

# 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, Foley Square, in the City of New York, on the 20<sup>th</sup> day of August two thousand four,

Present:

Hon. Pierre N. Leval,  
Hon. Robert D. Sack,  
*Circuit Judges,*  
Hon. Edward Korman,  
*District Judge.\**



Dominic M. Franza,

Petitioner,

v.

03-3576-op

David Miller, Superintendent,

Respondent.

Petitioner, *pro se*, moves to recall this Court's mandate denying his application for leave to file a successive 28 U.S.C. § 2254 petition. Upon due consideration, it is ORDERED that the motion is denied. See Sargent v. Columbia Forest Products, Inc., 75 F.3d 86, 89 (2d Cir. 1996)(recall of mandate will issue only in "exceptional circumstances."). As we previously held, petitioner's § 2254 petition was properly regarded as successive because his prior petition was dismissed on its merits. See Ching v. United States, 298 F.3d 174, 177 (2d Cir. 2002); Graham v. Costello, 299 F.3d 129, 134 (2d Cir. 2002). Furthermore, petitioner is ineligible to file a successive § 2254 petition because the claim that he seeks to raise was raised in his prior petition and is not based on "newly discovered evidence" or a "new rule of constitutional law." See 28 U.S.C. § 2244(b).

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: Lucille Carr

~~AUG 20 2004~~

\*Hon. Edward Korman, Chief Judge of the U.S. District Court for the Eastern District of New York, sitting by designation.