

**In the**  
**Supreme Court of the United States**

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KERRY KOTLER,

*Petitioner,*

v.

L. JUBERT, Deputy Superintendent of Security, et al.,

*Respondents.*

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**BRIEF IN OPPOSITION**

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## **STATEMENT OF QUESTION PRESENTED**

If a party to federal litigation dies, the deceased party must be dismissed from the case unless a motion to substitute a successor or representative for that party is made “within 90 days after service of a statement noting the death.” Fed. R. Civ. P. 25(a)(1). The question presented is:

Whether the 90-day period for a plaintiff to move to substitute a successor or representative for a deceased defendant is commenced by service of a statement of the defendant’s death upon the plaintiff, even if that statement is not also served upon the decedent’s successor or representative.

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## INTRODUCTION

Federal Rule of Civil Procedure 25(a)(1) requires that a claim by or against a party to a civil action who has died “must be dismissed” unless a motion for substitution of the decedent’s legal representative or successor is made “within 90 days after service of a statement noting the death.” Petitioner Kerry Kotler (“plaintiff”) filed a federal civil rights action against eight officers of a New York State correctional facility where he had been incarcerated. While plaintiff’s action was pending in the district court, John Donelli, one of the named defendants, died, and counsel for the remaining defendants served plaintiff with a statement notifying him of the death. Plaintiff did not move to substitute the legal representative of defendant Donelli’s estate, nor did he ask the district court for more time to locate the representative. After more than 90 days, the district court dismissed Donelli from the case under Rule 25(a). The case proceeded to a jury trial against the remaining defendants, and the jury rejected plaintiff’s claims.

On appeal, plaintiff challenged the pretrial dismissal of Donelli, arguing that, even though he had been served with the statement of death, the 90-day period for him to move to substitute a legal representative never started running because, in order to start the clock, service also had to be made on the deceased defendant’s legal representative. The U.S. Court of Appeals for the Second Circuit rejected that argument, and plaintiff seeks this Court’s review.

This Court should deny the petition. Federal Rule 25(a) requires service of the statement of death to start the 90-day clock to move for substitution of the deceased

party, but does not specify who must be served in order to start the clock. The Second Circuit held that when the deceased party is a defendant, service of the statement of death on the plaintiff is sufficient to subject that plaintiff to Rule 25(a)'s 90-day period to move for substitution. The Second Circuit reasonably interpreted Rule 25(a) to provide that the 90-day time limit applies to anyone who wishes to move for substitution who has been properly served with the statement of death, regardless of who else has or has not been served with the statement. If such a person has been served with the notice of death, then the period begins to run as to that movant, because the whole point of the rule is to start the clock for substitution, and the purpose of serving the statement of death is to inform potential movants of the facts that create the occasion for substitution: the party's death and the existence of the lawsuit. In contrast, the Second Circuit suggested without deciding that in a case where the decedent is a plaintiff rather than a defendant, Rule 25(a) *would* require service of the statement upon the decedent's successor, because in that case the successor would be the potential movant.

The question presented in this case, however, is who must be served with a statement of death when a defendant dies. Contrary to plaintiff's claim, there is no conflict between the Second Circuit's holding on that question and the holdings of other circuits. While one other circuit has expressed a contrary view, it did so only in dicta and without substantive discussion. That disagreement has had no significant effect on litigants' rights, and does not warrant this Court's intervention. In addition, this case is a poor vehicle to raise this question because its resolution would make no

difference to the outcome of this case; plaintiff does not have a colorable motion to substitute even if his motion is not barred by Rule 25(a), and the addition of the deceased defendant's successor would not change the outcome of the case in any event.

## STATEMENT

### A. Federal Rule 25(a)

This case turns on the correct interpretation of Federal Rule of Civil Procedure 25(a)(1). In full, that rule states:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1).

Except for minor changes in wording, the current version of Rule 25(a)(1) has been in effect since 1963. The Advisory Committee on the Rules of Civil Procedure promulgated this version in response to the perceived hardship created by *Anderson v. Yungkau*, 329 U.S. 482 (1947), which interpreted the previous version of Rule 25 to allow a motion for substitution within two years of a party's death, without discretion to extend that time. Fed. R. Civ. P. 25, 1963 advisory comm. notes.

The current version of Rule 25 differs from its predecessor in three substantive ways: (1) the period in which to move for substitution is now measured from notice of the death, rather than the date of the death, (2) the period is now 90 days, rather than two years, and (3) district courts are given discretion to extend that period. Fed.

R. Civ. P. 25. The time period was shortened—provided there is service of a statement of death—to accelerate the process after the death became known to interested parties. *Id.* The Advisory Committee recognized the utility of acting promptly to substitute a successor, lest a court deny a belated motion for substitution on the ground that it interfered with probate proceedings. *Id.* As the Chair of the Committee observed, “If [a party] once has knowledge of [the death], there ought not to be an indefinite time for him to move for substitution. He ought to get busy right away.” Minutes of Advisory Comm. on Rules of Civ. Proc. 192 (Mar. 9, 1955).

## **B. Background**

At all times relevant to this case, plaintiff was incarcerated in a New York State correctional facility. In 2003, plaintiff acted as a representative on the committee that resolved prison-level inmate grievances. John Donelli, the prison’s superintendent, was frustrated with plaintiff’s behavior on the grievance committee, and asked whether plaintiff could be removed from the committee. Donelli was told that inmate members of the committee could be removed upon a determination that they had violated certain disciplinary rules. Pet. App. 5.

On November 1, 2003, a correction officer received an anonymous tip that plaintiff’s cell contained a hidden weapon. The officer searched the cell and discovered a shank. At an ensuing disciplinary proceeding, a hearing officer found plaintiff guilty of possessing a weapon. This determination of guilt, in turn, resulted in plaintiff’s removal from the grievance committee. Pet. App 5-6.

### C. Proceedings Below

Proceeding pro se, plaintiff sued several correction officials, including Donelli, in the United States District Court for the Northern District of New York, alleging that they violated his First Amendment rights by conspiring to plant the shank in his cell to retaliate against him for his protected work on the grievance committee. Pet. App. 3, 5.

In 2012, while the litigation was pending, Donelli died. Pet. App. 44. In August 2013, an assistant attorney general, representing the remaining defendants, served plaintiff with a statement under Rule 25(a) advising of Donelli's death. The statement of death warned that all claims against Donelli would be dismissed within 90 days unless plaintiff moved to substitute the appropriate legal representative or successor. Pet. App. 44-45.

Plaintiff received the statement of death and requested defendants' assistance locating the deceased defendant's estate. Pet. App. 46-48. He did not, however, request an extension of Rule 25(a)(1)'s 90-day period for a motion to substitute or otherwise notify the district court that there was a reason he would be unable to meet that deadline. He failed to file a motion to substitute within the requisite 90-day period. On November 22, 2013—93 days after defendants filed the statement of death and served it on plaintiff—a magistrate judge recommended Donelli's dismissal from the case. Pet. App. 49-52.

Plaintiff objected, contending that the statement of death was defective on its face because it did not identify Donelli's legal representative. For the first time, he

also suggested that he was still trying to locate that representative. Pet. App. 54-55. The district court accepted the magistrate judge's recommendation and dismissed Donelli from the case. Pet. App. 56-58.

Plaintiff's case against the remaining defendants proceeded to trial. Because Donelli, having died, was unavailable to testify, the district court permitted plaintiff to read portions of Donelli's earlier deposition testimony into the record. Pet. App. 10. Plaintiff called as witnesses other defendants who he alleged were part of the retaliatory scheme, and questioned them extensively on his theory that they planted a weapon in his cell. Following three days of trial, the jury returned a verdict in defendants' favor. Pet. App. 10-11.

Plaintiff appealed the final judgment, arguing that the district court erred in dismissing Donelli from the case because Rule 25(a)(1)'s 90-day period to move for substitution had not begun to run in light of the remaining defendants' failure to serve the statement of death on the deceased defendant's legal representative. Pet. App. 13.

The Second Circuit affirmed, holding that when "a plaintiff is properly served a statement of death for a defendant, the 90-day clock begins running under Rule 25(a)(1)." Pet. App. 23.<sup>1</sup> The Second Circuit observed that it had not yet addressed the "precise question at issue in this case—whether the notice of death has to be served on the deceased's legal representative to trigger the 90-day substitution period for parties who have been properly served." Pet. App. 14-15. Nevertheless, the court

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<sup>1</sup> The Second Circuit remanded for a new trial limited to a different claim. Pet. App. 35-36.

noted that it had earlier held in *Unicorn Tales v. Banarjee*, 138 F.3d 467 (2d Cir. 1998), that a statement of death need not identify the legal representative to trigger the 90-day period, and that it “necessarily follows” that if a statement of death need not even identify the representative to trigger the 90-day period, then “it certainly is not required that the statement be *served* on that representative.” Pet. App. 14-15 (emphasis in original). The Second Circuit also rejected plaintiff’s argument that a requirement to serve the legal representative arose from Rule 25’s instruction that the statement of death must be “served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4,” instead construing that language to simply establish the acceptable methods of service on parties and nonparties when it is effectuated. Pet. App. 19.

The Second Circuit acknowledged that other circuits had required service of the statement of death on the decedent’s legal representative. But it distinguished most of those cases as involving the death of a plaintiff, and an effort by the plaintiff’s legal representative to revive the dismissed lawsuit, never having known of the lawsuit’s existence because they had not received a statement of death. Pet. App. 15-16. In those cases, courts required service of the statement of death on the representative in order to start the 90-day time period for moving to substitute; a “recurring theme” of those cases was the “perceived need to alert the nonparty to the consequences of death for a pending suit” so that the nonparty could decide whether to take “action to preserve the claim.” Pet. App. 15-16. The Second Circuit pointed out that there was no similar need to alert a potential moving party here because it was

a defendant who had died, and the potential moving party—plaintiff—was well aware of the death, having been served with notice of it. Thus the Second Circuit saw no conflict, and had “no occasion to opine on the validity of those cases” requiring service on the successor to a deceased plaintiff. Pet. App. 16. And while the Second Circuit commented that “some courts” had more broadly held that a statement of death must be served not only on all potential moving parties but also on a deceased defendant’s representative to trigger the 90-day period “*even for the served parties*” Pet. App. 17 (emphasis in original), the Second Circuit identified only one such court, and observed that in that case the suggestion was “arguably dicta.” Pet. App. 18 (citing *Bass v. Attardi*, 868 F.2d 45, 50 n.12 (3d Cir. 1989)).

Addressing plaintiff’s argument that he was unable to identify Donelli’s legal representative within the 90-day period, the Second Circuit referenced the guidance that it had offered in *Unicorn Tales* for litigants in this situation: they should request that the district court extend the 90-day period, and, as necessary, grant limited discovery for the purpose of locating the legal representative. Pet. App. 21. Noting that plaintiff had never sought an extension, the Second Circuit ruled that “solicitude for pro se litigants does not require us to excuse failure to comply with understandable procedural rules and mandatory deadlines.” Pet. App. 21-22.

Plaintiff petitioned for rehearing en banc, which the Second Circuit denied. Pet. App. 38. This petition for a writ of certiorari followed.

## **REASONS FOR DENYING THE PETITION**

### **A. There is No Circuit Split Over Rule 25(a)'s Service Requirement That Warrants This Court's Review.**

Plaintiff argues that the decision below merits review to resolve a conflict among the circuit courts of appeal over the proper interpretation of Rule 25(a). While the Second Circuit's interpretation of Rule 25(a) appears to differ from an interpretation the Third Circuit expressed in dicta, there is no genuine conflict among the holdings of the courts of appeals on the question presented here. And any disagreement is too inconsequential to justify this Court's intervention at this time.

#### **1. The Second Circuit's Holding Below Did Not Create a Genuine Circuit Split.**

In affirming the dismissal of the deceased defendant from plaintiff's civil action, the Second Circuit held that "where, as here, a plaintiff is properly served a statement of death for a defendant, the 90-day clock begins running under Rule 25(a)(1) for the plaintiff to file a motion to substitute the decedent's successor or representative." Pet. App. 23. That holding reflects the view that because the sole purpose of the service requirement is to trigger the 90-day clock for a motion to substitute, the question whether service has been properly made must be considered in relation to the person who seeks to make such a motion. If the movant has been served with the statement of death, then the clock starts to run as to that movant because any person served with such a statement will thereby receive notice of both the party's death and the existence of the lawsuit—and thus, be in a position to make an informed decision about whether to substitute.

The Second Circuit’s view finds support in Rule 25(a)’s text, which does not direct that the statement of death be served on anyone, but simply describes the consequence *if* the statement is properly served on a party or nonparty who seeks to move for substitution. It also finds support in Rule 25(a)’s history: in connection with the 1963 amendment to Rule 25, the Advisory Committee noted that proper service of the statement of death places parties on notice of *both* the death and the ongoing litigation—thereby triggering a responsibility to take prompt action. Fed. R. Civ. P. 25, 1963 advisory comm. notes. The Second Circuit therefore sensibly rejected plaintiff’s argument that proper service of the statement of death upon him failed to trigger the 90-day deadline on his time to move to substitute only because the statement was not served on someone else.

Although plaintiff asserts that the Second Circuit “recognized that its holding would perpetuate a split with other circuits” (Pet 10), he fails to identify a holding from another court of appeals that actually conflicts with the Second Circuit’s holding. The closest that plaintiff comes to identifying a conflicting decision is *Bass v. Attardi*, 868 F.2d 45 (3d Cir. 1989), which the Second Circuit described below as “suggest[ing]” that the Third Circuit would apply Rule 25(a) differently when given the opportunity. But *Bass* itself does not conflict with the Second Circuit’s holding. Although *Bass* stated in a footnote that the statements of two defendants’ deaths were deficient because they were not served on the legal representatives of the deceased defendants (despite having been served on the plaintiff), that was a passing remark, and not a square holding of the court. First, the district court had not ruled

on that issue, and therefore the Third Circuit could not reach it without finding plain error, which it did not find. Second, the remark was wholly unnecessary to the outcome in *Bass*, because the Third Circuit affirmed the district court's order dismissing both deceased defendants on the ground of absolute immunity. *Id.* at 52.<sup>2</sup> A subsequent Third Circuit case cited *Bass*'s language concerning the requirement to serve the statement of death on the representative of a deceased defendant, but that case too was resolved on other grounds. *See Giles v. Campbell*, 698 F.3d 153, 158 (3d Cir. 2012) (affirming dismissal of deceased defendant because plaintiff failed to serve his motion to substitute on the decedent's estate).

While plaintiff therefore is correct that "the Second Circuit appears to stand alone" in its holding (Pet. 14), that is not because other circuits have disagreed. Instead, it is because the decision below is the only time a court of appeals has needed to address whether service upon a plaintiff of a statement noting a defendant's death is sufficient to trigger Rule 25(a)'s 90-day deadline for a plaintiff to move to substitute, even if the deceased defendant's legal representative has not also been served with the statement. While plaintiff asserts that several cases have required service on a defendant's successor or representative to trigger the 90-day deadline (Pet. 16), he points only to district court decisions within the Second Circuit that were rendered prior to the decision below (Pet. 16 n.4.), and have thus been overruled by

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<sup>2</sup> The Third Circuit observed that absolute immunity applied only to the extent defendants are sued in their individual capacities. *Bass*, 868 F.2d at 51. But to the extent the plaintiff there had sued the defendants in their official capacities, that lawsuit would not continue against the deceased defendants because the officials who took their place would automatically be substituted for them. Fed. R. Civ. P. 25(d)(1); *see Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985).

that decision. That is not a conflict in the circuits at all, much less one meriting certiorari.

Plaintiff further highlights language from other courts of appeals to the effect that ‘Rule 25(a)(1)’s 90-day clock does not begin to run until a statement of death has been served on the decedent’s representative or successor.” (Pet. 14.) As the Second Circuit recognized (Pet. App. 15), however, this generalized language does not necessarily reflect a conflict because those cases involved deceased plaintiffs, whose representatives were attempting to preserve or revive the decedent’s lawsuit more than 90 days after a statement of death was filed with the court. Thus, the persons seeking to move for substitution were nonparties with a potential interest in moving for substitution, but, not having been served with the statement of death, they had not learned of the lawsuit’s existence within 90 days of the statement’s filing. To avoid the prejudice that dismissal would cause under that circumstance, courts have rejected attempts to enforce the 90-day period against such nonparties prior to service of the statement of death upon them. *See, e.g., Sampson v. ACS Indus.*, 780 F.3d 679, 682-83 (5th Cir. 2014); *Atkins v. City of Chicago*, 547 F.3d 869, 873 (7th Cir. 2008); *Barlow v. Ground*, 39 F.3d 231, 233-34 (9th Cir. 1994); *Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985).

The Second Circuit’s holding, by contrast, concerns only a party to the litigation who already has been properly served with a statement of death. Indeed, the Second Circuit expressly declared that it was not addressing the validity of its

sister circuits' holdings, and its discussion suggests that it would likely join them if confronted with a case implicating similar interests.

Although plaintiff stresses that Rule 25(a) draws no distinction between plaintiffs and defendants on its face (Pet. 15-16), the relevant distinction is not between plaintiffs and defendants, but between a potential movant who has been served and one who has not. The lack of service on Donelli's representative or successor might have extended the time for those unserved individuals to substitute as defendants under Rule 25(a) if they had wished to do so, but it did not extend the plaintiff's time. The Second Circuit enforced the 90-day window as to plaintiff because he *had* been properly served with the statement of death, and was therefore in a position to act.<sup>3</sup> And because no court of appeals has read Rule 25(a) to allow a party who has been properly served with a statement of death to disregard the 90-day window due to defective service or nonservice on someone else, there is no circuit split.

Plaintiff also asks this Court to review whether Rule 25(a)(1) conditions the 90-day period on a statement of death's identification of a decedent's legal representative. (Pet. 12-14.) Admittedly, on this issue, there is circuit split of long duration. *Compare Rende v. Kay*, 415 F.2d 983, 985 (D.C. Cir. 1969), *with Unicorn Tales*, 138 F.3d at 470. But this case is not the proper vehicle by which to resolve that split because plaintiff did not argue—and the Second Circuit did not decide—the

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<sup>3</sup> Insofar as plaintiff claimed to have difficulty locating the deceased defendant's representative or successor, the Second Circuit observed that he could have sought an extension of the 90-day window on this basis. Plaintiff does not purport to seek review of this aspect of the Second Circuit's adverse ruling.

issue of identification. The court’s holding was limited to whether, under Rule 25(a)(1), service of the statement of death upon a plaintiff is sufficient to start the clock on the plaintiff’s motion to substitute, regardless of who else has or has not been served with the statement. The Second Circuit observed that it had never decided this question (Pet. App. 14-15), and plaintiff himself describes it as “distinct” from the issue of identification. (Pet. 14.)

Although the Second Circuit’s earlier decision in *Unicorn Tales* bound the panel that decided plaintiff’s case on the issue of identification, *see Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 66 n.24 (2d Cir. 2021), plaintiff said nothing to preserve the issue for future review. Instead he strenuously argued below that, while *Unicorn Tales* was preclusive on the issue of identification (Pet. 8), it did not control because a service requirement was a distinct issue. (2d. Cir. No. 16-4191, ECF No. 218 at 38-39 n.8.) And when plaintiff petitioned for rehearing en banc—where it was open to the court to overrule its precedent—he declined to argue for reversal on the issue of identification. (ECF No. 287 at 7-9.) The Second Circuit thus did not have occasion to revisit its earlier holding that the statement of death need not identify the defendant’s legal representative. Plaintiff should not be allowed to obtain review of a question he knowingly avoided at the Second Circuit. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (declining to address argument not raised before the court of appeals).

**2. The Disagreement Between the Second and Third Circuits Does Not Warrant This Court’s Intervention at This Time.**

In the absence of a genuine circuit split on the issue presented, this Court should deny certiorari. Contrary to plaintiff’s claim (Pet. 11), the limited disagreement between the Second and Third Circuits over Rule 25(a)’s service requirement does not create a need for this Court’s prompt intervention. As noted above, the Third Circuit is the only court of appeals to suggest that service of a statement of death on a deceased defendant’s legal representative is necessary under Rule 25(a) to start the clock on a served plaintiff’s time to move to substitute, and it did so in dicta and without extensive analysis. Plaintiff concedes that a number of circuits have yet to address the question presented. (Pet. 14-15 & nn.2-3.) This Court would benefit from letting the issue percolate in the courts of appeals before weighing in.

Moreover, plaintiff’s identified disagreement concerning Rule 25(a) would not produce “dramatically different results” in different circuits. (Pet. 16-17.) Whether a plaintiff (incarcerated or not) files suit in the Second Circuit or a circuit that conditioned the start of Rule 25(a)’s 90-day window on service of a statement of death on a deceased defendant’s representative, that plaintiff would enjoy meaningful protections against adversaries who might seek to exploit any difficulty he might experience in trying to locate the appropriate legal representative.<sup>4</sup> The only difference is that the Second Circuit requires such plaintiffs to protect their interests

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<sup>4</sup> This reasoning applies with equal force to plaintiff’s argument that there is an additional, reviewable split on whether Rule 25 conditions the start of the ninety-day period on identification of the decedent’s legal representative.

by requesting more time, as well as limited discovery if necessary to assist in locating a decedent's successor or legal representative.

Plaintiff fails to support his assertion that the requirement to enlist the district court's assistance in accomplishing this task represents an "unjust disparity" between himself and litigants in other circuits. (Pet. 4.) He does not explain why it was unfairly onerous to require him to ask for more time and discovery if necessary. Indeed, plaintiff engaged in extensive discovery on other issues, as incarcerated persons prosecuting civil actions pro se routinely do. Without more, plaintiff cannot establish that the marginal additional burden that the Second Circuit places upon plaintiffs notified of a defendant's death raises a question of particular urgency requiring resolution by this Court.

**B. This Case Is a Poor Vehicle for Resolving the Issue Plaintiff Asks This Court to Address.**

This case is unworthy of certiorari for the additional reason that it is not a good vehicle for resolving the service and identification questions on which plaintiff seeks review. For two related reasons, further review would not change the outcome of this case.

First, joinder of Donelli's successor or legal representative, even if allowed at this late date, would do nothing to strengthen plaintiff's claims, which a jury has already rejected. Plaintiff repeatedly insists on the deceased defendant's importance to his theory of the case: he was the "lynchpin defendant, the alleged architect of the retaliatory scheme," without whom "he could not prove his claims" (Pet. 5); his "case was hamstrung by the absence of Donelli as a part in the case. . ." (Pet 8). But Donelli

had died before trial. The district court thus permitted his deposition testimony to be admitted into evidence at trial. Plaintiff does not explain how he could have proceeded any differently if he had substituted a new defendant for Donelli. Any retrial, with or without Donelli’s successor as a defendant, would suffer from the same difficulty. Unable to call Donelli as a witness, plaintiff’s only option for eliciting evidence of Donelli’s state of mind would be to read his deposition testimony into the record and question witnesses about their interactions with him—exactly what he did at the trial here, without success. Pet. App. 28-29.

Second, even if this Court were to agree with plaintiff that a motion to substitute a successor was not barred by Rule 25(a), the futility of a retrial and the passage of time since Donelli’s death give plaintiff no reasonable prospect of success on such a motion. A court retains the discretion to deny a motion to substitute to avoid unfair prejudice—including prejudice to a decedent’s estate that has already been distributed or is about to be distributed. *See Anderson*, 329 U.S. at 485-86; Fed. R. Civ. P. 25, 1963 advisory comm. notes (“a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute”); *see also Snider v. Vertex Aerospace, LLC*, 338 F.R.D. 358, 363 (D. Miss. 2021) (denying substitution of a defendant where the defendant’s estate had been “effectively closed”); *S & W X-Ray Inc. v. Film Recovery Sys., Inc.*, No. 84-C-10479, 1987 WL 6626, at \*4 (N.D. Ill. 1987) (it would be inequitable to substitute the defendant’s wife and “disrupt the completed distribution of the estate”).

If a motion to substitute Donelli's successor were not time-barred, it would likely be denied on equitable grounds of this type. Donelli's estate was small, and in 2013—eight years ago—a Florida court distributed the estate to his widow. (*See Addendum.*) Accordingly, plaintiff would need to move to substitute Donelli's widow on the ground that she was his beneficiary and therefore his “successor.” *See In re Baycol Prods. Litig.*, 616 F.3d 778, 784-85 (8th Cir. 2010) (adopting this interpretation); *McSurely v. McClellan*, 753 F.2d 88, 98-99 (D.C. Cir. 1985) (it was proper to substitute widows for deceased defendants). Plaintiff has failed to explain why an opportunity to read Donelli's deposition testimony to a new jury would render it equitable to pull his widow into this longstanding litigation nearly a decade after her husband's death.

The question presented by this petition is whether a plaintiff may avoid Rule 25(a)'s 90-day deadline to move for substitution so long as the representative of a deceased defendant has not been served. This Court should not address that question in a case where its resolution in the plaintiff's favor could not lead to a viable motion for substitution. Accordingly, this Court should deny the petition.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## **Addendum**

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Case #: 11-2013-CP-001802-0001-XX

Offense Date:

Party Name/Company: Donelli, John Jay

File Date: 10/22/2013

Party Type: Deceased

Status: Disposed

Name Suffix:

Case Type: Summary \$1,000 or more

DOB:

Court Type: CP

Citation #:

## Court Events

Date	Time	Event Type	Location	Room	Notes
No records found					

## Parties

Judge: Krier, Elizabeth V

Party Name/Company	Party Type	Sex	Race	Date of Birth	AKA	Deceased	Sheriffs #
Donelli, John Jay	Deceased	M	W			10/21/2012	
Donelli, Kathleen Linda	Party Attorneys ()	Heir					
Donelli, Kathleen Linda	Party Attorneys ()	Petitioner	F	U			

## Charges

Statute #	Count	Description	Disposition Date	Sentence	Offense Date	Citation #	Offense Level	Plea Date	Court Action	Prosecutor Action
No records found										

## Dockets

Image	Docket Num	Effective	Count	Description
	1	11/19/2012	0	Will on Deposit
	2	11/19/2012	0	Cover Letter
	3	11/19/2012	0	Affidavit of Of Attesting Wistnesses
	4	11/19/2012	0	Last Will and Testament dated 12/30/1978 deposited by William A Brenner
	5	11/19/2012	0	Will Deposit Receipt
	6	10/22/2013	0	Consent and Waiver of Notice of Hearing
	7	10/22/2013	0	Summary \$1,000 or more
	8	10/22/2013	0	Petition for Summary Administration Testate
	9	10/22/2013	0	Paid \$345.00 on receipt 539273, Fully Paid

Image	Docket Num	Effective	Count	Description
	10	10/24/2013	0	Cover Letter
	11	10/28/2013	0	Order Admitting Will
	12	10/28/2013	0	Order of Summary Administration Testate Recorded 2013-10-30 Instrument# 4907417
	13	11/01/2013	0	Cover Letter
	14	11/15/2013	0	Affidavit of Publication 1st Publication date 11/08/2013
	15	12/09/2013	0	Correspondence to Judge Lauren L. Brodie, from Kerry Kotler
	16	12/09/2013	0	Correspondence to Kerry Kotler, from Judge Lauren L. Brodie
	17	04/01/2016	0	Per Administrative Order, case reassigned to Judge Greider, Christine
	18	05/18/2016	0	Scheduled Judge Reassignment By Administrative Order. Effective: 07/01/2016, Judge Christine Greider To Judge James R Shenko
	19	07/01/2016	0	Per Administrative Order, case reassigned to Judge Shenko, James R
	20	06/30/2018	0	Per Administrative Order, case reassigned to Judge Hardt, Frederick R
	20	01/09/2019	0	Per Administrative Order, case reassigned to Judge Krier, Elizabeth V

## Sentences

Date	Count	Sentence	Confinement	Term	Credit Time	Conditions	Status
No records found							

## Fees

## Fees

**Total Balance + Interest: \$0.00**

(The fees listed below do not necessarily reflect all outstanding fees on the case. For complete balance information, please contact the Clerk's office.)

Effective Date	Due Date	Description	Amount Due	Amount Paid	Balance	In Collections	In Judgment	Judgment Interest
10/22/2013	10/22/2013	Probate Filing Fee \$345	\$345.00	\$345.00	\$0.00			\$0.00
			\$345.00	\$345.00	\$0.00			\$0.00

## Fees

Plan #	Scheduled Pay Amount	Balance Due	PP
No records found			

24  
IN THE CIRCUIT COURT FOR COLLIER COUNTY,  
FLORIDA  
IN RE: ESTATE OF

File No. 13-1802-CP

JOHN JAY DONELLI

Division 02

Deceased.

FILED  
COLLIER COUNTY, FLORIDA  
13-1802-CP  
2013 OCT 28 AM 10:21  
CLERK OF COURTS  
D.C.

**ORDER OF SUMMARY ADMINISTRATION  
(testate)**

On the petition of Kathleen Linda Donelli for summary administration of the estate of John Jay Donelli, deceased, the court finding that the decedent died on October 21, 2012, that all interested persons have been served proper notice of the petition and hearing or have waived notice thereof; that the material allegations of the petition are true; that the will dated December 30, 1978, has been admitted to probate by order of this court as and for the last will of the decedent; and that the decedent's estate qualifies for summary administration and an Order of Summary Administration should be entered, it is

ADJUDGED that:

1. There be immediate distribution of the assets of the decedent as follows:

<b>Name</b>	<b>Address</b>	<b>Asset, Share or Amount</b>
Kathleen Linda Donelli	8530 Chase Preserve Drive Naples, FL 34113	Prudential Insurance Policy Face Value \$1,000.00 Number 53229873
		Wells Fargo Account Number [REDACTED] \$100.00
		<b>Total</b> \$1,100.00

2. Those to whom specified parts of the decedent's estate are assigned by this order shall be entitled to receive and collect the same, and to maintain actions to enforce the right.

3. Debtors of the decedent, those holding property of the decedent, and those with whom securities or other property of decedent are registered, are authorized and empowered to comply with this order by paying, delivering, or transferring to those specified above the parts of

the decedent's estate assigned to them by this order, and the persons so paying, delivering, or transferring shall not be accountable to anyone else for the property.

4. Petitioner, and petitioner's attorney, as set forth herein, shall be entitled to receive un-redacted copies and un-redacted certified copies of the Petition for Summary Administration and any Orders filed in this proceeding.

ORDERED on October 27, 2013.

Janeen L. Bradley

Circuit Judge



LAUREN L. BRODIE  
CIRCUIT JUDGE  
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA

COLLIER COUNTY COURTHOUSE  
3315 TAMiami TRAIL EAST, SUITE 203  
NAPLES, FLORIDA 34112

TELEPHONE  
(239) 252-8909

December 9, 2013

Kerry Kotler, 97-A-6645  
Fishkill Correctional Facility  
Box 1245  
Beacon, New York 12508

RE: John Donelli 13-CP-1802

Dear Kerry Kotler,

This is in response to your letter dated November 28, 2013. I am unable to serve as your Attorney or to provide you legal advice. The information you seek is available through the Clerk's Office or on-line. However, I can tell you that, as of this date, no Executor has been appointed.

Very truly yours,

*Lauren L. Brodie*  
Lauren L. Brodie  
Circuit Court Judge

LLB/cjs

FILED 13  
COLLIER COUNTY, FLORIDA  
2013 DEC -9 PM 4:10  
CLERK OF COURTS  
BY D.C.