

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re MASAO YONAMINE,

Petitioner,

vs.

KATHLEEN G. GERBING, Superintendent of Otisville
Correctional Facility, Otisville, NY 10963, Under
The jurisdiction Of Custody/Control Of New York
State Corrections and Community Supervision,

Respondent.

ON PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO
28 USCA Sec.2241(a)(c)(3) and 28 USCA Sec.1651(a)(b)

PETITION FOR A WRIT OF HABEAS CORPUS

Masao Yonamine 88A7233
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QUESTION PRESENTED

POINT I

PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC 2241(a)(c)(3) SUBMITTED AGAINST THE PERSON(S) WHO HOLDS PETITIONER IN WHAT PETITIONER CLAIMS THAT HE IS UNLAWFULLY DETAINED OR IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, BY PURSUING THE VALIDITY OF THE JURISDICTION OF HIS DETENTION TO OBTAIN HIS LIBERTY PURSUANT TO UNITED STATES CONSTITUTION Art.III Sec.2 cl.(2) and UNITED STATES CONST.Art.1, Sec.9 cl.(2) IS THE PROPER APPLICATION ?

POINT II

MAY A FEDERAL COURT ENTERTAIN AND DETERMINE THE MERIT OF A STATE PRISONER'S APPLICATION FOR HABEAS CORPUS RELIEF FROM A VOID JUDGMENT, ILLEGALLY IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN CONTRAVENTION OF THE CONSTITUTION OR LAWS, OR TREATIES OF THE UNITED STATES, EVEN THOUGH PRISONER EXHAUSTED A FORMERLY AVAILABLE STATE REMEDY AND THERE IS NOW NO STATE REMEDY AVAILABLE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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UNITED STATES SUPREME COURT'S DECISION

On January 8, 2018, this Court denied Petitioner's petition for a WRIT OF HABEAS CORPUS under 28 USCA Sec.2241(a)(c)(3) dated 11/17/17 In Re Masao Yonamine Docket No.17-6939 without opinion; also on March 19/2018 denied petition for REHEARING. See APPENDIX A & B both denial the WRIT & REHEARING.

OPINION BELOW

The U.S.Court of Appeal for the 2d Cir. on Sept.26/17, Present: RAYMOND J. LOHIER, Jr.,CHRISTOPHER F.DRONEY, Cir.judges, JED S.RAKOFF, Dist.Judge, denied Petitioner's Writ pursuant to 28 USC 2241(a)(c)(3), from a Memorandum & Order dated Aug.1/17, issued by DONNELLY, Judge,EDNY-Bklyn, Dkt.#17-cv-4453, to obtain permission pursuant to 28 USC 2244(b)(3)(A) to pursue petitioner's Application for a Writ of Habeas Corpus release as a successive petition. The opinion from the 2d Cir.Ct. see APPENDIX 1-2 Dkt.#17-2354. The opinion from Dist. Ct., Judge DONNELLY, Aug.1/17, Dkt.#17-cv-4453 see APPENDIX 3-5.

The 2d Cir.Court on Feb.21/17, Present: AMALYA L.KEARSE, PETER W.HALL, DENNY CHIN, Cir. Judges, denied Petitioner's WRIT under 2241(a)(c)(3), from a Transfer Ordered 12/20/16 issued by the U.S.Dist. Court SDNY, Judge COLLEEN McMAHON for permission to pursue petitioner's Application pursuant to 2244(b)(3)(A). The opinion for the 2d Cir. see APPENDIX 6-7 Dkt.#16-4245 Feb.21/17. The opinion of the Dist.Ct. Dkt.#16-cv-9537 12/20/16 see APPENDIX 8-10.

The State of New York Court of Appeals Present: Hon. JANET DiFiore, denied Petitioner's Motion for leave to appeal from the Appellate Div.2nd. Dept.'s Affirmation of petitioner's application pursuant to Art.70 (CPLR) WRIT OF HABEAS CORPUS and a denial of the Application for STAYING and RECOGNIZANCE (See APPENDIX 11 Mo.No.2016-788 decided Oct.20/16, People ex rel. Yonamine v. Connolly); See APPENDIX 12-13 Appellate Div.2nd. Dept.'s Decision Jun.22/16, Dkt.#2015-08037 & opinion affirming the lower court dismissing the proceeding,

and also see APPENDIX 14 denial Motion on May 31/16 Dkt.#2015-08037 for STAY and Recognizance with no papers having been filed in opposition. And see APPENDIX 15-18 opinion of the Sup. Court of the State of New York, County of Dutchess, Judge GRELLER's Decision/Order July 7/15, Index No.3018/2014, In the Matter of the Application, Yonamine v. Connolly, dismissing Petitioner's Application for a WRIT without conducting a hearing.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner according to Art.III Sec.2,cl.(2) of the U.S. Constitution; U.S.Const. Art.I, Sec.9,cl.(2); 28 USC Sec.2241(a)(c)(3); 28 USC Sec.2243; 28 USC Sec.1651(a)(b).

Pursuant to 28 USC 2242, the "reasons for not making application to the district court of the district in which the applicant is held," is that Petitioner previously had submitted twice of his application under 2241(a)(c)(3) to the Dist. Courts "within theirs respective jurisdiction," and said Courts declined to conduct a hearing (28 USC s.2243) to determine whether petitioner was unlawful convicted, sentenced, detained or in custody restrained of his liberty in violation of the U.S. Constitution, from a judgment of the STATE COURTS, where petitioner had exhausted all available remedies in the State Courts. Thereby, justify the granting of a writ of habeas corpus, because, extraordinary circumstances exist to review of the unlawful conviction, to warrant the exercise of the Court's discretionary power,because that adequate relief cannot be obtained in any other form or from any other Courts or judges

QUESTION PRESENTED POINT I

PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC 2241(a)(c)(3) SUBMITTED AGAINST THE PERSON(S) WHO HOLDS PETITIONER IN WHAT PETITIONER CLAIMS THAT HE IS UNLAWFULLY DETAINED OR IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, BY PURSUING THE VALIDITY OF THE JURISDICTION OF HIS DETENTION TO OBTAIN HIS LIBERTY PURSUANT TO UNITED STATES CONST. Art.III Sec.2 cl.(2) and UNITED STATES CONST.Art.1,Sec.9 cl.(2) IS THE PROPER APPLICATION ?

POINT II

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APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Art.III Sec.2, cl(2) Provides in Part:

"The Supreme Court shall have Appellate Jurisdiction, both as to Law and Fact,"

United States Constitution Art.1, Sec.9, cl.(2) Provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases OF Rebellion or Invasion the public Safety may require it."

United States Constitution, XIV Amendment, Provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Congress shall have the power to enforce, by appropriate legislation, the provision of this article.

United States Constitution, V Amendment Provides:

...; "nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;".....

United States Constitution, VI Amendment, Provides:

"In all criminal prosecution, the accused shall enjoy the right to a....public trial, by an impartial jury of the state and district wherein the crime shall have been committed..., and to have the assistance of counsel for his defense."

United States Constitution, VIII Amendment, Provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 28 USC Sec.2241, Power to grant Writ, Provides in Part:

(a) Writ of Habeas Corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless---

- (3) He is in custody in violation of the constitution or laws, or treaties of the United States.

Title 28 USCA Sec.2243. Issuance of Writ; return, hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

.....
The Court shall summarily hear and determine the facts and dispose of the matter as law and justice require.

Title 28 USCA 2254, State Custody; remedies in Federal Courts Provides:

(a) The Supreme Court, a justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the Courts of the State; or

(B)(i) there is an absence of available State correction process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Criminal Procedure Law Sec.470.35(1). Determination by Court of Appeals from Orders of Intermediate Appellate Court;Scope of review. Provides in Part that:

1. Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine not only question of law which were raised or considered upon the appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceeding resulting in the original criminal court judgment, sentence or order, regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.

CRIMINAL PROCEDURE LAW Sec.310.30 Provides;

"At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text to any statute which, in its discretion, the court deems proper."

PRACTICE COMMENTARIES
BY PETER PREISER

The Court of Appeals has furnished the following model for procedure that should be followed when a deliberating jury requests additional information. (J)urors' inquiries must generally be submitted in writing, since ...written communication are the surest method for affording the court and counsel an adequate opportunity to confer. Further, whenever a substantive written jury communication is received by the judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review. After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses..... (T)he trial court should ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate before the jury is exposed to the potentially harmful information. Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and, in cases where the communication was sent by the individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made. *People v. O'Rama*, 78 N.Y.2d 270, 277-278, 574 N.Y.S.2d 159, 5 N.E.2d 189 (1991). Note that it is particularly important to afford counsel access to the juror's note and an opportunity to suggest responses thereto (*id.*, at 279; *People v. Cook*, 85 N.Y.2d 928, 626 N.Y.S.2d 1000, 650 N.E.2d 847 (1995)).

C.P.L. Sec.260.20 JURY TRIAL; DEFENDANT'S PRESENT AT TRIAL, Provides:

"A defendant must be personally present during the trial of a indictment";...

McKinney's Cons. Laws of New York, Book 1, Statutes Sec.171, Provides:

F. MANDATORY AND DIRECTORY PROVISIONS Sec.171, GENERALLY

MANDATORY provisions of a statute go to the jurisdiction of the person acting, while directory provision are mere instruction or direction.

"In the construction of statutes, mandatory provisions, generally speaking are those which are essential. They go to the jurisdiction or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it. Where they prescribe a certain mode of procedure it must be strictly pursued, otherwise the whole proceeding is thereby rendered void."

New York State Constitution Art.1 Sec.4 Habeas Corpus, Provides:

"The privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety require it."

New York State Constitution Art.1 Sec.6, Provides in Part:

"In any trial in any court whatever the party accused shall be allowed to

appear and defend in person and with counsel as in civil actions and shall be informed of the nature,"....."No person shall be subject to be twice put in jeopardy for the same offense.""No person shall be deprived of life, liberty or property without due process of law."

New York State Constitution Art.1 Sec.11, Provides in Part:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, or religion, be subjected to any discrimination in his civil rights by any other person....., or by the state or any agency or subdivision of the state."

CLEAR SUBSTANTIAL EVIDENCE OF THE FAILURE TO DISCLOSE THE JURY'S NOTE
AS APPEARED ON THE FACE OF THE TRIAL'S RECORD

After the jury had been sent out to deliberate, the following proceeding with respect to the jury's note request occurred:

THE COURT: Okay, remand.

(T.502, 6/15/88)*

(Whereupon, the jury deliberated and at 3 p.m. returned to the courtroom)

(T.503, 6/15/88)

THE CLERK: This will be court Exhibit 2. They sent out a notice earlier for court exhibits.

THE COURT: The first one is for evidence, that is Court Exhibit 1.

COURT OFFICER: Jury entering.

THE COURT: The first request was for evidence which you received, did you not?

JUROR #1: Yes.

THE COURT: The second one market Court Exhibit 2 is number one, please bring in the medical examiner's testimony regarding bullet wound to Alice's head. Also, all bullet wounds to John Cody's body.

Number two, Please bring in testimony of Dobson, EMG, relating to the positioning of cars as he witnessed it.

Now, I don't know if you-- if that is what you want, because apparently, the Reporter in going through the notes, does not find a great deal of information about that from Dobson. However, we will read whatever it is to you.

(T.504, 6/15/88)

On the second question the Court Reporter says there is no testimony relating at least from Dobson relating to the position of the cars.

Now, there was testimony if you recal by Washington, McPartland and maybe those are people you want to hear from, I don't know. But apparently, on Dobson, there isn't too much.

(Whereupon, the appropriate testimony was read back by the Reporter:)

THE COURT: All right. Ladies and gentlemen, that's what we have for you at the moment. You have to go back in and regroup and see what if anything else you want.

Take the jury out.

(whereupon, the jury left the Courtroom at 3:10 p.m. and then the following took place in chambers:)

MR. LAURIA: If I may have to respectfully except to the Court naming other witnesses to this jury. The question covered Mr. Dobson and there was no testimony. For the Court to suggest that maybe they are considering Mr. Washington or McPartland, I have to strenuously object to that and-

(T.505, 6/15/88)

THE COURT: You have your exception.

MR. LAURIA: Thank you much very much.

MR. ZUCKERMAN: For the record, I think Mr. Lauria is in no position to object. It was he who shouted out in front of the jury perhaps the jury would like to listen to the cross examination.

MR. LAURIA: There was more testimony concerning--

MR. ZUCKERMAN: There is more testimony concerning the position of the cars not from Dobson.

THE COURT: I don't have any exception to your suggestion that they listen to cross examination.

MR. LAURIA: I understand. I appreciate that.

(Whereupon, a recess was taken while the jury deliberated and we resumed at 6:30 p.m..)

(T.506, 6/15/88)

THE COURT: Let the record show that we have a Court Exhibit market Court Exhibit 3. The jury wants to have reread the testimony of Nathan Washington, Officer McPartland, Mrs. Gregoretti, Mr. Dobson. We have all of it except Mrs. Gregoretti's, which we can have first thing in the morning.

And then we wanted to clarify the judge's Charge pertaining to murder two and the criteria, thereof as well as manslaughter and the five criteria.

We don't have anything as such as five criteria, I have worked it out where with the three murder criteria plus two seem to be the basis of the emotional

distress affirmative defense.

Extreme emotional distress offense.
I think we come up with five which might satisfy them.

So, we will put it in that context to them. Bring out the jury.

COURT OFFICER: Jury entering.

THE COURT: Mr. Barry, would you give us Nathan Washington's testimony.

(T.507, 6/15/88)

(Whereupon, the testimony of Mr. Washington was read by the Reporter.)

THE COURT: Can we have the testimony of Officer McPartland.

(Whereupon, the testimony of Mr. McPartland was read by the Reporter.)

THE COURT: Which don't have Mrs. Gregoretti's out yet, but we do have Mr. Dobson's. We will give you Ms. Gregoretti's tomorrow morning first thing.

Let's do Mr. Dobson.

Remember at any time during the read back any portion of it satisfies what you are looking for, you can indicate that to the Court.

You have may proceed.

(Whereupon, the testimony of Mr. Dobson was read by the Reporter.)

THE COURT: Ladies and gentlemen, I told you that Mrs. Gregoretti's testimony will be given to you first thing in the morning.

**PETITIONER'S BACKGROUND, DIRECT APPEAL, MOTION AND COLLATERAL APPEAL
STATE AND FEDERAL WRIT OF HABEAS CORPUS**

BACKGROUND. Petitioner was indicted in New York, Queens County under Ind. No. 7840/86, charged with 2 counts of 2nd. degree murder (Penal Law Sec.125.25). The jury, acquitted one count and the other count convicted of 2nd. degree murder, and he was sentenced to 25 years to life imprisonment. (APPENDIX 21).

PETITIONER'S DIRECT APPEAL, was affirmed by the Appellate Div. 2nd. Dept. (See People v. Yonamine, 192 AD2d 687, 597 NYS2d 102); leave application to the New York Court of Appeals was denied (See People v. Yonamine, 82 NY2d 854, and re-argument also, denied see 82 NY2d 905)

PETITIONER'S FEDERAL WRIT OF HABEAS CORPUS UNDER 28 USCA Sec.2254, Docket #97-cv-2517, (Yonamine v. Artuz) was affirmed by the Dist.Court Eastern Dist.

of New York (JACK B. WEINSTEIN, Judge) on Dec.3/1999. But granted a Certificate of Appealability "on the issue of discussion by the state trial court, apparently without the presence of defendant and with no reporter making a record." The Court of Appeals for the 2d Circuit, under Docket #00-2080 (Yonamine v. Artuz) affirmed on Oct.18/2000 the District Court's decision by issuing a Summary Order indicating that: "This Summary Order will not be published in the Federal Reporter and may not be cited as precedential authority to this court or any other court.".....; AND the Application for a Writ of Certiorari to the United States Supreme Court under Docket #00-9025 (Yonamine v. Artuz, 532 U.S. 1041) was denied on May 21, 2001.

PETITIONER'S MOTION & COLLATERAL APPEALS. Petitioner had submitted Motions pursuant to Criminal Procedure Law (CPL) pursuant to CPL Sec.440.10 to the lower Supreme Court claiming issues as Brady/Rosario Material; without his presence and participation in regard of Challenges to the jurors, discharging sworn jury, the only Oriental juror of the panel's member was dismissed without petitioner's presence. Said motions were denied without conducting a hearing. Leave application to appeal to the Appellate Courts, were denied. Also, Petitioner had submitted a Motion for a WRIT OF CORAM NOBIS, claiming ineffective assistance of Appellate Counsel to the Appellate Court and said Court denied Petitioner's Writ of Coram Nobis..

PETITIONER' STATE WRIT OF HABEAS CORPUS PURSUANT TO CPLR Art.70. On June27/2014, Petitioner submitted an application for a Writ of Habeas Corpus to the Sup.Ct. Dutchess County, Poughkeepsie, New York, claiming immediate release from custody. Based that petitioner is unlawful detained on grounds that substantial evidence appear on the face of the petitioner's trial record; because, the trial judge failed to abide the language of the construction, interpretation and, mandatory provision of the statute CPL 310.30 & 260.20.

Further, he claimed that the statutes for which he was convicted, sentenced, detained, were unconstitutional enacted, in violation of his State/ Fed. Const. rights of due process of law and equal protection of the laws. The lower Sup. Court denied petitioner's writ without conducting a hearing. (See Courts' denial Decision from New York Ct. of Appeals to the lower Sup. Court as APPENDIX 11-18). Thereby, petitioner had exhausted twice his State available corrective process on the merit of his Fed. Constitutional claims.

PETITIONER FED. WRIT OF HABEAS CORPUS PURSUANT TO 28 USCA Sec.2241(a)(c)(3)

Petitioner had submitted twice his Fed. WRIT under 28 USC 2241(a)(c)(3) TO THE Federal Courts below, claiming on the merit of his State/Fed. Const. rights. But, said Federal Courts failed to conduct a hearing pursuant to 2243 as law and justice required to determine of the substance of his petition under 2241(a)(c)(3). (See APPENDIX 1-10 Yonamine v. Gerbing). Thereby, action/inaction from the State & Federal Courts below's denial of his petition for a WRIT under 2241(a)(c)(3) can be construed to preclude resort to petitioner's Writ which amounted to unconstitutional 'suspension' of the writ pursuant to New York Const. Art.1 sec.4, and U.S.Const. Art.1, sec.9,cl.(2). Therefore, there is no form or from any other courts or judges to review petitioner's claims on the merit of his State/Fed. Const.rights' violation as appeared on the face of the Petitioner's trial record.

QUESTION PRESENTED

POINT I

PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC 2241(a)(c)(3) SUBMITTED AGAINST THE PERSON(S) WHO HOLDS PETITIONER IN WHAT PETITIONER CLAIMS THAT HE IS UNLAWFULLY DETAINED OR IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, BY PURSUING THE VALIDITY OF THE JURISDICTION OF HIS DETENTION TO OBTAIN HIS LIBERTY PURSUANT TO UNITED STATES CONST. Art.III Sec.2 cl.(2) and UNITED STATES CONST.Art.1,Sec.9 cl.(2) IS THE PROPER APPLICATION ?

It is respectfully submitted that pursuant to the United States Constitution Art.1, Sec.9, cl.(2) provides:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."

According to the language of the Original construction and interpretation pursuant to the Writ of Habeas Corpus 28 USC 2241(a)(c)(3) provides in part:

(a) Writ of Habeas Corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restrain complained of is had.

(c) The writ of habeas corpus shall not extent to a prisoner unless--

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;.....

According to Art.III Sec.2,cl.(2) of the U.S. Constitution, this Honorable Sup. Court has appellate jurisdiction, both as to law and facts, to consider cases in controversy properly brought before the Court from the lower courts in accordance with federal law and filed pursuant to the Rule of the Court.

Thereby, Petitioner respectfully submit this Writ to this U.S. Supreme Court to review Petitioner's application under 28 USC 2241(a)(c)(3), pursuant to Art.III, Sec.2, cl.(2) of the U.S.Const.; "all-writs" statutes 28 USC 1651(a)(b); 2242; 2243, to consider and allowed petitioner to pursue with his petition under 2241(a)(c)(3) and grant a Writ of Certiorari. Because, adequate relief cannot be obtained in any form or from any other courts or judges as petitioner had presented to the Federal lower Courts and State's courts. (See APPENDIX A-B and from 1-18 all courts'denial decisions). On ground that petitioner's claim will be in aid of the Court's Appellate Jurisdiction, showing that the case is of such imperative public importance as to justify deviation from normal appellate practice.

Thereby, pursuant to 28 USC 1651(a)(b), this Honorable Court has the power to review petitioner's Writ under 2241(a)(c)(3) to verify and clarify whether petitioner's application under 2241 was/is the proper application, forum and, jurisdiction to pursue his claim. Based, against the person(s) who hold petitioner in what petitioner claim that he is unlawfully detained or in cus-

tody restrained of his personal life and liberty in violation of the constitution or laws or treaties of the United States, by challenging of the validity of the jurisdiction of his detention.

With respect to the language of the construction and interpretation both statutes pursuant to 28 USC 2241(a)(c)(3), 28 USC 2243 supra and provision pursuant to "all Writ Statute" 28 USC Sec.1651(a)(b), Petitioner respectfully submit his petition under Writ of Habeas Corpus pursuant to 2241, which can be used e.g., see *Wales v. Whitney*, 144 US 564 at 571 (1885) indicates that:

"The Writ of Habeas Corpus is not a writ of error, thought in some cases in which the court issuing it has appellate power over the court by whose order the prisoner is held in custody, it may be used with the writ of certiorari for that purpose." "Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful, it must then discharge the prisoner." e.g. see *Ableman v. Booth*, 62 US 506 (1858) at 522 the court's power, issue upon writs of error to a state court.

HERE, is the case that the trial judge lost its jurisdiction or its core responsibility in the course of a Criminal Procedure Law (CPL) Statutes, when failed to abide the language of the construction, interpretation and, mandatory provision of the statutes pursuant to CPL Sec. 310.30 & 260.20 as required to follow under the authority of the Legislature intent (during jury deliberation how to disclose a jury's note) as appears on the face of the Petitioner's trial record. Thereby, after the trial judge failed to comply with the mandatory provision of the statute CPL Sec.310.30, the following proceeding of the conviction is void, the sentence is void and, detention or custody is void. (See McKinney CPL Sec.310.30's mandatory provision with Practice Commentaries by Peter Preiser, or see supra at pg.4-5); See APPENDIX 24-30 or see supra at pg.6-8 Petitioner's trial transcript minutes, showing trial judge's error, and objection by petitioner trial counsel, issue preserved for appel-

late review); (Also, see McKinney's Cons.Law of New York Book 1 STATUTES Sec.171, MANDATORY PROVISION OF THE STATUTES or see supra at pg.5, where describes the responsibility of the trial judge's jurisdiction to comply with mandatory provision of the statutes which, provides in part that:

MANDATORY provision of a statute go to the jurisdiction of the person acting,.

.....

"In the construction of statutes, mandatory provisions, generally speaking are those which are essential. They go to the jurisdiction or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it. **Where they prescribe a certain mode of procedure it must be strictly pursued, otherwise the whole proceeding is thereby rendered void.**" (See e.g. People v. Meyers, 207 Misc. 431 (1955) case reversed and the information dismissed; People ex rel. Lawton v. Snell, 216 N.Y. 527 (1916), case reversed and relator discharged; Francis v. Fonfara, 303 Conn. 292, 33 A.3d 185 (2012) WRIT OF ERROR GRANTED, judgment reversed).

Since, Petitioner is currently 'in custody' unlawful and has submitted his Application 'within the meaning of the Fed. Habeas Corpus statute 28 USC Sec. 2241(a)(c)(3)' against his custodian. See Payton v. Rowe, 391 US 54, 84 S.Ct. 1549, 20 L.Ed.2d 426 (1968)(which had permitted a prisoner to attack on habeas corpus only "current confinement"). Therefore, the writ of habeas corpus does not act upon the prisoner who seek relief, but upon the person who holds him in what is alleged to be unlawful custody. See WALES v. WHITNEY, 114 US 564, at 574, 5 S.Ct.1050,1054-55 (1885); Also see Braden v. 30th Judicial Cir.Court of Kentucky, 410 US 484 (1973) at 494-495, indicating that:

'The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the letter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.' In the Matter of Jackson, 15 Mich.471, 479 440 (1867), quoted with approval in Ex parte Endo, 323 U.S. 282, 306, 65 S.Ct.208, 220, 89 L.Ed. 243 (1944). See also Ahrens v. Clark, 335 U.S., at 196-197, 68 S.Ct., at 1447. (Rutledge, J., dissenting).

Read literally, the language of s2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian, So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he

be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction. (See Braden supra).

HERE, according to Braden's case supra, confirm that petitioner's application under 2241 submitted to the Dist.Court with the meaning of 'within their respective jurisdiction' was a proper forum for the Dist. Court to award the writ by issue an order directing the respondent to show cause why a writ should not be awarded to bring up the body of Masao Yonamine, pursuant to Sec. 2243's language of the statute which requires that petitioner be brought before the Court and be present to testify (s2241(c)(5)) for a hearing to determine of the substance of his petition for unlawful detention; to make a final determination of fact and law in regard of his claim of the validity of the jurisdiction of his conviction and detention as law and justice required. Based, that the Dist. Court has its jurisdiction over the custodian's territorial jurisdiction and over petitioner's petition under 2241, where petitioner is held confined. Even if the petitioner himself is confined outside, the court's territorial jurisdiction. See e.g. U.S. v. Hayman, 342 US 205 at 220, 222, where the court in Hayman indicates:

"This want of power though to follow from our decision in Ahrens v. Clark, 1948, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898, where we hold that the phrase 'within their respective jurisdiction' in habeas corpus statute 32 (see note 32, 28 U.S.C. s452 (now 28 U.S.C. (Supp.IV) s 2241, 28 U.S.C.A. s2241) require the presence of the petitioner within the territorial jurisdiction of the District Court as a prerequisite to his filing an application for habeas corpus."....

This is in accord with the procedure in habeas corpus actions, Walker v. Johnston, 321 U.S. 275, at 284, 61 S.Ct. at 578. According to the Reviser's NOTE, 28 U.S.C.(Supp.IV) s2243, 28 U.S.C.A. s2243, governing the requirements for presence of a prisoner in habeas corpus actions, was drafted to conform with the practice described in WALKER case. (see Hayman at 222 supra Note 38). See, Walker v. Johnston, supra, at 284, where the Court in Walker indicates:

"the Court or Judges 'shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and

thereupon to dispose of the party as law and justice require."

In this particular case the Dist. Court acted improperly by transferring Petitioner's application under 2241 to the 2d Cir. Court, without conducting a hearing pursuant to 2243 to determine of the substance of the petition which involved petitioner's life & liberty from a miscarriage of justice; without follow of the plain language of the provision pursuant to 2241(5), which provides that: "it is necessary to bring him into court to testify or for trial," and (d) (for the district within which the state Court was held which convicted and sentenced him"....). Thereby, the Dist. Courts action/inaction were systematically deviated from within responsive jurisdiction and deviated from the language of the adequacy and constitutional of the 28 USCA 2241. Thus precluded resort to petitioner's writ which amounted to unconstitutional 'suspension' of the Writ of Habeas Corpus pursuant to U.S.Const.Art.1 Sec.9,cl. 2. See, for example the Court in *Machibroda v. U.S.*, 368 US 487 (1962) at 495-496 indicates in regard to a hearing that:

"What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory or palpably incredible his allegation may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner. Whether the petition in the present case can appropriately be disposed of without the presence of the petitioner at the hearing is a question to be resolved in the further proceedings in the District Court.

There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this junction be said to be incredible. If the allegation are true, the petitioner is entitled to relief." (See *Machibroda supra* at 495-96. Also, see *Sanders v. U.S.*, 373 US 1 at 21-22). Therefore, "On this record it is his right to be heard." See *Walker v. Johnston, supra*, at 287, also *Machibroda supra* at 496.

The Writ of Habeas Corpus has been available to review the legality of Executive determination. See *Felker*, 518 US at 667, 116 S.Ct.2333. The Federal Courts have been authorized to issue writ of habeas corpus since the enactment

of the Judiciary Act of 1789, and Section 2241 of the Judiciary Code provides that federal judges may grant the writ of habeas corpus on the application of a prisoner held "in custody in violation of the constitution or laws or treaties of the United States." In fact, Sec.2241 descends directly from Sec.14 of the judiciary Act of 1789 and the 1867 Act. See Act of Sept.24,1789, ch.20, Sec.14. 1 Stat.82; Act of Feb.5,1867, ch.28,14 Stat.385. Its text remained undisturbed by either AEDPA or IIRIRA. (See I.N.S. v. St.Cyr, 533 U.S. 289 at 305, and n.25). Also, the writ of habeas corpus was available to challenge Executive and private detention in civil cases as well criminal. See e.g. Ex parte Randolph, 20 F.Cas. 242 (No.11,588) (C.C.D.Va.1833) (Marshall, C.J., on circuit). More, the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed determinations based on error of law, including the erroneous application or interpretation of statutes. (See I.N.S. v. St.Cyr, 533 U.S. 289, at 302). Here, e.g., Petitioner's claim that he is currently unlawful in custody for 31½ years "in violation of the constitution or laws or treaties of the United States." Based, that the trial judge lost its jurisdiction during the course of the Criminal Procedure Law (CPL) STATUTES by disregarded the statute of the CPL 310.30, including the erroneous application of the language of the construction, interpretation and mandatory provision of the statute CPL 310.30, which violated Petitioner' State/Fed.Const.Rights of due process of law & equal protection of the laws. e.g. cases similar to petitioner's case that were reversed on the law of the interpretation of the statute 310.30, Roger v. US, 422 US 35, 95 S.Ct. 2091, 2094-5; United States v. Ronder, 639 F.2d. 931,934 (2d Cir.); Shield v. U.S. 273 US 587, 47 S.Ct.478; People v. O'Rama, 78 NY2d 270; People v. Silva, 24 N.Y.3d 294; People v. Rivera, 23 N.Y.3d 827; People v. Kisoan, 8 N.Y.3d 129.

Therefore, Petitioner prays the Court for immediate release from custody,

be granted pursuant to 28 USC 2241(a)(c)(3), because, the judgment of his detention is void, based for unlawful of the validity jurisdiction of the detention, (in respect to trial judge's jurisdiction of the inferior court, both in respect to the subject-matter and to the person). Thereby, "on this record it is his right to be heard." See Walker v. Johnston supra at 287; Machibroda supra at 496 and, pursuant to 2241 and 2243 as laws and justice requires. Further, petitioner respectfully request the Court for an answer from Petitioner's Question Presented Point I supra.

POINT II

MAY A FEDERAL COURT ENTERTAIN AND DETERMINE THE MERIT OF A STATE PRISONER'S APPLICATION FOR HABEAS CORPUS RELIEF FROM A VOID JUDGMENT, ILLEGALLY IN CUSTODY RESTRAINED OF HIS PERSONAL LIBERTY IN CONTRAVENTION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES, EVEN THOUGH PRISONER EXHAUSTED A FORMERLY AVAILABLE STATE REMEDY AND THERE IS NOW NO STATE REMEDY AVAILABLE AND NO FEDERAL LOWER COURT REMEDY AVAILABLE ?

It is respectfully submitted, since the trial judge failed to abide the language of the construction, interpretation and, mandatory provision pursuant to CPL Sec.310.30, it is claimed, consequent loss the jurisdiction by the trial judge which appear affirmatively on the face of the trial record, see (APPENDIX 24-30 or supra at pg.6-8 trial's transcript minutes record and, see also, McKinney's Cons. Laws of New York Book 1 Statutes Sec.171, Mandatory Provision of the Statutes or see supra at pg.5). Thereby, a court's jurisdiction during jury deliberation lost its jurisdiction, 'in the course of the proceeding' violated Petitioner' State/Fed. Constitutional guaranteed of due process of law & equal protection of the laws through the 5th, 6th, 8th and, 14th Amends. of the United States Const. whose life or liberty is at stake. cf. Frank v. Mangum, 237 US 309, at 327. If this requirements of the 5th, 6th, 8th and, 14th Amends. is no complied with, the court no longer has jurisdiction to proceed. "The judgment of conviction pronounced by a court without jurisdiction is void, and one imprison thereunder may obtain release by habeas

corpus." (See Ex parte Hans Neilsen Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118; Johnston v. Zerbst, 304, U.S. 458 (1938) at 468).

Unquestioned, criminal jurisdiction to convict and imprison attached at common law where the trial court has jurisdiction over the defendant and over the subject matter and a showing of such jurisdiction upon the return of a writ of habeas corpus ad subjiciendum concluded a court from further inquire. Ex parte WATKINS, 3 pet.193 (1830), also see Watkins, 32 US 568 (1833), 7 Pet.568; Bushel's case, 6 Howell's State trial 999 (1670). The very nature of the writ demanded such rule, for regardless of the "incorrectness" of a judgment of conviction detention thereunder would be "lawful." Only if the judgment were void could the resulting detention be unlawful. See 1 Bailey, Habeas Corpus 79-94 (1913 ed.), Halsbury's Laws of England 701-715 (2d.ed.).

Here, since petitioner's conviction and detention is unlawful, the Fed. Court can issue an Order pursuant to a writ of habeas corpus to release immediately to the petitioner, because Petitioner cannot be retrail for the same offense to be put in jeopardy of life or limb in violation of the 5th Amend. of the U.S. Const., and New York State Const. Art.1 Sec.6 (No person shall be subject to be put in jeopardy for the same offense) through the 14th Amend., due process of law. See e.g. Ex parte Lange, 18 Wall.163, 21 L.Ed.872, (Application for a writ and released on ground of double jeopardy). Because, on Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 established rule of federal law is embodied in the Fifth Amendment guaranteed against double jeopardy is enforced against States through the 14th Amendment, (due process of law).

A Habeas Corpus is a proper remedy for revising the proceeding of a court in criminal case. See, 1 Chitty's Criminal Law 180. Because, in many cases Habeas Corpus has been issue as to make its action to that of a writ of error, in which the party must show that he is imprisoned by a court having no juris-

diction. (See Ex parte Walking, 28 US 193 at 197). Also, see Mr. Justice HOLMES in his dissenting OPINION IN Frank v. Mangum, 277 US 309 at 348, indicates:

"If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above."

It is of the Historical essence of habeas corpus that it lies to test proceeding so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. See APPENDIX 24-30 transcript minutes during jury deliberation, in which the trial judge exceeded its jurisdiction by suggest to hear witnesses' testimony not requested by the jury's note, said action can be construed that the jury were subjected to intimidation and can be construed as a mob dominated trial. (See Moore v. Dempsey, 261 US 86 (1923); Frank v. Mangum, 237 US 309 at 335).

In Fay v. Noia, 372 U.S. 391 at 430, indicates that: The broad power of the federal courts under 28 USC 2243 summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty, when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner. In re Medley, Petitioner, 134 U.S. 160, 173, 10 S.Ct. 384, 388, 33 L.Ed. 385. See Noia supra at 430.

Therefore, Petitioner respectfully request the Court to consider his petition under 2241(a)(c)(3), because he had exhausted twice all available State Court's remedies as required see APPENDIX 11-18 (See Preiser v. Rodriguez, 411 US 475 (1973)), and petitioner relying in Braden v. 30th Judicial Cir. Court of Kentucky, 410 US 484 (where petitioner Braden had exhausted all available State court remedies for consideration of his constitutional claim). Thereby, petitioner request the Court for a prompt hearing pursuant to 28 USC

2243 according to Hayman, 342 U.S. 205 at 222-223; Walker v. Johnston, 321 US 275 at 284; pursuant to 28 U.S.C. Sec.1651(a)(b); and 28 USC Sec.2241(b).

CONCLUSION

Petitioner respectfully request the Court for an Order (a) directed to the Court's Clerk to certify the record for review; (b) immediate release from unlawful conviction, sentence, detained or in-custody restrained of his personal life & liberty and he is actually innocence by law; (c) to vacate the judgment of conviction that is void; (d) to dismiss the indictment for the purpose of double jeopardy as law and justice require, based that petitioner has been unlawful 31½ years in custody in violation of the Constitution or laws or treaties of the United States, and as the Court may deemed just and equitable.

WHEREFORE, Petitioner prays that the Writ should granted.

DECLARATION UNDER THE PENALTY OF PERJURY

Petitioner is incarcerated. Petitioner's Writ of Habeas Corpus dated 6/16/18 is placed in the prison Mail system on 6/16/18 to be mailed via US POSTAL SERVICE VIA PRIORITY MAIL EXPRESS EK 606036565 U.S

DATED: Otisville New York
June 16, 2018

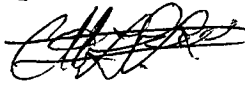
CC: BARBARA D. UNDERWOOD, Acting Atty. General
New York State Office, Attorney General
120 Broadway, NY, NY 10271

SOLICITOR GENERAL OF THE UNITED STATES
Room 5616, Dept. of Justice
650 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

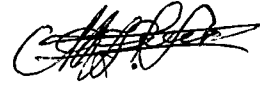
KATHLEEN G. GERBIBG, Superintendent
Otisville Correctional Facility
57 Sanitorium Rd., P.O. BOX 8
Otisville, NY 10963

RICHARD A. BROWN, Queens County, Dist. Atty.
125-01 Queens Blvd., Kew Gardens, NY 11415

Respectfully submitted,


Masao Yonamine 88A7233
Petitioner Pro se
Otisville Corr. Facility
P.O. BOX 8
Otisville, NY 10963

I declare, certify, verify or state under the penalty of perjury, pursuant to 28 U.S.C. 1746 that the foregoing is true and correct.
EXECUTED ON DATE: 6/16/18


Masao Yonamine 88A7233

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