

MANDATE

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

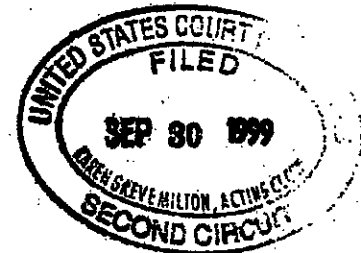
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United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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



UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.  
-----X

MEMORANDUM OF LAW

IN SUPPORT

Case Number 99-3588

PRELIMINARY STATEMENT

Petitioner Dominic M. Franza, respectfully submits this Memorandum of Law in support of Petitioner's motion to Recall this Court's Mandate, pursuant to Calderon v. Thompson, 523 U.S. 538, 549 (1998); Fed. R. of App. P. Rule 27; U.S. Court of Appeals 2nd Circuit Rule 27.1, 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.

Statement of Facts

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

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).

Thereafter, Petitioner filed a COA application with this Court. This Court denied Petitioner's COA on July 25th, 2000

(Case Number 99-2448).

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).

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.

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.

#### STANDARD OF REVIEW

It is well established, "the courts of appeals are recognized to have an inherent power to recall their mandates,".... Calderon v. Thompson, 523 U.S. 538, 549 (1998); Bottone v. U.S., 350 F.3d 59, 62 (2d Cir. 2003); Mancuso v. Herbert, 166 F.3d 97, 100 (2d Cir. 1999), however, this Court's "power to recall a mandate 'can be exercised only in extraordinary circumstances' and 'is one of last resort, to be held in reserve against grave, unforeseen contingencies.'" 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, at 62 (citing Calderon, 523 U.S., at 550); Mancuso v. Herbert, 350 F.3d, at 100.

It is also well established, "[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.'" Mancuso v. Herbert, 166 F.3d, at 100. The Second Circuit in Christian, 709 F.3d, at 142, "[has] previously identified four factors to consider in determining whether to recall a mandate: '(1) whether the governing law is unquestionably inconsistent with the earlier decision; (2) whether the movant brought to the Court's attention that a dispositive decision was pending in another court; (3) whether there was a substantial lapse in time between the issuing of the mandate and the motion to recall the mandate; and (4) whether the equities 'strongly favor' relief.'"

Judged by the above standard of review recall of the mandate is warranted, under the circumstances.

#### ARGUMENT

THE INTERVENING DECISIONS OF THIS COURT IN Wabb 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 CORPUS 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

It is established, 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 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. Transferring the matter to the District Court for further proceedings.

It is established as well, this Court in Wabb v. U.S., 408 F.3d 116 (2d Cir. 2005) held, Wabb'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 Wabb sought leave of this Court 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. Transferring the matter to the District Court for further proceedings.

Judged by Petitioner's subsequent timeline, according to Ching and Wabb, 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. Thus, under the circumstances, Petitioner should be afforded the same relief as in Ching and Wabb, warranting a Recall of the Mandate as the governing law is unquestionably inconsistent with this Court's earlier decision, the equities strongly favoring relief, clearly overriding factors 2 and 3. Christian, 709 F.3d, at 142.

In sum, what transpired here was a grave and unforeseen contingency and should be corrected.

CONCLUSION

For all the foregoing reasons Petitioner's motion to Recall the Mandate should be granted and the matter transferred to the District Court for further proceedings.

Respectfully, submitted

Dominic M. Fray



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

DOMINIC M. FRANZA, 92A3659,  
 Petitioner,

v.

JAMES STINSON, Superintendent,  
 Respondent.

**CERTIFICATE OF SERVICE\***Docket Number: 99-3588

I, Dominic M. Franza, 92A3659 hereby certify under penalty of perjury that  
 (print name)  
 on June 12th, 2020, I served a copy of Motion Information  
 (date)  
Statement / Affidavit with exhibits for a Recall of the Mandate  
 (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:

Cyrus R. Vance D.A. One Hogan Place New York, N.Y. 10013

Name	Address	City	State	Zip Code

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.

June 12th, 2020

Today's Date

Dominic M. Franza  
 Signature

17a

DOMINIC M. FRANZA  
92A3659  
FISHKILL CORRECTIONAL FACILITY  
P.O. BOX 1245  
BEACON, N.Y. 12508

6/11/2020

Catherine O'Hagan Wolfe  
Clerk of Court  
U.S. Court of Appeals 2nd Cir.  
40 Foley Square  
New York, N.Y. 10007

Re: Franza v. Stinson  
99-3588

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

Dear Ms. Wolfe:

Please find enclosed my Motion Information Statement,  
Affidavit with exhibits attached, for a Recall of the Mandate.

Note, the certificate of service is attached at the rear of  
the papers.

Thank you for your time and attention in my matter.

Sincerely, yours

Dominic M. Franza

189  
Dominic M. Traversy #245057  
Fish Kill Correctional Facility  
P.O. Box 1245  
Beacon, N.Y. 12508

CONFIDENTIAL



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Catherine O'Hagan Wolfe  
Clerk of Court  
Court of Appeals 2nd Cir  
40 Foley Square  
New York, N.Y. 10007

USM401  
SDNY

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 27<sup>th</sup> day of July, two thousand twenty,

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Dominic Franza,

*Petitioner,*

Docket number: 20-2339

v.

James Stinson, Superintendent,

Respondent.

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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 this Court's local rules pertaining to electronic filing and bear the new docket number.

FOR THE COURT:

Catherine O'Hagan Wolfe,  
Clerk of Court

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

