NO:_____

UNITED STATES SUPREME COURT

Fox Joseph Salerno,

Petitioner,

Vs.

State of Arizona,
Charles L. Ryan, Director of ADOC,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Lower Court Decisions

Exhibit A- Arizona Supreme Court denial of Special Action Jurisdiction (CR 18-0127 PR).

Exhibit B - Arizona Court of Appeals denial of Special Action Jurisdiction (1 CA-SA 18-0034).
Arizona Court of Appeals denial of petition for Review (1 CA-CR 18-0063).

Exhibit C –Superior Court Judge Gentry's December 21, 2017 dismissal of *PCR* & her January 31, 2018 rehearing denial (CR 2000-017362).

Exhibit D –2014-2017 Arizona Appellate Court Panel decision granting review and granting relief (1 CA-CR 14-0728 PRPC).

Exhibit E – Respondent Judge Gentry's rulings in 2014 dismissing *PCR* (First ruling June, 17, 2014, reconsideration denial July 8, 2014, Amended ruling July 25, 2017) (CR 2000-017362).

Exhibit F – Ninth Circuit's denial to allow the filing of a second Habeas Corpus.

Exhibit G – U.S. District Court's denial to allow the filing of a second Habeas Corpus.

QUESTION(S) PRESENTED

I.

Did the State Trial Court err by unconstitutionally using Federal case laws of *Missouri v. Frye/ Lafler v. Cooper* and applying it retroactively thus violating *Ex Post Facto* laws, Bill of Attainder, *U.S. Const. Art. 1, Sec 9 & 10 & Ariz. Const. art. 2, § 25?*

II.

***Does Frye/Lafler* set a blue line rule which allows it to be retroactive?**

III.

***If Missouri v. Frye/Lafler v. Cooper are* applicable, then did the trial court mis-apply the law by following Federal standards instead of State standards as *Frye* required?**

V.

Did Trial Court error by erroneously determining plea would not have been accepted by Judge/Prosecutor because his criminal history was not accurate?

LIST OF PARTIES

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

Petitioner –

- Fox Joseph Salerno
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  P.O. Box 2017
  Buena Vista, CO. 81211

  IN Pro Per

Respondents -

- State of Arizona.
- Charles L. Ryan, Director A.D.O.C.
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  Phoenix, AZ 85007

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CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the highest Federal court to review the legal procedures appears at Appendix ___F___ to the petition, Ninth Circuit,. and is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits

appears at Appendix ___A___ to the petition, Arizona Supreme Court, and is unpublished.

JURISDICTION

[X] For cases from federal courts:

Ninth Circuit's refusal to allow filing of a second Habeas Corpus.

[X] For cases from state courts:

The date on which the highest state court decided my case was July 30, 2018. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date:

_____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____A ___.

❖ The jurisdiction of this Court is invoked under ***28 U. S. C. §1257(a).***

REASONS WHY THIS PETITION SHOULD BE GRANT

This case involves Constitutional issues that affect or will affect literally millions of Americans. The U.S. Supreme Court has not rendered any decision concerning *ex post facto* and *Bill of Attainder* laws in quite some time as relating to case laws being applied retroactively. The new times we live in and the makeup of the Court will likely reverse and/or alter previous Supreme Court case law. For judicial economy this Court should make a definitive ruling.

As Salerno's conviction expires in 2019 and State law does not allow a *Post-Conviction Petition* to be heard after expiration of sentence, Salerno filed a Special Action in the Arizona Appellate Court and the Arizona Supreme Court, both Courts denied their discretional

jurisdiction. This denial essential voids any ruling on this issue as a State appeal takes in excess of two years and even though Salerno did file his appeal (1-CA-18-0063PRPC), it will be dismissed and no relief possible as his sentence will have expired before a ruling is possible. The Federal District Court and Appellate Courts have refused to allow the filing of a second Habeas Corpus. Hence, the U.S. Supreme Court is the only Court which has jurisdiction to render a ruling which would allow relief.

FACTS MATERIAL TO A CONSIDERATION OF ISSUES PRESENTED:

Salerno was convicted of theft a class 3 felony after a jury trial in 2001 and sentenced to the aggravated maximum term of 20 years.

In 2014 Salerno filed his seventh *Post-Conviction Petition* alleging newly discovered evidence violating *Brady, Napue & Donald* case law (*Donald* is the 2000 Arizona State case preceding Federal cases of *Missouri v Frye & Lafler v. Cooper).* This writ only encompasses the *Donald/Frye/Lafler* claim. In 2017 the Arizona Appellate Court Granted Review & Granted Relief and remanded back down to trial court for an evidentiary hearing on all three claims (*1-CA-CR 14-0728 PRPC*).

For the *Donald* claim the Arizona Court had accepted issue as a newly discovered claim, and determined a *6th Amendment/Strickland* violation had occurred as his trial attorney failed to inform him of a stipulated probation plea which prejudiced him as he went through trial and received a prison term. Nevertheless, they determined it was harmless error because Salerno could not meet his new burden and show that the State would have adhered to plea and that the Court would have accepted undisclosed plea, per the requirements in the new 2012 case laws of *Missouri v. Frye, & Lafler v. Cooper.* (NOTE: The Trial Court never cited these cases even though her ruling is in line with them, but the State did argue *Lafler* during the evidentiary

hearing). The 2000 State *Donald* case law only required that a defendant show that they were not informed of plea and prejudiced by receiving a longer sentence (be it from a less favorable plea or after a trial), defendants were not required to show the State would have adhered to plea and/or the Court would have accepted plea.

ARGUMENTS

I.

The trial court erred and abused its discretion by unconstitutionally using Federal case law of *Missouri v Frye/Lafler v. Cooper* and applying them retroactively thus violating *Ex Post Facto laws, Bill of Attainder, U.S. Const. Art. 1, Sec 9 & 10 & Ariz. Const. art. 2, § 25.*

On September 20, 2000 *State v. Donald, 198 Ariz. 406, 10 P.3d 1193, 1200 (App. 2000)* came into play. Salerno was convicted by a jury on May 18, 2001 and sentenced on July 18, 2001; mandate issued in 2003. On March 21, 2012 *Missouri v. Frye, 566 U.S. 134 & Lafler v. Cooper 566 U.S. 156* became effective on the same date, *Frye* first..

Salerno and all defendants are required to be sentenced under laws, be they statute or case law, that were in affect at the time of their conviction, sentence and when the *6th Amendment & Strickland* violations occurred (In Salerno's case - November 30, 2000 thru July 18, ~~February 23~~, 2001).

The 2000 *Donald* case required Defendants in a *Sixth Amendment* claim under the *Strickland* standard to show only that of deficient performance and prejudice - that being, attorney failing to tell client of plea offer and defendant prejudiced by receiving a longer sentence; be it after a trial or a less favorable plea. The 2012 *Frye/Lafler* cases added the extra requirements that Defendants also show that prosecutor would have adhered to offer and that the Court would have accepted offer.

Donald, Frye & Lafler agree that failure to inform defendant of plea offer is a *sixth Amend* violation per *Strickland* (*Frye HN10).* Trial Court's ruling (P.3, Par. 3) was that it was harmless error that his attorney failed to inform him of plea as the Court would have not accepted plea and/or the State would have withdrawn plea anyway. Consequently, the Trial Court ruled a *Strickland* violation had occurred but no relief granted as Salerno did not meet the *Frye/Lafler* standard by showing State would not have backed out of offer and the Court would have accepted offer. The record in Salerno's case is void of any evidence of any effort by trial counsel to communicate the plea offer to Salerno (*Frye HN15)*, and the State never offered any evidence/testimony that they would have backed out of offer or that the Court would not have accepted; Salerno just never met his burden to prove they would have followed through.

As the trial court dismissed Salerno's *sixth Amendment* claim based upon *Frye & Lafler's* extra standards of having to prove prosecutor would have adhered to plea and judge would have accepted plea, Salerno argues it violated the Ex Post Facto clause in the U.S. Constitution. Salerno should have been required to prove only what *Donald* required as that was the law in affect at the time of his conviction, sentence, and when the *6th Amendment* Violation occurred.

Salerno proved his claim under the 2000 *Donald* case law doctrine which was in affect at time of Constitutional violation and conviction, and the Court agreed by declaring an error albeit a harmless error. Accordingly applying *Frye/Lafler* retroactively was error. It is the same principle as *Apprendi/Blakely* cases which the U.S. Supreme Court have determined defendants to have received an unconstitutional sentence per *Apprendi/Blakely*, but still allowed their sentences to be carried out as these two new case laws came into effect after their mandates. Therefore the only reason why *Frye* would be allowed to apply to cases retroactively and not *Apprendi/Blakely* is because *Frye* benefits the State whereas Apprendi/*Blakely* benefits

prisoners – very unfair and inconsistent.

Ex Post Facto means "Made after the occurrence, e.g., penal and criminal legislation"; "...the law annexed to the crime when committed is an *Ex Post Facto law*. The U.S. Congress is prohibited from passing *Ex Post Facto Laws U.S. Const. Art. 1, Sec. 9.* The States are prohibited from passing *Ex Post Facto Laws U.S. Const. Art. 1, Sec 10*"; Arizona is prohibited by Ariz. Const. art. 2, § 25.

Frye/Lafler are ex post facto laws of the Federal government violating *Sec 9*, and when the State applied the *Frye/Lafler* cases to Salerno, the State violated *Sec. 10* & Ariz. Const. art. 2, § 25.

... Due process is implicated whenever there is a deprivation of a substantive right of a defendant.

Sixth Amendment right to competent counsel is a substantial right.

... prohibition on ex post facto laws to include judicial decisions. While the Ex Post Facto Clause applies directly to legislative acts, the Fourteenth Amendment extends Article 1, Section 10's prohibition on ex post facto laws to include judicial decisions. Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894(1964).

- *Ross v. Oregon, 227 U.S. 150 (1912)* – "...if the purpose of that decision is not to prescribe a new law for the future but only to apply laws enforced at the time...the ruling is a judicial and not a legislative act...."

Donald, Frye & Lafler are all applicable for future acts and therefore are legislative acts.

- *Pentis v. Atlantic Coast Line, 211 U.S. 210, 226 [****2] (1908)* – "The purpose of a judicial inquiry is to enforce laws as they are at present; legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter."

- *Beazell v. Ohio, 269 U.S. 167 (1925); Duncan v. Missouri, 152 U.S. 377 (1894)* - "*Ex Post Facto* law is one which...in relation to offense or its consequences, alters situation of party."

The *Frye/Lafler* ruling altered what Salerno had to prove and what constituted a *Sixth Amendment* violation at the time of the criminal act, conviction, sentence, and Constitutional violation. Not to mention placing a previously non required undue burden on Salerno.

- *Cummings v. Missouri, 71 U.S. 277 (1867)* – "Ex Post Facto Law is law which imposes...changes rules of evidence, by which less or different testimony is sufficient...."

This is exactly what the *Frye/Lafler* cases did as it altered the Rules of Evidence standard set out in *Donald* as to what evidence a defendant needed to present to prove a Constitutional violation under *6th Amend. & Strickland* standards.

- *Bouie v. Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894, 1964 U.S. LEXIS 825* △

■*Cited by: 378 U.S. 347 p.353 12 L. Ed. 2d 894 p.900*

... Kring v.Missouri, 107 U.S. 221, 235. See Fletcher v. Peck, 6 Cranch 87, 138; Cummingsv.Missouri, 4 Wall. 277, 325-326. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the *Due Process Clause* from achieving precisely the same result by judicial construction. ...

Arizona Corp. Comm'n v. Superior Court, 107 Ariz. 24, 480 P.2d 988, (1971) "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, [***7] declares, and enforces liabilities as they stand on present or past facts and under laws supposed **[*27]** [**991] to already exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind * * *." 211 U.S. at page 226, 29 S.Ct. at page 69.

- "In *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000), the [Supreme] Court added that a law which 'alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender' also violates the [Ex Post Facto] Clause." *Wilson v. Belleque*, 554 F.3d 816, 831 n.4 (9th Cir. 2009) (quoting *Carmell*, 529 U.S. at 530, 534-35).

- Landry v. Cain, 2017 U.S. Dist. LEXIS 168984 Therefore, the ex post facto clause's prohibition extends to a statute which "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, **or which deprives one charged with crime of any defense available according to law at the time when the act was committed.**" Collins v. Youngblood, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

Salerno was deprived of his *6th Amendment* right defense.

II.

***Frye* does not set a blue line rule which allows it to be retroactive.**

Self-explanatory.

III.

***If Missouri v. Frye/Lafler v. Cooper are* applicable, then the trial court mis-applied the law by following Federal standards instead of State standards as *Frye* required.**

Trial Court erred by mis-applying the legal standards contained in *Frye,* by applying a Federal requirement and Federal case law when *Frye* specifically requires State courts to follow State laws and State case laws.

The *Donald* court was aware that many courts around the country required that Defendants show prosecutors would have adhered to plea offer and the court would have accepted offer, as they noted *(HN 18)* these discrepancies within the Courts. The *Donald* court intentionally & deliberately ruled that they wanted Arizona Defendants to only have to show a S*ixth Amendment* Violation per *Strickland* standard and prejudice, in place of Arizona courts guessing what prosecutors and other judges may do: "It would be unfair and unwise for courts to guess on how a particular judge would have acted in particular circumstances." Therefore the Arizona Appellate Court created a new Arizona State law for future Arizona criminal litigants, hence a legislative act.

The *Frye* court's decision clearly required and intentioned the lower courts to adhere to State law and standards over federal. *(Frye HN15)* – "Whether the prosecution and trial courts are required to do so [show if court would have accepted and prosecutor would have not withdrawn plea] is a matter of state law, and it is not the place of this Court to settle these matters". Arizona State law at the time was *Donald* and its standards were clearly set out with what it wanted and did not want. *Frye* was a 5/4 decision of the Supreme Court, Justice Scalia's dissent is in line with the *Donald:*

> "Of course after today's opinions there will be cases galore, so the Court's *assumption* would better be cast as an optimistic *prediction* of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law. Whatever the "boundaries" ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant's constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, *would have been* exercised."

The trial court in Salerno's case mis-applied the *Frye* ruling and did not consider State laws & standards. *Donald* is the law & standard for Arizona.

IV.

Trial Court erred by erroneously determining plea would not have been accepted by Judge and/or Prosecutor would have withdrawn from plea because Salerno's criminal history was not accurate, and therefore was harmless error for Trial Counsel's failure to inform him of plea offer;

Even assuming the trial court was required to adhere to the *Frye/Lafler* decisions, it mis-applied the facts. During the evidentiary hearing Salerno did show a "reasonable probability" that prosecutors would have honored plea and the Court would have accepted it by the current customs of Arizona's Court system; at the very least he could have negotiated a better plea than his 20 year maximum sentence, or even received an Alford or no contest plea. The State never submitted ANY evidence that they would have withdrawn plea or Judge would not have accepted, but the Court still made the ruling that Salerno never met his burden and showed they would have adhered and accepted respectfully.

The State introduced a copy of a plea bargain during evidentiary hearing without any authentication that it was the plea bargain related to the newly discovered plea offer letter. This unsubstantiated document listed two of Salerno's priors and said the plea was conditioned upon it being true. Salerno in fact did have other priors not listed in document. However, Salerno testified that the document was fraudulent as it did not have his legal name

upon it; it said "Joseph Francis Salerno" instead of "Fox Joseph Salerno". No one from the State testified that it was the plea in question or authenticated the document in any way. It was a fraudulent document created specifically for the evidentiary hearing by prosecutor Strange and the court ate it up hook line and sinker and used this document solely to dismiss Salerno's claim (Par 4, PG. 3; Par. 5, PG. 2).

The State never even introduced any evidence that they would not have accepted plea – therefore no evidence exists that State would not have accepted plea by just adding his other prior, or that the State would not have offered a different plea which may have been worse than this probation plea but still better than the maximum 20 year term he received. Either one shows prejudice or that his sentence would have been lesser. It is the standard and custom in Arizona for the prosecutor to offer a plea for a property crime, which was less than the maximum sentence a defendant could receive if he went to trial. Salerno did show that his sentence would have been changed and the Court's ruling that Salerno failed to show this is an abuse of discretion based upon the facts. Salerno only had to show "reasonable probability that the end result would have been more favorable" to show prejudice (*Frye HN11*).

The trial Court also falsely claimed that Salerno testified that his plea agreement would have been a fraud if he accepted it. Salerno simply testified that he was innocent of the crime but given that this was as stipulated probation plea and he was facing over 30 years in prison, he would have accepted plea – this is not fraud. Remember what Justice Scalia said in his dissent in *Lafler v. Cooper*:

> "In the United States, we have plea bargaining aplenty, [****52] but until today it has been regarded as a necessary evil. **It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense**; and for guilty

> defendants it often-perhaps usually-results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, *e.g.,* [*186] Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 38 (1979)."

But even if we went further in conjection, what would have happened if Salerno signed that plea, knowing he had more priors, and the Court unknowingly accepted it and sentenced him to probation on it? Maybe the State would have never found out about the extra prior or if they did, would or could they attempt to get it over-turned after the Court accepted it and/or after sentencing? This makes the question of guessing whether the prosecutor would have accepted plea moot as they cannot reject a plea after it has been accepted under Arizona law; *U.S. v. Kuchiniski, 469 F.3d 853, 857-858 (9th Cir. 2006).* Would or could the Court then over-turn it, or would it be barred procedurally as time periods may have lapsed before they found out? Salerno was denied the option to sign plea, knowing it may be invalidated and taking his chances, thus causing a lot of questions in guessing what the future may hold. Not to mention that just because a defendant lies in their allocation hearing does not necessarily mean it voids their plea; numerous cases exist where defendants have attempted to get their pleas thrown out by pointing out their lies and the Courts have still upheld their plea and refused to let them back out – what's good for the goose is good for the gander.

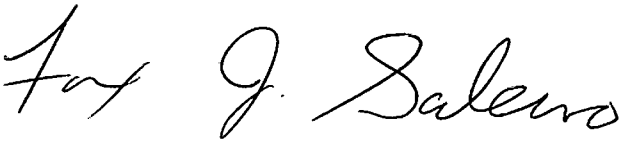
Just prior to trial Salerno was offered the only plea he knew about: a 6.5 year prison term. There was no mention of the first plea and this plea agreement also did not contain his accurate priors. However, this plea was offered after Salerno was arrested for another crime (CR 2001-006753) while on bail and both cases were to be resolved together. Therefore this plea is irrelevant as to the legal issues presented here.

CONCLUSION

For the foregoing reasons Salerno prays this Court accept Review and grant relief, including vacating Salerno's conviction and ordering his immediate release from custody on this charge, and any other relief the Court deems appropriate.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 7, 2018