UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MASAO YONAMINE,

Petitioner,

-against-

KATHLEEN G. GERBING, Superintendent of Otisville Correctional Facility,

Respondent.

----------X

NOT FOR PUBLICATION

MEMORANDUM & ORDER
18-CV-4325 (AMD)

ANN M. DONNELLY, United States District Judge:

On July 30, 2018, the petitioner, Masao Yonamine, who is currently incarcerated at Otisville Correctional Facility, filed this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging the validity of his state court conviction. The petitioner paid the filing fee to commence this action. For the reasons discussed below, the petition is transferred to the Second Circuit.

BACKGROUND

On July 12, 1988, the petitioner was convicted of second-degree murder after a jury trial in New York State Supreme Court, Queens County. The Honorable John Crabby sentenced the petitioner to a prison term of 25 years to life. (ECF No. 1, at 1.) The Appellate Division affirmed the petitioner's conviction on April 19, 1993, and the New York Court of Appeals denied the petitioner's application for leave to appeal on November 17, 1993. *See People v. Yonamine*, 192 A.D.2d 687 (2d Dep't 1993); *People v. Yonamine*, 82 N.Y.2d 854 (1993). On December 3, 1999, the Honorable Jack B. Weinstein denied the petitioner's application for a writ of habeas corpus pursuant to § 2254 on the merits. *See Yonamine v. Artuz*, No. 97-CV-2517 (JBW), 1999 WL 1487598 (E.D.N.Y. Dec. 3, 1999), *aff'd*, *Yonamine v. Artuz*, 234 F.3d 1263 (2d Cir. 2000) (summary order).

APPENDIX A

5.

On November 2, 2001, the petitioner filed a second § 2254 petition, which Judge Weinstein transferred to the United States Court of Appeals as a second or successive application. *See Yonamine v. Greiner*, No. 01-CV-7453 (JBW) (E.D.N.Y. Jan. 15, 2002). On April 1, 2002, the Second Circuit denied the petitioner's application. (*Id.* at ECF No. 16.) On July 27, 2017, the petitioner filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the same 1988 conviction. *See Yonamine v. Gerbing*, No. 17-CV-4453 (AMD) (E.D.N.Y. Aug. 1, 2017). I transferred this petition to the Second Circuit as a second or successive petition, and the Second Circuit denied the application. (*Id.*, ECF No. 3; ECF No. 4, Mandate, No. 17-2354) ("§ 2254, and not § 2241, is the proper vehicle by which Petitioner, who is 'in custody pursuant to the judgment of a State court,' must advance his claims."). The petitioner has now filed a second § 2241 petition seeking to challenge the same 1988 conviction.

DISCUSSION

28 U.S.C. § 2254 applies to "application[s] for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that [the person applying] is in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). Because the petitioner's challenge—that the trial judge handled a jury note improperly—is to the validity of his criminal conviction and sentence, I construe this petition as a § 2254 application.[1] (ECF No. 1, at 3, 15.) *See Cook v. New York State Div. of Parole*, 321 F.3d 274, 277 (2d Cir. 2003) ("[I]f an application that should be brought under 28 U.S.C. § 2254 is mislabeled as a

[1] In general, "before a court can recharacterize a petition brought under § 2241 or some other statute as one brought under § 2254 it must first provide petitioner notice and opportunity to withdraw the petition." *McCullough v. Fischer*, No. 13-CV-1176, 2014 WL 576260, at *3 (W.D.N.Y. Feb. 10, 2014). However, notice is not required in this case because "a previously filed § 2254 petition [was] denied on the merits." *Id.*

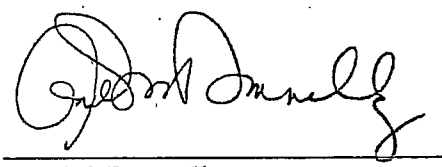
petition under section 2241, the district court must treat it as a section 2254 application instead.") (citing *James v. Walsh,* 308 F.3d 162, 166 (2d Cir. 2002).

Since this is the petitioner's fourth attempt to challenge the same conviction in federal court, the petition is considered a "second or successive petition." *Torres v. Senkowski*, 316 F.3d 147, 151 (2d Cir. 2003). Under the Antiterrorism and Effective Death Penalty Act of 1996, "the courts of appeals, not the district courts," have jurisdiction over "successive habeas motions or applications." *Id.* Consequently, the petitioner must move in the United States Court of Appeals for the Second Circuit for permission to pursue this successive petition for habeas corpus relief. 28 U.S.C. § 2244(b)(3)(A).

CONCLUSION

Accordingly, in the interest of justice, the Clerk of Court must transfer this petition to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1631. The Clerk of Court shall close this case.

SO ORDERED.



Ann M. Donnelly
United States District Judge

Dated: Brooklyn, New York
August 13, 2018

APPENDIX C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 1, 2018

Mr. Masao Yonamine
Prisoner ID #88A7233
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

Re: In Re Masao Yonamine
No. 17-9468

Dear Mr. Yonamine:

The Court today entered the following order in the above-entitled case:

The petition for a writ of habeas corpus is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 8, 2018

Mr. Masao Yonamine
Prisoner ID #88A7233
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

Re: In Re Masao Yonamine
No. 17-6939

Dear Mr. Yonamine:

The Court today entered the following order in the above-entitled case:

The petition for a writ of habeas corpus is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 19, 2018

Mr. Masao Yonamine
Prisoner ID #88A7233
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

Re: In Re Masao Yonamine
No. 17-6939

Dear Mr. Yonamine:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX F

E.D.N.Y.-Bklyn
17-cv-4453
Donnelly, 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 26th day of September, two thousand seventeen.

Present:

Raymond J. Lohier, Jr.,
Christopher F. Droney,
Circuit Judges,
Jed S. Rakoff,*
District Judge.

Masao Yonamine,

Petitioner,

v. 17-2354

Superintendent Kathleen G. Gerbing, under the jurisdiction of Custody/Control of New York State Corrections and Community Supervision,

Respondent.

Petitioner moves for leave to file a successive 28 U.S.C. § 2254 petition, but also argues that he should be permitted to proceed under 28 U.S.C. § 2241. Petitioner's motion appears to present two claims: that the trial court erred by (a) reviewing a jury note outside Petitioner's presence and (b) presenting the wrong testimony to the jury in response to a jury request. Upon due consideration, it is hereby ORDERED that the motion is DENIED because Petitioner must proceed under § 2254 and he has not made a prima facie showing that the requirements of 28 U.S.C. § 2244(b) are satisfied.

---

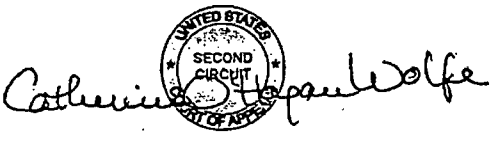
* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

First, § 2254, and not § 2241, is the proper vehicle by which Petitioner, who is "in custody pursuant to the judgment of a State court," must advance his claims. 28 U.S.C. § 2254(a); *see Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 277 (2d Cir. 2003).

Second, Petitioner clearly does not make the prima facie showing required under § 2244(b). Petitioner's claim that the trial court erred by reviewing a jury note outside Petitioner's presence was raised in his first § 2254 petition, and in his successive motion docketed under 16-4245, and cannot be raised again in a new petition. 28 U.S.C. § 2244(b)(1). In any event, even if both of Petitioner's claims are considered new, Petitioner has not made a showing that either claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), or that either claim is based on evidence that "could not have been discovered previously through the exercise of due diligence" and, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Petitioner] guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B).

To the extent Petitioner asserts actual innocence, he does not make a showing "that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)) (discussing standard for actual innocence claims as gateway to defaulted constitutional claims); *id.* at 555 (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)) (discussing the higher standard applicable to freestanding actual innocence claims).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MASAO YONAMINE,

Petitioner,

- against -

KATHLEEN G. GERBING, superintendent of Otisville Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

17 Civ. 4453 (AMD)

ANN DONNELLY, District Judge.

On July 27, 2017, the petitioner, Masao Yonamine, who is currently incarcerated at Otisville Correctional Facility, filed this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the validity of his state court conviction. The petitioner paid the filing fee to commence this action. For the reasons that follow, the petition is transferred to the Second Circuit.

BACKGROUND

On July 12, 1988, the petitioner was convicted of second degree murder and sentenced to a term of imprisonment of 25 years to life, before Judge John Clabby of the Supreme Court of New York, Queens County. On April 19, 1993, the Appellate Division affirmed the conviction. *See People v. Yonamine*, 192 A.D.2d 687 (2d Dep't 1993). On November 17, 1993, the New York Court of Appeals denied leave to appeal. *See People v. Yonamine*, 82 N.Y.2d 854 (1993). By a decision on the merits dated December 3, 1999, the Honorable Jack B. Weinstein denied the petitioner's application for a writ of habeas corpus pursuant to § 2254. *See Yonamine v. Artuz*,

APPENDIX 3

#3

No. 97-CV-2517 (JBW), 1999 WL 1487598 (E.D.N.Y. Dec. 3, 1999), *aff'd*, Mandate No. 00-2028 (2d Cir. Nov. 8, 2000). On November 2, 2001, the petitioner filed a second § 2254 petition, which Judge Weinstein transferred to the United States Court of Appeals for the Second Circuit, as a second or successive application. *See Yonamine v. Greiner*, No. 01-CV-7453 (JBW) (E.D.N.Y. Jan. 15, 2002). On April 1, 2002, the Second Circuit denied the petitioner's application. (*Id.* at ECF 16.) The petitioner now files this application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, challenging the same 1988 conviction for which he has already challenged in two prior petitions.

DISCUSSION

The petitioner purports to bring this petition under § 2241. However, he challenges the validity of his criminal conviction and sentence, and requests this Court "vacate the judgment of conviction." (Pet. At 4.) While § 2241 permits habeas corpus review for prisoners "in custody in violation of the Constitution or laws or treaties of the United States," generally, this provision is superseded by § 2254, which provides federal court jurisdiction to review challenges to state court convictions. *See Cook v. New York State Div. of Parole*, 321 F.3d 274, 277 (2d Cir. 2003) ("if an application that should be brought under 28 U.S.C. § 2254 is mislabeled as a petition under section 2241, the district court must treat it as a section 2254 application instead") (citing *James v. Walsh*, 308 F.3d 162, 166 (2d Cir. 2002). Accordingly, this Court treats the petition as a § 2254 application.[1]

[1] "Generally, before a court can recharacterize a petition brought under § 2241 or some other statute as one brought under § 2254 it must first provide petitioner notice and an opportunity to withdraw the petition." *See McCullough v. Fischer*, No. 13-CV-1176, 2014 WL 576260, at *3 (W.D.N.Y. Feb. 10, 2014) However, this requirement does not apply in this case because "notice is not necessary if a previously filed § 2254 petition has been denied on the merits." *Id.*

This is the petitioner's third attempt to challenge the same conviction in federal court, and therefore, it is considered a "second or successive petition." *See Torres v. Senkowski*, 316 F.3d 147, 151 (2d Cir. 2003). Under the Antiterrorism and Effective Death Penalty Act of 1996, "the courts of appeals, not the district courts," have jurisdiction over "successive habeas motions or applications." Consequently, the petitioner must move in the United States Court of Appeals for the Second Circuit for permission to pursue this successive petition for habeas corpus relief. 28 U.S.C. § 2244(b)(3)(A).

CONCLUSION

Accordingly, in the interest of justice, the Clerk of Court shall transfer this petition to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1631. The Clerk of Court shall close this case.

SO ORDERED.

S/ AMD

Ann M. Donnelly
United States District Judge

Dated: Brooklyn, New York
August 1, 2017

APPENDIX 5

S.D.N.Y.–N.Y.C.
16-cv-9537
McMahon, C.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 21st day of February, two thousand seventeen.

Present:

Amalya L. Kearse,
Peter W. Hall,
Denny Chin,
Circuit Judges.

Masao Yonamine,

Petitioner,

v. 16-4245

Kathleen G. Gerbing, Superintendent of Otisville Correctional Facility, under the Supervision of Custody/Control of New York State Corrections and Community Supervision,

Respondent.

Petitioner moves for leave to file a successive 28 U.S.C. § 2254 petition, but also requests that his petition be transferred to the district court as a 28 U.S.C. § 2241 petition. Upon due consideration, it is hereby ORDERED that Petitioner's motions are DENIED because Petitioner has not made a prima facie showing that the requirements of 28 U.S.C. § 2244(b) are satisfied.

First, § 2254, and not §2241, is the proper vehicle by which Petitioner, who is "in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a); *see Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 277 (2d Cir. 2003), must advance his claim. Second, Petitioner concedes that he raised the same claim regarding the jury note in his 1997 § 2254 petition, and he is thus barred under 28 U.S.C. § 2244(b)(1) from presenting it again. Third, even if the claim were considered new, Petitioner has not made a showing that it satisfies the requirements of § 2244(b)(2). Specifically, Petitioner does not cite a new rule of constitutional law, he does not make a showing that "the

factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and he does not make a showing that, "but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2)(B)(i) and (ii). To the extent Petitioner seeks to rely only on § 2244(b)(2)(B)(ii), he overlooks the fact that he must satisfy the requirements of both (i) and (ii), which he has not done.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MASAO YONAMINE,

Petitioner,

-against-

KATHLEEN GERBING,

Respondent.

16-CV-9537 (CM)

TRANSFER ORDER

COLLEEN McMAHON, Chief United States District Judge:

Petitioner, currently incarcerated at Otisville Correctional Facility, brings this *pro se* petition challenging his July 12, 1988 conviction in the New York Supreme Court, Queens County. The Court transfers this action to the United States Court of Appeals for the Second Circuit for the reasons set forth below.

Petitioner brings this action as a 28 U.S.C. § 2241 petition. Because Petitioner seeks to challenge his state court conviction, the proper jurisdictional basis for the application is a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. *See Cook v. New York State Div. of Parole*, 321 F.3d 274 (2d Cir. 2003). Petitioner, however, has already challenged this sentence by filing a petition under § 2254 in the United States District Court for the Eastern District of New York. *See Yonamine v. Artuz*, No. 97-CV-2517 (JBW) (E.D.N.Y. Apr. 22, 1997). The Court, therefore, is not required to provide Petitioner an opportunity to withdraw this application before it is recharacterized as a § 2254 Petition. *See Jiminian v. Nash*, 245 F.3d 144, 148 (2d Cir. 2001).

An application is second or successive if a prior petition attacking the same conviction was adjudicated on the merits. *See Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002). Because Petitioner's previous application for relief under § 2254, challenging the same conviction, was adjudicated on the merits, *see Yonamine*, No. 97-CV-2517, this application is a

second or successive petition. Before a second or successive *habeas* petition is filed in the district court, authorization from the appropriate court of appeals is required. 28 U.S.C. § 2244(b)(3)(A). Petitioner, therefore, must move in the United States Court of Appeals for the Second Circuit for permission to pursue this application. 28 U.S.C. § 2244(b)(3)(A).[1]

CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy of this order to Petitioner, and note service on the docket. In the interest of justice, the Court transfers this application, construed as a petition under § 2254, to the United States Court of Appeals for the Second Circuit. *See* 28 U.S.C. § 1631; *see also Liriano v. United States*, 95 F.3d 119, 122-23 (2d Cir. 1996) (*per curiam*). This order closes this case. If the Court of Appeals authorizes Petitioner to proceed in this matter, he must refile his submission in the Eastern District of New York.

Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253.

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[1]Any motion to the Court of Appeals must show that: (A) the claim being raised by the petition "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A); or (B) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(i)-(ii).

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: December 20, 2016
New York, New York

COLLEEN McMAHON
Chief United States District Judge

APPENDIX 10

State of New York
Court of Appeals

Decided and Entered on the twentieth day of October, 2016

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2016-788
The People &c. ex rel. Masao Yonamine,
Appellant,
v.
William J. Connolly, &c.,
Respondent.

Appellant having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied.

John P. Asiello
Clerk of the Court

APPENDIX 11

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D49370
O/htr

_____AD3d_____

Submitted - May 16, 2016

MARK C. DILLON, J.P.
ROBERT J. MILLER
SYLVIA O. HINDS-RADIX
VALERIE BRATHWAITE NELSON, JJ.

2015-08037

DECISION & ORDER

The People, etc., ex rel. Masao Yonamine, appellant,
v William J. Connolly, etc., respondent.

(Index No. 3018/14)

Masao Yonamine, Otisville, NY, appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Nancy Fitzpatrick Talcott, and Danielle M. O'Boyle of counsel), for respondent.

In a proceeding pursuant to CPLR article 70 for a writ of habeas corpus, the petitioner appeals from a judgment of the Supreme Court, Dutchess County (Greller, J.), dated July 7, 2015, which, without a hearing, denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, without costs or disbursements.

By judgment rendered July 12, 1988, the petitioner was convicted, upon a jury verdict, of murder in the second degree. He remains incarcerated pursuant to that judgment of conviction. The petitioner commenced the instant proceeding pursuant to CPLR article 70 for a writ of habeas corpus, arguing that he has been imprisoned after having been deprived of fundamental constitutional and statutory rights (*see People ex rel. Keitt v McMann*, 18 NY2d 257, 262). Specifically, he argues that the Supreme Court committed an *O'Rama* error (*see People v O'Rama*, 78 NY2d 270) when it read a jury note in open court in the presence of the jury and immediately responded to it without having first notified defense counsel of the contents of the note and providing him an opportunity to suggest an appropriate response outside of the presence of the jury as required by CPL 310.30 and *People v O'Rama* (78 NY2d 270). In addition, to the extent that such a conference was held off-the-record outside of the petitioner's presence, or that the court gave the jury

the requested information outside of the petitioner's presence, he contends that he was deprived of his right to be present at all material stages of the proceedings (*see* CPL 260.20, 310.30; *People ex rel. Lupo v Fay*, 13 NY2d 253, 257).

The petitioner's claim of an *O'Rama* error was raised on his direct appeal from the judgment of conviction (*see People v Yonamine*, 192 AD2d 687) and, therefore, he may not seek a second review of the claimed error already passed on in an earlier appeal (*see People ex rel. Keitt v McMann*, 18 NY2d at 262). Contrary to the respondent's contention, the petitioner's claims that he was absent when the purported off-the-record conference was held and when the court gave the jury the information requested in the jury note were not raised on direct appeal or in any prior motion pursuant to CPL 440.10. However, even assuming such errors occurred, neither would have affected "'the integrity of the fact-finding process'" or deprived the petitioner of a fair trial, and therefore he cannot collaterally attack the judgment of conviction years after his trial on the basis of these errors (*People ex rel. Rohrlich v Follette*, 20 NY2d 297, 302, quoting *Linkletter v Walker*, 381 US 618, 639; *see People ex rel. Keitt v McMann*, 18 NY2d at 262; *People ex rel. Lupo v Fay*, 13 NY2d at 257). Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding.

DILLON, J.P., MILLER, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M212376
E/sl

MARK C. DILLON, J.P.
ROBERT J. MILLER
SYLVIA O. HINDS-RADIX
VALERIE BRATHWAITE NELSON, JJ.

2015-08037

The People etc., ex rel. Masao Yonamine, appellant, v William J. Connolly, respondent.

DECISION & ORDER ON MOTION

(Index No. 3018/14)

Motion by the appellant to stay an execution of the underlying judgment of conviction or release him on his own recognizance or fix bail on an appeal from an order of the Supreme Court, Dutchess County, dated July 7, 2015.

Upon the papers filed in support of the motion and no papers having been filed in opposition or in relation thereto, it is

ORDERED that the motion is denied.

DILLON, J.P., MILLER, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
MASAO YONAMINE,

Petitioner,

-against-

WILLIAM J. CONNOLLY, SUPERINTENDENT
FISHKILL CORRECTIONAL FACILITY,

Respondent.

NOTICE OF ENTRY
Index No. 3018/2014
Greller, J.

PLEASE TAKE NOTICE that the within is a true and complete copy of the Decision and Order Application for Writ of Habeas Corpus in this proceeding duly entered in the Office of the County Clerk of Dutchess County on July 16, 2015.

Dated: Poughkeepsie, New York
July 21, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601
(845) 485-3900

BY: Barry Kaufman
BARRY KAUFMAN
Assistant Attorney General

BK:llg

TO: Masao Yonamine, #88A7233
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

APPENDIX 15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------X

In the Matter of the Application of
MASAO YONAMINE,

Petitioner,

- against -

WILLIAM J. CONNOLLY, SUPERINTENDENT
FISHKILL CORRECTIONAL FACILITY,

Respondent.

DECISION AND ORDER
APPLICATION FOR
WRIT OF HABEAS CORPUS

Index No. 3018/2014

----------X

STEPHEN L. GRELLER, ACTING SUPREME COURT JUSTICE

Petition for Writ of Habeas Corpus -----X
Affidavit in Support
/Accompanying Exhibits ----------X
Affirmation and Return
/Accompanying Exhibits ----------X
Reply Affidavit
/Accompanying Exhibits ----------X

The foregoing documents were considered in deciding this application. Petitioner is currently incarcerated at Otisville Correctional Facility, but made the instant application while incarcerated at Fishkill Correctional Facility. Petitioner's incarceration is based upon his conviction in Queens County for Murder in the Second Degree, to which he was sentenced to 25 years to life.

Petitioner currently claims that he is being illegally detained. He asserts that he was denied an opportunity to be present at all stages of his murder trial. In addition, the petitioner alleges that the Court improperly handled communications from the jury during the course of his

proceedings.

DISCUSSION

The Court has spent considerable time pouring over the voluminous submissions by the petitioner attempting to glean any cognizable new legal claim not previously raised in the petitioner's court history.

Following the petitioner's conviction and sentence in 1988, the petitioner has submitted numerous applications in both the State and Federal Courts. In reviewing all of those documents scrupulously, the Court comes to the conclusion that the petitioner has re-phrased and recycled the same legal arguments over the last 25 years.

The petitioner's current application presents no new legal arguments which had not already been decided by one or more courts.

The cases are legion that a writ of habeas corpus is not an appropriate remedy in this instance. A review of the record reflects that petitioner has unsuccessfully raised identical issues in multiple prior state and federal habeas corpus proceedings. Under such circumstances where a Court perceives no basis upon which to depart from the traditional orderly court procedure, a dismissal of the writ is appropriate. See Ex Rel Brown v. Artus, 64 AD3d 1064 (3rd Dept. 2009), lev. den. 13 NY3d 709.

Where the record reflects that similar issues have been the subject of previous and unsuccessful CPL §440 motions, as well as

direct appeal and habeas corpus applications, the Court is justified in denying the writ of habeas corpus application. See Ex Rel Franza v. Lape, 61 AD3d 1200 (3rd Dept. 2009).

Where a Court has previously rejected a petitioner's attack upon his convictions in prior CPL §440 motions as well as habeas corpus applications, the Court is justified in denying the habeas corpus relief sought. See Ex Rel Rivas v. Walsh, 69 AD3d 1236 (3rd Dept. 2010), lev. den. 14 NY3d 712.

Even if petitioner were correct in his assertions, he would not be entitled to immediate release, but at best a new trial. As petitioner's claims would not entitle him to immediate release, his application must be dismissed. See People Ex Rel Stevenson v. Beaver, 309 AD2d 1171 (4th Dept. 2003), lev. den. 1 NY3d 509.

For the foregoing reasons, the petitioner's application is dismissed.

This constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
July 7, 2015

HON. STEPHEN L. GRELLER,
Acting Supreme Court Justice

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APPENDIX 18

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