

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): 18-3472; 12-4764-cv; and 18-1343

Caption [use short title]

Motion for: Court Order to Reinstate Appeal and Recall the Mandate

for Gayle v. Harry's Nurses Registry, Inc. (HNR) and Harry Dorvilier (18-3472);

Isigi v. Dorvilier, Harry's Nurses Registry (18-1343); and Gayle v. HNR (12-4764)

Set forth below precise, complete statement of relief sought:

Reinstate Appeal and Recall: (1) the Summary Order Mandate issued 02/14/2020

in Gayle v. HNR and Dorvilier (18-3472), referenced above; (2) the Summary

Order Mandate issued 02/07/2020 in Isigi (18-1343), referenced above; and

(3) the Mandate issued 07/06/2011 in Gayle v. HNR (12-4764)

referenced above.

Gayle/Isigi v. HNR and Harry Dorvilier

MOVING PARTY: HNR and H. Dorvilier

OPPOSING PARTY: Gayle, et. al; and R. Isigi

Plaintiff  Defendant

Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY:

OPPOSING ATTORNEY:

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

George A. Rusk, Attorney at Law

Jonathan A. Bernstein

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NYC, NY 10007 212-226-7334

Court- Judge/ Agency appealed from: Winter, Hall, Cote Summary Order Mandate (2/14/2020); Jacobs, Carney, Park Summary Order Mandate (02/07/2020); \*\*

Please check appropriate boxes:

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

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

Yes  No (explain):

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:

Opposing counsel's position on motion:

Unopposed  Opposed  Don't Know

Does opposing counsel intend to file a response:

Yes  No  Don't Know

\*\* Jjacobs, Winter, Parker Amended Order Mandate (07/06/2011)

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:

Date: 1/12/2021

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

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

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CLAUDIA GAYLE, Individually and  
On Behalf of All Others Similarly Situated  
and as Class Representative, et. al.  
Plaintiffs

**FORM T-1080 ATTORNEY  
AFFIRMATION IN SUPPORT OF  
MOTION TO REINSTATE APPEAL  
AND RECALL THE MANDATE**

v.

HARRY'S NURSES REGISTRY, INC. and  
HARRY DORVILIER  
Defendants

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**18-3472 2d Cir Court of Appeals  
Summary Order Mandate**  
(issued 02/14/2020)

ROSELYN ISIGI,  
Plaintiff-Appellee

**18-1343 2d Cir Court of Appeals  
Summary Order Mandate**  
(issued 02/07/2020)

v.

HARRY DORVILIER, HARRY'S NURSES REGISTRY  
Defendants-Appellants

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CLAUDIA GAYLE Individually and  
On Behalf of All Others Similarly Situated  
and as Class Representative, et. al.

**12-4764 2d Cir Court of Appeals  
Mandate** (issued 07/06/2011) and  
**Summary Order** (filed 12/8/2014)

v.

HARRY'S NURSES REGISTRY, INC.,  
Defendant

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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IN RE: DORVILIER AND HARRY'S NURSERY a/k/a  
HARRY'S NURSES REGISTRY, INC.,

**1:16-cv-01765 (AMD) (LB) EDNY  
Memorandum Decision and Order**  
(*Habeus Corpus* Petition decision/  
order filed 05/31/2017)

Petitioner

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McFARLANE

Plaintiff

**17-CV-06350 (PKC) (PK) EDNY**  
(filed 4/2/2020 and 12/07/2020)

v.

Harry's Nurses Registry and Harry Dorvilien (sp)  
Defendants

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GEORGE A. RUSK, Esq., affirms as true and states:

1. I am an attorney admitted to practice before the in the United States Court of Appeals For the Second Circuit (hereinafter referred to as the “Court”).

2. I have been retained by Defendants to prosecute a motion to vacate in connection with the above-captioned matters (hereinafter referred to as the “Motion”). The specific decisions that I seek to vacate in this Court are specified in paragraph 6 of this Affirmation; additionally I seek to vacate the specific U.S. Eastern District Court of New York (hereinafter referred to as “EDNY”) decisions specified in paragraph 7 of this Affirmation.

3. This affirmation is provided in connection with Defendants’ filing of the Form T-1080 that is required for the filing of the instant Motion, pursuant to local rule 27.1(a)3 of the Second Circuit (hereinafter referred to as “the Court”); and to support the instant pre-requisite motion that is filed herein for the Reinstatement of Appeal and the Recall the Mandate Summary Orders of this Court in the cases of *Gayle* and *Isigi* .

**I. CONSENTS FROM OTHER ATTORNEYS PREVIOUSLY REPRESENTING  
DEFENDANTS ON OTHER MATTERS**

4. Attached hereto in **Exhibit 1** is a copy of the certificate of service confirming that this motion has been filed with ECF. Previously filed with the ECF are consents of previous counsel that were involved in various aspects of the *Gayle* and *Isigi* cases and my executed Acknowledgement and Notice of Appearance form to comply with Court rules.

## II. CONFIRMATION OF OPPOSITION

5. This will confirm that I have left telephone messages and sent email notification to Jonathan A. Bernstein, counsel for plaintiffs in the three captioned proceedings that are the subject of this Motion to the Court. It is unknown as to whether they will be opposing this motion but I anticipate they will.

## III. MOTION TO REINSTATE APPEAL AND RECALL THE MANDATE

6. Cases For Which Defendants Request Reinstatement Of Appeal And Recall Of Mandate:

This Motion concerns the three (3) captioned cases identified as 18-3472, 18-1343 and 12-4764 and the respective Mandate Orders issued in those cases and also identified in the caption to this Motion. If this Motion is successful, Defendants will seek to vacate the following Court decisions:

- a. Gayle v. Harry's Nurses Registry, decided January 24, 2020 by Summary Order Mandate of Winter, Hall and Cote issued 2/14/2020;
- b. Gayle v. Harry's Nurses Registry, Inc., decided December 8, 2014 by Summary Order of Katzmann, Winter and Marrero; and
- c. Isigi v. Harry Dorvilier, Harry's NursesRegistry, decided December 19, 2019 by Summary Order of Jacobs, Carney and Park and affirmation Summary Order Mandate issued 2/7/2020.

7. Implications of the Instant Motion On Decisions Rendered By EDNY

If successful with the instant Motion to Reinstate and Recall Mandate and the follow-on Motion to Vacate in this Court, identical Motions will be filed in the U.S. District Court For The Eastern District of New York (hereinafter referred to as "EDNY") with respect to the following EDNY decisions, all of which involve the same Defendants and raise identical legal issues:

- a. Gayle v. Harry's Nurses Registry, Inc., decided March 9, 2009 by Memorandum and Order of Judge Sifton;
- b. Gayle v. Harry's Nurses Registry, Inc. , decided March 1, 2012 by Memorandum and Order of Judge Garaufis;
- c. Gayle v. Harry's Nurses Registry, Inc. , decided September 18, 2012 by Memorandum and Order of Judge Garaufis;
- d. Gayle v. Harry's Nurses Registry, Inc. , decided September 27, 2013 by Memorandum and Order of Judge Garaufis;
- e. Gayle v. Harry's Nurses Registry, Inc. and Harry Dorvilier a/k/a Harry Dorvilien, decided April 6, 2015 by Memorandum and Order of Judge Garaufis;
- f. In re Dorvilier & Harry's Nursery Registry, decided May 31, 2017 by Memorandum Decisions and Order of Judge Donnelly; and
- g. Gayle v. Harry's Nurses Registry, decided July 31, 2020 by Order of Judge Garaufis.
- h. McFarlane v. Harry's Nurses Registry, Harry's Homecare, Inc. and Harry Dorvilier , decided April 2, 2020 by Memorandum & Order of Judge Chen; and
- i. McFarlane v. Harry's Nurses Registry, Harry's Homecare, Inc. and Harry Dorvilier , decided December 7, 2020 by Memorandum & Order of Judge Chen.

Copies of the twelve (12) decisions identified in paragraphs 6 and 7 hereinabove,

are attached hereto as **Exhibit 2**, in accordance with the Court's local rule 27(a)2(B)iii.

8. Legal Basis For Instant Motion

As more thoroughly addressed in its Memorandum of Law submitted in connection with the instant motion, it is Defendant's position that the relief herein is warranted on the following grounds:

- a. This Motion is timely submitted, based on the Corona Virus pandemic concerns raised herein;
- b. Recall of the Mandate is required to prevent grave injustice to Defendants, that otherwise would result, if the significant , threshold legal issues previously raised *pro se* by Defendants, were not properly considered by

the Court;

- c. The previous *pro Se* status of Defendant constitutes a special reason and an exceptional circumstance that warrants the relief requested herein.

Each of these issues are addressed below.

**Timeliness of Motion.**

9. This Motion should be deemed timely submitted based on the social and legal process disruptions caused by the Corona Covid 19 virus pandemic (hereinafter referred to as the “Corona Pandemic” ). The Mandate Summary Order in the *Isigi* case was issued on February 7, 2020 and the Mandate Summary Order in the *Gayle* case was issued February 14, 2020. I respectfully request that the Court take judicial notice of the extreme disruption caused by the Corona Pandemic and that the court take this into consideration when ruling on this Motion. The above dates occurred at a point in time when the impacts of the Corona Pandemic were just beginning to be understood and when the massive social upheaval and disruption of Court activity was most pronounced. Under the circumstances, it would be unjust and unfair to prevent Defendants from reinstating the appeal and recalling the mandate issued in the *Isigi* and *Gayle* cases based on any timeliness concerns.

**Prevention Of Grave Injustice.**

10. The Memorandum of Law to be filed (hereinafter referred to as “the Memorandum”) in support of the instant motion and Defendants’ accompanying Motion for Leave to File an Oversize Brief, identify ten (10) substantive legal issues that that are relied on by Defendants as the basis for the legal relief sought in the instant motion and are summarized below:

- a. Defective Consent
- b. Fraud and Fraud on the Court
- c. Absence Of Engagement In Commerce Voids FLSA Applicability and Defendants' Liability Thereunder
- d. Individual Liability Of Defendant Dorvilier Violates New York State Labor Law and the 14<sup>th</sup> Amendment of the United States Constitution
- e. Criminal Liability Of Defendant Harry Dorvilier Constitutes a Violation of Federal and State Law and the 14<sup>th</sup> Amendment of The United States Constitution
- f. US DOL Regulations Exempted Defendants from FLSA Liability
- g. Statute of Limitations Not Properly Applied
- h. Defendants Were Denied Their Right to Jury Trial To Determine The Amount of FLSA Liquidated Damages Under The 6<sup>th</sup> Amendment of the U.S. Constitution and Unlawfully Denied Good Faith Affirmative Defense As A Matter Of Law
- i. Flawed Discovery; and
- j. US DOL Did Not Make A Determination that An FLSA Violation Occurred And Said Determination Is Required By FLSA Section 216(b)

11. The Memorandum filed herewith focuses on each of these legal issues in more detail. A number of these issues involve interpretation of some of the “grey areas” of the Fair Labor Standards Act (FLSA), that warrant scrutiny by the Court because of its widespread impact on workers and employers throughout the country. Given the facts that the statute is dated, arcane in its wording and perhaps not written as clearly as one might like -- Defendants maintain a number of critical issues that they raised in their *pro se* filings, were not addressed properly by the Court and provide the legal basis for the instant Motion on the grounds that reinstatement of the appeal and recall of the mandate are necessary to prevent grave injustice to

the Defendants. Examples of the injustice and prejudice to Defendants that would result if the relief requested herein is not granted, are presented below:

- a. It is hard to understand how the Domestic Worker exemption, which has been codified in a US DOL regulation since 1975 and was found to be valid by the U.S. Supreme Court in its 2008 decision, was entirely overlooked by the Courts in their decisions in this case. Also overlooked by Courts was the fact that the U.S. Supreme Court noted in said decision that US DOL had tried unsuccessfully to remove this exemption and make domestic workers subject to FLSA overtime payment requirements, in three separate proposed rulemaking efforts during the period 1993 to 2007; and that a fourth proposed rulemaking was initiated by US DOL to remove that exemption and the regulatory change was upheld and took effect on October 15, 2015 (see Home Care Association of America v. Weil, (No. 15-5018)). It is Defendants' position that throughout the entire period during which the *Gayle* litigation took place (i.e. 2004 or 2005 until 2007), domestic workers such as those employed by Defendant HNR were exempt from overtime rules by the express terms of this provision.
- b. Similarly, for example, it also is hard to understand how Defendant Dorvilier can be held **individually liable for corporate conduct** (i.e. for non-payment of overtime wages) when the laws of the New York State insulate him from such a harsh result;
- c. It is also extremely difficult to justify the holding in a companion *habeus corpus* proceeding **that Defendant Dorvilier could be individually and criminally liable**



**for corporate conduct** (i.e. for non-payment of employer worker's compensation contributions) when the laws of New York state and the FLSA insulate him from such a result;

- d. It is difficult to reconcile that Defendants can be determined to be liable for over \$930,000 in actual and liquidated damages in the *Gayle* case alone, despite the facts that the liquidated damages were barred by the FLSA, Section 260 Good Faith Affirmative Defense provision; and the underlying action/conduct engaged in by Defendants (i.e. non-payment of overtime wages) that gave rise to those damages was authorized by the FLSA (and confirmed as lawful by the U.S. Supreme Court) under the domestic worker exemption.
- e. Plaintiffs' failure to allege in its complaint or establish in the record, the necessary nexus to interstate commerce cannot be allowed to stand. This is a fundamental jurisdictional issue on which FLSA authority is predicated and without it, the decisions must be vacated. Even the court in *McFarlane*, supra, recognized this fundamental error.
- f. Similarly, filing of a written consent is a statutory prerequisite for establishing any valid FLSA section 216(b) proceeding. Simply put, since no such consent was filed by the named plaintiff in either the *Gayle* or *Isigi* cases constitutes a clear defect that warrants vacatur of the Court decisions in those cases.
- g. There are other examples of perplexing, troubling issues raised by Plaintiff that include the introduction of stolen/tainted evidence by Plaintiff and misrepresentation of the consent filed by the lead Plaintiff in the *Gayle* case, that

raise issues of “Fraud on the Court”; collusion between Plaintiff’s counsel and government officials to initiate the aforementioned criminal proceedings against Defendant Dorvilier; and the improper and arbitrary application of “short-cut” processes and procedures by the New York State Department of Labor (hereinafter referred to as “NYS DOL”) that resulted in the swift criminal conviction of Defendant Dorvilier in lieu of long, drawn out, labor intensive NYS DOL agency actions that were required to lawfully promulgate corrective regulations and reverse administrative judge decisions that prevented NYS DOL from holding Defendants liable for its lawful practice of withholding \$1 per hour from checks issued to staff nurses to cover a portion of Workers’ Compensation contributions paid by Defendants. The lawful regulatory process in this case ultimately required NYS DOL to formally declare a change in policy and engage in cumbersome litigation to reverse two inconvenient Administrative Law Judge decisions by the NYS DOL Workers’ Compensation Board that had prevented NYS DOL from holding Defendants civilly liable for the amount of Workers’ Compensation insurance contributions that NYS DOL had sought from them for the 2008 - 2010 period. In point of fact, NYS DOL did not accomplish this policy change and confirm it by court affirmation until April 2019 (see Matter of Harry’s Nurses Registry, Inc. (Commissioner of Labor), 2019 NY Slip Op 03114, decided on April 25, 2019, Appellate Division, Third Department).

- h. Defendants only ask that the Court keep an open mind regarding these issues in its consideration of the instant motion and that they not be dismissed out of hand as

musings that are the product of an overactive imagination.

Pro se Status Special Reason and Exceptional Circumstance

12. It is important for purposes of this Motion for the Court to understand that all of the ten substantive legal grounds raised by Defendants have a factual basis in the record but were not in properly addressed by the Court. How is this possible the Court may ask when the legal issues raised in the two cases at issue were reviewed and decided by several courts, judges and magistrates? The answer, I submit is because Mr. Harry Dorvilier is a brilliant accountant and businessman but lacks the necessary training as a lawyer: as a result, the *pro se* legal arguments he presented to the Court on behalf of Defendants, were not articulated in a way that clearly and concisely conveyed the import and legal significance of his arguments to the Court. I would further submit that in an adversary process that is heightened by the detailed procedural rules of this Court, a *pro se* defendant can suffer mightily and be seriously prejudiced when arguments are presented as common sense propositions perhaps understood by a layman -- but which are not backed up with the legal precedent and legal justification that is demanded by the Court. The net result I believe is that meritorious arguments were overlooked by a Court and counsel that were narrowly focused on employee/independent contractor classification, statutory damages and attorney fee awards while absolutely critical fundamental, jurisdictional/statutory issues were not given adequate scrutiny.

#### IV. CONFIRMATION OF REPRESENTATION

13. Attached as **Exhibit 3** is written confirmation that I have been authorized by Defendants to represent them in connection with the instant Motion to Reinstate and Recall Mandate. **Exhibit 4** contains copies of the Notices of Appearance filed with the Court together with documentation confirming that I am an attorney duly registered to practice before the Court.

**WHEREFORE**, I hereby request on behalf of Defendants that the Court Reinstate The Appeal of the three cases identified in Paragraph 5 of this Motion and Recall The Mandate of same, so the Court can exercise jurisdiction in connection with a Motion to Vacate that Defendants wish to file in those cases; and that I be recognized as the attorney of record for Defendants in connection with the instant Motion, the Motion For Leave to File an Oversize brief and the Motion to Vacate to be filed upon authorization of this Court.

Dated: January 12, 2021  
Buffalo, New York



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