

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE COTTON - Petitioner,

v.

HAROLD GRAHAM - Respondent.

MOTION FOR LEAVE TO FILE

OUT-OF-TIME PETITION FOR REHEARING

Petitioner moves that this Court grant leave to file a petition for rehearing of the denial by an assistant of the Clerk of Court of a timely filing of a petition for a writ of certiorari to the United States Supreme Court.

The accompanying petition sets out intervening circumstances which represent substantial grounds for granting the petitions for rehearing and for a writ of certiorari.

Petition for a writ of certiorari was filed on October 29, 2021, by an initial assistant clerk, then erroneously refiled on December 1, 2021, by a substitute assistant clerk, before being rejected by the supplant clerk for not being filed before December 1, 2021.

This Court has granted petition for rehearing and filing,

which were filed before the expiration of the time prescribed by the Rules of this Court. See, for example, Young v. Harper, 520 U.S. 143, 153 n.1. Also, research reveals that the Court has granted out-of-time petitions. Therefore, it is clear that the Court has not divested itself of the power to consider such petitions for rehearing and that, where meritorious grounds exist, leave to file a petition for rehearing may be granted. I submit that the accompanying petition for rehearing should be accepted for filing and granted.

Dated: January 19, 2021.


Maurice Cotton, Pro Se

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE COTTON - Petitioner,

v.

HAROLD GRAHAM - Respondent.

ON PETITION FOR REHEARING

Now comes the petitioner, Maurice Cotton, and respectfully prays for a rehearing of this case before a full bench. This petition is made because this case has not received the full consideration that justice requires due to a rejection and refiling by an assistant clerk of Court of a revisionary writ of certiorari, after a filing of the writ of certiorari months before the refiling.

1. On May 13, 2021, the lower court made a judgment "denying motion to proceed in forma pauperis ... motion for certificate of appealability." Exhibits A and B.

2. On July 16, 2021, I filed a motion for rehearing/rehearing en banc. Exhibit B and C.

3. After July 19, 2021, I was directed to rename rehearing/rehearing en banc on denied leave to proceed in forma

pauperis and certificate of appealability to reconsideration/reconsideration en banc, to recall mandate and to vacate judgment. Exhibit C.

4. On August 6, 2021, I resubmitted the motion for reconsideration, after renaming the motion for rehearing. Exhibit D.

5. On August 6, 2021, I resubmitted the motion to recall mandate and vacate judgment, after refacing issue. Exhibit A.

6. On August 23, 2021, the lower court issued a final judgment. Exhibit A.

7. On October 29, 2021, I filed a petition for writ of certiorari with Court. Exhibit F.

8. On December 3, 2021, I resubmitted a revised petition for writ of certiorari with Court. Exhibit H.

9. On the evening of January 10, 2021, I received a letter and returned revisionary writ of certiorari from supplant assistant clerk of Court. Exhibit G.

10. Assistant Claude Alde indicated that, "date of the lower court judgment or order denying a timely petition for rehearing was May 13, 2021. Exhibit H.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI
WAS TIMELY FILED WHEN MAILED WITHIN
70 DAYS OF JUDGMENT BECAUSE A TIMELY
PETITION TOLLS 90 DAY PERIOD FOR IT.

A timely filed petition tolls the running of the time for petition for certiorari. Young v. Harper, 520 U.S. 143, 153 n.1. In Young, the Court holds offender was subjected to having his parole release revoked because of a change in politics and socialemconomics. Id. Offender was released because of overcrowding conditions. Id. Offender filed a petition for rehearing, after exhausting judicial remedies. Id., at 153 n.1. Petition was treated as timely filed by the lower court. Id. Petition for certiorari was filed within 90 days, after the denial of rehearing. Id. Petitions for certiorari and for rehearing were timely. Id.

Here, as in Young, my petition for certiorari was timely. I timely filed petition for rehearing, the was re-entitled petition for reconsideration. Exhibits B, C, D and E. One assistant indicates that "date of the lower court judgment or order denying a timely petition for rehearing was May 13, 2021. Ex. H. But, judgment or order denying in forma pauperis and certificate of appealability is dated May 13, 2021. Ex. A. So, petition for rehearing or reconsideration of judgment or order dated May 13,

2021, denying leave to proceed in forma pauperis and certificate of appealability could not have been examined simultaneously; likewise, petition for certiorari was not "due on or before October 10, 2021," like he contends.

Different assistant clerk indicates that writ of certiorari with revision to document was untimely and initially filed on December 1, 2021. Ex. H. But, the writ of certiorari was filed on October 29, 2021. Ex. F. The final decision from lower court was made on August 23, 2021. Ex. E. The time between the beginning of September 2021 and the end of October 2021 does not exceed 70 days. So, the writ of certiorari was filed within the 90-day-time-period prescribed by rules.

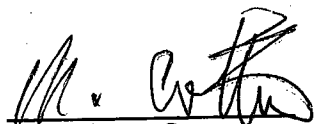
Different assistant clerk indicates the lower court's order dated August 23, 2021, is not an order denying petition for rehearing. But, order dated August 23, 2021, is denying petition for rehearing. A motion and petition for rehearing were presented to lower court. Ex. B and C. I was directed to re-entitle it from rehearing to reconsideration. Ex. C. Direction required me to separate motions for reconsideration and to recall and to vacate judgment. Ex. C. I timely resubmitted the petition for reconsideration. Ex. D. I did not make the direction; I applied it. The lower court omitted the words reconsideration and rehearing in its fleeting order dated August 23, 2021. Ex. E. But, lower court clerk and I committed the words rehearing and reconsideration. Ex. B, C and D. The lower court considered the

petition for rehearing because the issue being presented was facially re-entitled reconsideration, after direction from lower court clerk to revise petition.

CONCLUSION

BY REASON OF THE FOREGOING, THE PETITION FOR REHEARING SHOULD BE GRANTED, THE DIFFERENT ASSISTANT CLERK'S JUDGMENT CORRECTED, AND THE CASE RESTORED FOR A FULL CONSIDERATION.

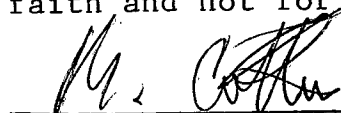
Respectfully submitted,



Maurice Cotton, Pro Se
Elmira Correctional Facility
1879 Davis Street
Elmira, New York 14901

CERTIFICATION

Pursuant to Rule 44.1 of the Rules of this Court, I hereby certify that this petition for rehearing is presented in good faith and not for delay.



Maurice Cotton, Pro Se

CERTIFICATE OF COMPLIANCE

No.

MAURICE COTTON - Petitioner,

v.

HAROLD GRAHAM - Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for rehearing contains 959 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

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

Executed on this 19 day of January, 2022.

A handwritten signature, appearing to be "M. Cotton", is written over a horizontal line.

Exhibit A

MANDATE

W.D.N.Y.
17-cv-650
Vilardo, J.
Scott, M.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 13th day of May, two thousand twenty-one.

Present:

Dennis Jacobs,
Reena Raggi,
Susan L. Carney,
Circuit Judges.

Maurice Cotton,

Petitioner-Appellant,

v.

20-4172

Superintendent Harold Graham,

Respondent-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis and a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:

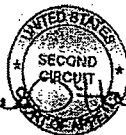
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



Catherine O'Hagan Wolfe

MANDATE ISSUED ON 06/23/2021

Exhibit B

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket #: 20-4172**- Docketed:** 12/17/2020**Nature of Suit:** 3530 PRISONER PET-Habeas Corpus**Termed:** 05/13/2021

Cotton v. Graham

Appeal From: WDNY (BUFFALO)**Fee Status:** IFP Pending in USCA**Case Type Information:**

- 1) Prisoner
- 2) State
- 3) Habeas Corpus

Originating Court Information:**District:** 0209-1 : 17-cv-650**Trial Judge:** Lawrence Joseph Vilardo, U.S. District Judge**Trial Judge:** Hugh B. Scott, U.S. Magistrate Judge**Date Filed:** 07/14/2017**Date Order/Judgment:**

11/23/2020

Date Order/Judgment EOD:

11/23/2020

Date NOA Filed:

12/15/2020

Date Rec'd COA:

12/17/2020

Prior Cases:

None

Current Cases:

None

Panel Assignment: Not available

Maurice Cotton
 Petitioner - Appellant

Maurice Cotton, -
 [NTC Pro Se]
 Green Haven Correctional Facility
 P.O. Box 4000
 Stormville, NY 12582-4000

Superintendent Harold Graham
 Respondent - Appellee

David Anthony Heraty, Assistant District Attorney
 Direct: 716-858-2447
 [COR LD NTC Government]
 Erie County District Attorney's Office
 Appeals Bureau
 25 Delaware Avenue
 Buffalo, NY 14202

Barbara D. Underwood, -
Terminated: 01/07/2021
 [COR NTC Government]
 New York State Office of the Attorney General
 28 Liberty Street
 New York, NY 10005

Maurice Cotton,

Petitioner - Appellant,

v.

Superintendent Harold Graham,

Respondent - Appellee.

- | | | | |
|------------|--------------------------|-----------|--|
| 12/17/2020 | <input type="checkbox"/> | <u>1</u> | NOTICE OF PRISONER APPEAL, with district court docket, on behalf of Appellant Maurice Cotton, FILED. [2996747] [20-4172] [Entered: 12/18/2020 01:25 PM] |
| | | | 9 pg, 245.21 KB |
| 12/17/2020 | <input type="checkbox"/> | <u>2</u> | DISTRICT COURT DECISION AND ORDER, denying certificate of appealability, dated 11/23/2020, RECEIVED.[2996753] [20-4172] [Entered: 12/18/2020 01:28 PM] |
| | | | 11 pg, 148.92 KB |
| 12/17/2020 | <input type="checkbox"/> | <u>4</u> | ELECTRONIC INDEX, in lieu of record, FILED.[2996758] [20-4172] [Entered: 12/18/2020 01:33 PM] |
| | | | 5 pg, 78.91 KB |
| 12/18/2020 | <input type="checkbox"/> | <u>5</u> | INSTRUCTIONAL FORMS, to Pro Se litigant, SENT.[2996764] [20-4172] [Entered: 12/18/2020 01:35 PM] |
| | | | 1 pg, 11.87 KB |
| 01/05/2021 | <input type="checkbox"/> | <u>6</u> | ORDER, dated 01/05/2021, dismissing appeal by 01/26/2021 unless Appellant Maurice Cotton, submits Acknowledgment and Notice of Appearance Form, copy to pro se appellant, FILED.[3005711] [20-4172] [Entered: 01/05/2021 06:55 AM] |
| | | | 1 pg, 25.27 KB |
| 01/07/2021 | <input type="checkbox"/> | <u>7</u> | ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Harold Graham, FILED. Service date 01/07/2021 by US mail.[3008155] [20-4172] [Entered: 01/07/2021 11:28 AM] |
| 01/07/2021 | <input type="checkbox"/> | <u>8</u> | NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee Harold Graham, FILED. Service date 01/07/2021 by US mail. [3008157] [20-4172] [Entered: 01/07/2021 11:31 AM] |
| | | | 2 pg, 105.48 KB |
| 01/07/2021 | <input type="checkbox"/> | <u>9</u> | DEFECTIVE DOCUMENT, ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, [7], on behalf of Appellee Harold Graham, copy to pro se appellant, FILED.[3008298] [20-4172] [Entered: 01/07/2021 12:45 PM] |
| | | | 2 pg, 18.34 KB |
| 01/07/2021 | <input type="checkbox"/> | <u>10</u> | CURED DEFECTIVE NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL [9], [8], on behalf of Appellee Harold Graham, FILED.[3008306] [20-4172] [Entered: 01/07/2021 12:50 PM] |
| 01/07/2021 | <input type="checkbox"/> | <u>11</u> | ATTORNEY, David Anthony Heraty, [8], in place of attorney Barbara D. Underwood, SUBSTITUTED.[3008312] [20-4172] [Entered: 01/07/2021 12:51 PM] |
| 01/07/2021 | <input type="checkbox"/> | <u>12</u> | ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Harold Graham, FILED. Service date 01/07/2021 by US mail.[3008744] [20-4172] [Entered: 01/07/2021 04:31 PM] |
| | | | 2 pg, 121.27 KB |
| 01/15/2021 | <input type="checkbox"/> | <u>13</u> | ORDER, dated 01/15/2021, dismissing appeal by 02/05/2021, unless Appellant Maurice Cotton, moves for certificate of appealability, copy to pro se appellant, FILED.[3014344] [20-4172] [Entered: 01/15/2021 09:52 AM] |
| | | | 1 pg, 40.26 KB |
| 01/25/2021 | <input type="checkbox"/> | <u>14</u> | FORM D-P, on behalf of Appellant Maurice Cotton, FILED. Service date 01/07/2021 by |

		US mail.[3020777] [20-4172] [Entered: 01/26/2021 09:46 AM]
01/25/2021	<input type="checkbox"/> <u>15</u>	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE FORM, on-behalf of Party Maurice Cotton, FILED. Service date 01/07/2021 by US mail.[3020781] [20-4172] [Entered: 01/26/2021 09:47 AM]
01/25/2021	<input type="checkbox"/> <u>16</u>	MOTION, to proceed in forma pauperis, for certificate of appealability, on behalf of Appellant Maurice Cotton, FILED. Service date 01/07/2021 by US mail.[3020787] [20-4172] [Entered: 01/26/2021 09:51 AM]
01/26/2021	<input type="checkbox"/> <u>21</u>	PAPERS, copy of Acknowledgment and Notice of Appearance, and Certificate of Service, RECEIVED.[3023849] [20-4172] [Entered: 01/28/2021 10:25 AM]
01/26/2021	<input type="checkbox"/> <u>22</u>	LETTER, dated 01/21/2021, on behalf of Appellant Maurice Cotton, informing the Court of Acknowledgment and Notice of Appearance as well as Certificate of Service, RECEIVED. Service date 01/21/2021 by US mail.[3023857] [20-4172] [Entered: 01/28/2021 10:28 AM]
05/13/2021	<input type="checkbox"/> <u>28</u>	NEW CASE MANAGER, Atasha Joseph, ASSIGNED.[3099832] [20-4172] [Entered: 05/13/2021 12:00 PM]
05/13/2021	<input type="checkbox"/> <u>30</u>	MOTION ORDER, denying motion to proceed in forma pauperis [16] filed by Appellant Maurice Cotton; denying motion for certificate of appealability [16] filed by Appellant Maurice Cotton, by DJ, RR, SLC, copy sent to pro se, FILED. [3099859][30] [20-4172] [Entered: 05/13/2021 12:06 PM]
05/21/2021	<input type="checkbox"/> <u>31</u>	DISTRICT COURT Record on Appeal (1 Box) to U.S. District Court - WDNY Buffalo , RETURNED. Attn: Kim Yvette McMillan--[Edited 05/21/2021 by SH] [3105342] [20-4172] [Entered: 05/21/2021 10:33 AM]
06/23/2021	<input type="checkbox"/> <u>33</u>	CERTIFIED COPY OF ORDER, dated 05/13/2021, determining the appeal to WDNY, copy sent to pro se, ISSUED.[Mandate][3124560] [20-4172] [Entered: 06/23/2021 11:35 AM]
07/16/2021	<input type="checkbox"/> <u>34</u>	FORM D-P, on behalf of Appellant Maurice Cotton, FILED. Service date 07/09/2021 by US mail.[3139788] [20-4172] [Entered: 07/19/2021 09:07 AM]
07/16/2021	<input type="checkbox"/> <u>35</u>	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE FORM, on behalf of Party Maurice Cotton, FILED. Service date 07/09/2021 by US mail.[3139793].[20-4172] [Entered: 07/19/2021 09:09 AM]
07/16/2021	<input type="checkbox"/> <u>36</u>	MOTION, for panel rehearing and rehearing en banc, on behalf of Appellant Maurice Cotton, FILED. Service date 07/09/2021 by US mail.[3139797] [20-4172] [Entered: 07/19/2021 09:14 AM]
07/19/2021	<input type="checkbox"/> <u>37</u>	DEFECTIVE DOCUMENT, MOTION, for panel rehearing and rehearing en banc, [36], on behalf of Appellant Maurice Cotton, copy sent to pro se, FILED.[3139800] [20-4172] [Entered: 07/19/2021 09:16 AM]

- ☒ Documents and Docket Report
☐ Documents and Docket Summary
☐ Documents Only

☒ Include Page Numbers

Selected Pages: Selected Size:

Exhibit C

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: July 19, 2021
Docket #: 20-4172pr
Short Title: Cotton v. Graham

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 17-cv-650
DC Court: WDNY (BUFFALO)
DC Judge: Scott
DC Judge: Vilardo

NOTICE OF DEFECTIVE FILING

On July 16, 2021 the motion for panel rehearing and rehearing en banc, on behalf of the appellant Maurice Cotton, was submitted in the above referenced case. The document does not comply with the FRAP or the Court's Local Rules for the following reason(s):

- ☐ Failure to submit acknowledgment and notice of appearance (*Local Rule 12.3*)
- ☐ Failure to file the Record on Appeal (*FRAP 10, FRAP 11*)
- ☐ Missing motion information statement (*T-1080 - Local Rule 27.1*)
- ☐ Missing supporting papers for motion (e.g, affidavit/affirmation/declaration) (*FRAP 27*)
- ☐ Insufficient number of copies (*Local Rules: 21.1, 27.1, 30.1, 31.1*)
- ☐ Improper proof of service (*FRAP 25*)
 - ☐ Missing proof of service
 - ☐ Served to an incorrect address
 - ☐ Incomplete service (*Anders v. California 386 U.S. 738 (1967)*)
- ☐ Failure to submit document in digital format (*Local Rule 25.1*)
- ☐ Not Text-Searchable (*Local Rule 25.1, Local Rules 25.2*), click [here](#) for instructions on how to make PDFs text searchable
- ☐ Failure to file appendix on CD-ROM (*Local Rule 25.1, Local Rules 25.2*)
- ☐ Failure to file special appendix (*Local Rule 32.1*)
- ☐ Defective cover (*FRAP 32*)
 - ☐ Incorrect caption (*FRAP 32*)
 - ☐ Wrong color cover (*FRAP 32*)
 - ☐ Docket number font too small (*Local Rule 32.1*)
- ☐ Incorrect pagination, click [here](#) for instructions on how to paginate PDFs (*Local Rule 32.1*)
- ☐ Incorrect font (*FRAP 32*)
- ☐ Oversized filing (*FRAP 27 (motion), FRAP 32 (brief)*)
- ☐ Missing Amicus Curiae filing or motion (*Local Rule 29.1*)
- ☒ Untimely filing

xx Incorrect Filing Event

xx Other: because the mandate issued on 06/23/2021, a motion to recall the mandate is required. A separate motion for reconsideration/reconsideration en banc would be the next course of action. Both motions must include the enclosed Motion Information Statement forms, your explanation of reason(s) for each motion and the enclosed Certificate of Service forms. With the motion for reconsideration/reconsideration en banc, no exhibits are permitted.

Please cure the defect(s) and resubmit the document, with the required copies if necessary, no later than 08/09/2021. The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

Failure to cure the defect(s) by the date set forth above will result in the document being stricken. An appellant's failure to cure a defective filing may result in the dismissal of the appeal.

Inquiries regarding this case may be directed to 212-857-8522.

Exhibit D

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): 20-4172

Caption [use short title] _____

Motion for: reconsideration/reconsideration en banc

Set forth below precise, complete statement of relief sought:

The panels opinion dated June 23, 2021,

be vacated and the court enter a new

opinion granting leave to proceed in forma

pauperis, certificate of appealability

and pro bono counsel.

MOVING PARTY: Maurice Cotton

OPPOSING PARTY: Harold Graham

☐ Plaintiff

☐ Defendant

☒ Appellant/Petitioner

☐ Appellee/Respondent

MOVING ATTORNEY: Pro Se

OPPOSING ATTORNEY: David A. Heraty, Asst. D. A.

Green Haven Correctional Facility

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

Appeals Bureau

594 Route 216, Box 4000

25 Delaware Avenue

Stormville, New York 12582

Buffalo, New York 14202

Court- Judge/ Agency appealed from: Lawrence J. Vilardo

Please check appropriate boxes:

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

☒ Yes ☐ No (explain): _____

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☒ Don't Know

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

Has this request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this court?

☐ Yes ☐ No

Requested return date and explanation of emergency: _____

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:

M. Cotton

Date: 8-6-21

Service by: ☐ CM/ECF ☒ Other [Attach proof of service]

Exhibit E

**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 23rd day of August, two thousand twenty-one.

Before: Dennis Jacobs,
Reena Raggi,
Susan L. Carney,
Circuit Judges.

Maurice Cotton,

Petitioner - Appellant,

v.

Superintendent Harold Graham,

Respondent - Appellee.

ORDER

Docket No. 204172

Appellant, pro se, moves for a recall of the mandate and to vacate the Court's decision dated May 13, 2021.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court


Catherine O'Hagan Wolfe

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