.S. 794, 806 (2005) ("As a practical matter, a decision by this Court denying

discretionary review usually signals the end of litigation."). Further finding, just as in Ching, Whab's "application is unnecessary and moot ... transfer[ring] Whab's petition to the district court for whatever further proceedings are appropriate."

In light of the rulings in Ching and Whab, the Court of Appeals established the law not simply for those cases, but for future "Second or Successive" cases sought by defendants in the Second Circuit, an intervening rule of law amounting to an extraordinary circumstance. Thus, the Second Circuit's own guide weighed heavily in favor of transferring Petitioner's 1999 "Second or Successive" application, affording Petitioner the same relief Ching received on his 1998 petition.

However, the Second Circuit held under Petitioner's circumstances, "Petitioner has not demonstrated the existence of exceptional circumstances." Further, that Petitioner "has not identif[ied] any intervening rule of law that would support the requested relief".... (Pet App. 20a).

This Court's review is necessary to determine if the Second Circuit abused its discretion in denying Petitioner's Recall of the Mandate motion under the Second Circuit's established law in Ching and Whab.

#### ARGUMENT

THE SECOND CIRCUIT'S DENIAL OF  
PETITIONER'S RECALL OF THE MANDATE MOTION  
SUPPORTED BY SECOND CIRCUIT LAW WHICH  
WARRANTED A RECALL OF THE MANDATE UNDER  
PETITIONER'S CIRCUMSTANCE WAS AN ABUSE OF  
DISCRETION

#### A. Abuse Of Discretion Standard

It is well-established by this Court, "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." Calderon v. Thompson, 523 U.S. 538, 549 (1998). This Court further held, "the power can be exercised only in extraordinary circumstances." id., at 550. See, Christian Louboutin S.A. v. Yves Saint Laurent American Holding, Inc., 709 F.3d 140, 142 (2d Cir. 2013).

It will be evident below, the Second Circuit indeed abused its discretion in denying Petitioner's Recall of the Mandate motion warranting this Court's intervention, as the Second Circuit's intervening decisions warranted a Recall of the Mandate under Petitioner's circumstance.

#### B. Intervening Decisions Of The Second Circuit Warranting A Recall Of The Mandate

In Mancuso v. Herbert, 166 F.3d 97, 100 (2d Cir 1999) the Second Circuit held, "[o]ne circumstance that may justify recall of a mandate is '[a] supervening change in governing law that calls into serious question the correctness of the court's judgment.'" See, Christian Louboutin S.A. v. Yves Saint Laurent American Holding, Inc., 709 F.3d, at 142; Bottone v. U.S., 350 F.3d 59, 62 (2d Cir. 2003).

The Second Circuit made a supervening change in the governing law which called into question the correctness of the court's judgment on Petitioner's "Second or Successive" application.

In Ching v. U.S., 298 F.3d, at 177-179, 182, the Second Circuit decided the AEDPA "Second or Successive" provisions did

not apply to Ching's 1998 motion as the initial adjudication of the motion was not yet complete, transferring the matter to the district court for further proceedings.

In Whab v. U.S., 408 F.3d, at 118-120, the Second Circuit did not depart from Ching, and held Whab's adjudication is not final until the opportunity to seek review in the Supreme Court has expired. Finding Whab's "Second or Successive" application was not so and transferred the application to the district court for further proceedings.

This Court's decision in Bell v. Thompson, 545 U.S. 794, 806 (2005) holding "a decision by this Court denying discretionary review usually signals the end of litigation" supports Ching's and Whab's finality of adjudication position. As this Court held in McClesky v. Zant, 499 U.S. 467, 491 (1991), "[n]either innocence nor just punishment can be vindicated until the final judgment is known."

Clearly, Ching and Whab, especially Whab holding that an adjudication will not be final until [a] petitioner's opportunity to seek review in the Supreme Court has expired," are "'exceptional'" 'case[s] ... that stand[] out from' Villanueva v. U.S., 346 F.3d 55 (2d Cir. 2003); James v. Walsh, 308 F.3d 162 (2d Cir. 2002); Littlejohn v. Artus, 271 F.3d 360 (2d Cir. 2001); Muniz v. U.S., 236 F.3d 122 (2d Cir. 2001) 'with respect to the substantive strength of [Petitioner's] litigation position.'" Highmark Inc. v. Allcare Health Management Systems, Inc., 572 U.S. 559, 563 (2014). In sum, Ching and Whab are supervening expansions.

Thus, from the law perspective herein, any "Second or Successive" application that is commenced before the initial adjudication has become final in this Court, by whatever adjudicatory process, is not considered to be a "Second or Successive" application, and should be transferred to the district court for further proceedings, rendering 28 U.S.C. §2244(b)(3)(A) inoperable.

C. Petitioner Presenting An Extraordinary Circumstance Which Was Disregarded By The Second Circuit Amounting To An Abuse Of Discretion

1. Extraordinary Circumstance

Judged by Petitioner's subsequent timeline, according to Ching and Whab, Petitioner's 1999 leave application was not a "Second or Successive" application, as Ching's 1998 application was not held to be a "Second or Successive" application (Pet App. 4-6, 10-12). Just as in Ching and Whab Petitioner's matter was not final, as there was no decision by this Court ending the litigation, the ending occurring on March 19th of 2001, Franza v. Stinson, 532 U.S. 929 (2001), reh'g denied, 532 U.S. 1035 (2001). It is on this basis Petitioner sought a Recall of the Mandate seeking the same relief.

2. Abuse Of Discretion

The Second Circuit having Petitioner's "Second or Successive" application which did "not present a revisitation of the merits" ... and is not "inconsistent with" the "AEDPA", e.g., Gonzalez v. Crosby, 545 U.S. 524, 534 (2005), held, "[p]etitioner has not demonstrated the existence of exceptional circumstances." Further, that Petitioner, "has not identif[ied] any intervening

rule of law that would support the requested relief" .... (Pet App. 20a).

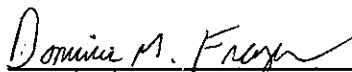
It is abundantly clear, the supervening change in Ching and Whab call into serious question the correctness of the Second Circuit's denial of Petitioner's 1999 "Second or Successive" application (Pet App. 8), as the Second Circuit completely failed to afford Petitioner the same relief as Ching received on his 1998 application.

The Second Circuit should have Recalled its Mandate and transferred Petitioner's application to the district court for further proceedings, instead failing to judge the merits fairly, denying Petitioner of Due Process of Law under the Fifth Amendment to the United States Constitution. Logan v. Zimmermon Brush Co., 455 U.S. 422, 433 (1982).

#### CONCLUSION

For the foregoing reasons, the Second Circuit's denial of Petitioner's Recall of the Mandate motion should be reversed as there was an abuse of discretion.

Respectfully submitted



Dominic M. Franza  
92A3659  
Fishkill Corr. Facility  
P.O. Box 1245  
Beacon, N.Y. 12508



No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Dominic M. FRANZA - PETITIONER

vs.

James STINSON, Superintendent - RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

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Dominic M. Franza  
92A3659  
Fishkill Corr. Facility  
P.O. Box 1245  
Beacon, N.Y. 12508

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**MANDATE**

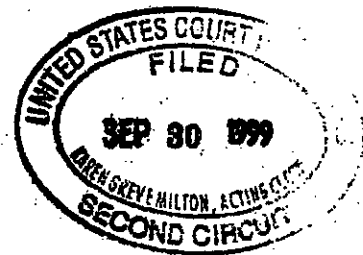
S.D.N.Y.  
98-civ-5484  
Kaplan, J.

**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 United States Courthouse, Foley Square, in the City of New York, on the 30 day of Sept. one thousand nine hundred and ninety-nine,

Present:

Hon. Thomas J. Meskill,  
Hon. Roger J. Miner,  
Hon. Fred L. Parker,  
Circuit Judges.



Dominic Franza,

Petitioner,

v.

James Stinson, Superintendent, Great Meadow Correctional Facility,  
Respondent.

99-3588

Petitioner has filed, *pro se*, a motion requesting an order authorizing the United States District Court for the Southern District of New York to consider a successive 28 U.S.C. § 2254 petition. Upon due consideration, it is ORDERED that the motion is denied because it does not satisfy the criteria set forth in 28 U.S.C. § 2244(b).

FOR THE COURT:  
Karen Greve Milton, Acting Clerk

By:

*Lucille Carr*

SEP 30 1999

ISSUED AS MANDATE: 9/30/99

S.D.N.Y.-N.Y.C.  
98-cv-5484  
Kaplan, 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 13<sup>th</sup> day of October, two thousand twenty.

Present:

Ralph K. Winter,  
John M. Walker, Jr.,  
Steven J. Menashi,  
*Circuit Judges.*

Dominic M. Franza,

*Petitioner,*

v.

20-2339

James Stinson, Superintendent,

*Respondent.*

Petitioner moves to recall the mandate for the proceeding docketed under 2d Cir. 99-3588 and to transfer the proceeding to the district court. Upon due consideration, it is hereby ORDERED that the motion is DENIED, since Petitioner has not demonstrated the existence of exceptional circumstances. See *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996). Among other reasons, Petitioner's arguments are virtually identical to those he asserted in his 2008 motion to recall the mandate, which this Court denied; he has not identified any intervening rule of law that would support the requested relief; he has not explained his delay in making this new motion; and he has not shown that the claims presented in his 1999 motion merit relief.

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

Catherine O'Hagan Wolfe



3a

**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): 99-3588

Caption [use short title]

Motion for: Recall of MandateFranza v. Stinson99-3588

Set forth below precise, complete statement of relief sought:

Recall of the Mandate and the matter  
transferred to the District Court for  
further proceedings

RECEIVED  
 2020 JUL -7 PM 3:54  
 U.S. COURT OF APPEALS

MOVING PARTY: Dominic M. Franza pro-seOPPOSING PARTY: Cyrus R. Vance D.A.☐ Plaintiff☐ Defendant☒ Appellant/Petitioner☐ Appellee/RespondentMOVING ATTORNEY: Dominic M. Franza pro seOPPOSING ATTORNEY: Cyrus R. Vance D.A.

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

Fishkill Correctional FacilityOffice of the N.Y. Co. D.A.P.O. Box 1245One Hogan PlaceBeacon, N.Y. 12508New York, N.Y. 10013Court/Judge/Agency appealed from: U.S. District Court Southern District of New York

Please check appropriate boxes:

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

☒ Yes ☐ No (explain):**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below?

☐ Yes ☐ No  
☐ Yes ☐ No

Has this relief been previously sought in this Court?

Requested return date and explanation of emergency:

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☒ Don't Know

Is oral argument on motion requested?

☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

Dominic M. FranzaDate: 6.11.2020Service by: ☐ CM/ECF☒ Other [Attach proof of service]

4a

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----X  
DOMINIC M. FRANZA, 92A3659,

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.  
-----X

AFFIDAVIT

Case Number 99-3588

State of New York    }  
County of Dutchess   } ss.:

I, Dominic M. Franza, being duly sworn, deposes and says:

1. I am the Petitioner in the above-entitled proceeding, and make this affidavit in support of Petitioner's Motion to Recall this Court's September 30th, 1999 Mandate, pursuant to Calderon v. Thompson, 523 U.S. 538, 549 (1998), as there is a supervening change in governing law that calls into serious question the correctness of this Court's decision, presenting an extraordinary circumstance, as amply set forth in Petitioner's accompanying Memorandum of Law in Support (Attached hereto as Exhibit "1" [September 30th, 1999 Decision]; Attached hereto as Exhibit "2" [Memorandum of Law in Support]).

Facts

2. On July 31st, 1998, Petitioner's writ of habeas corpus petition was filed (District Court Docket Entry 1, 98 Civ. 5484).

3. On June 30th, 1999, the District Court issued an order denying Petitioner's habeas corpus petition (District Court

Docket Entry 38, 98 Civ. 5484), the Judgment entered on June 30th, 1999 (District Court Docket Entry 39, 98 Civ. 5484).

4. Thereafter, Petitioner filed a COA application with this Court. This Court denied Petitioner's COA on July 25th, 2000 (Case Number 99-2448).

5. However, before this Court denied Petitioner's COA application, Petitioner filed an application for leave to file a Second or Successive habeas corpus petition, raising Napue v. Illinois, 360 U.S. 264 (1959) and Miller v. Pate, 386 U.S. 1 (1967) Constitutional violations, which this Court denied on August 30th, 1999, issuing the mandate on said date as well (Case Number 99-3588).

6. Thereafter, this Court in Ching v. U.S., 298 F.3d 174 (2d Cir. 2002) held, Ching's August 25th, 1998, petition was not Second or Successive within the meaning of §2244(b) as the adjudication of the initial motion was not yet complete as Ching's initial motion was still ongoing during the period of appellate review. Under the circumstances this Court held:

For the foregoing reasons, we dismiss the motion for leave to file a second or successive § 2255 motion as unnecessary, and transfer this matter to the district court for proceedings consistent with this opinion. id., at 182.

7. Thereafter, this Court in Wabb v. U.S., 408 F.3d 116 (2d Cir. 2005) held:

We noted further in Ching that until the adjudication of an earlier petition has become final, its ultimate disposition cannot be known. Id. at 178-179. Thus, so long as appellate proceedings following the district court's dismissal of the initial petition remains pending when a subsequent petition is filed, the




subsequent petition does not come within AEDPA's gatekeeping provisions for "second or successive" petitions. id., at 118

In the instant case, petitioner's motion for a COA with respect to the denial of his initial petition remained pending in this court at the time he sought leave of this court to file the present petition. For that reason, the subsequent petition was not "second or successive" within the meaning of § 2255, and the gatekeeping authorization of the court of appeals was not required. Petitioner was accordingly free to prosecute his petition in the district court without the need for our approval. id., at 118.

[T]his court's denial of a COA has not made the adjudication of the earlier petition final; that adjudication will not be final until petitioner's opportunity to seek review in the Supreme Court has expired." id., at 120

For the foregoing reasons, we find petitioner's application is unnecessary and moot and transfer his petition to the district court for whatever further proceedings are appropriate. id., at 120.

Wherefore, for all the foregoing reasons Petitioner prays that this Court Recall its Mandate and afford Petitioner the same relief as Wabb and Ching received on his 1998 motion as the governing law is unquestionably inconsistent with the Court's decision and for the reason the equities strongly favor relief.

  
Dominic M. Frenza  
92A3659

Subscribed to and sworn to before me  
this 12th day of June, 2020

  
Notary Public

TERRENCE M. GERMANO  
Notary Public, State of New York  
Reg. No. 01GE6395216  
Qualified in Orange County  
Commission Expires 07/22/2023

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