No. 18-9472

In The Supreme Court of the United States

JOSEPH J. **VIOLA**,

Petitioner,

v.

STATE OF **ARIZONA**,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

GIUSEPPE VIOLA, 050936
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SAN LUIS, AZ 85349
Petitioner *pro se*

QUESTIONS PRESENTED

Nine years ago, the State of Arizona in reaction to its becoming aware of an unrelated investigation of petitioner Giuseppe Viola, involving his automobile coach building operations, among those within his San Francisco holding company, where he had been resident for over two decades, began its prosecution of him, under an indictment it had issued twenty years earlier, in Nº. CR 1990-010323, alleging events occurring between 1987 and 1989, for a distinct and distinguishable individual, with the same common Italian surname, who was also bald and bearded.

The petitioner self-represented at trial, but was precluded from doing so on direct appeal, notwithstanding the state constitutional guarantee of appeal in all cases, under Art. 2 § 24, and two state supreme court decisions that fully recognized the right to self-represent on appeal, particularly for those who had also done so at trial.

Following a petition for review to the Supreme Court of Arizona; certiorari to this court on direct appeal; habeas of the state cause; a § 2255 motion in the derivative federal action in San Francisco; and of extensive litigation in an involuntary bankruptcy proceeding used to seize all assets; a collateral review to address a number of significant issues, ignored by appointed appellate counsel, was attempted under Arizona Rule of Criminal Procedure 32.

However, under its Order 171 Ariz. XLIV, the Supreme Court of Arizona amended Rule 32 on September 24, 1992, effective September 30, 1992, to impose a number of restrictions and procedural filing time limits, except for those who had been sentenced prior to the effective date, rather than providing exception for those with offenses alleged to have occurred prior to that date. The state thereby foreclosed effective review on direct appeal in its denial to self-represent, and again on collateral review, by not recognizing the ancient provenance of its indictment.

The Arizona charges were then used to attribute all actions in the federal action and bankruptcy proceedings under the name on its indictment, to the great prejudicial effect that has since frustrated all attempts at relief.

1. Did the order promulgating the 1992 amendments to Rule 32 constitute violations of guarantees against *ex post facto* law, and due process, afforded under the Constitution of the United States?
2. Upon a finding in the affirmative as to the above questions, will this court direct a review of the issues of law thus far deprived, and at a minimum, provide an opportunity to restore the productive enterprises on which clients and customers relied?

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PETITION FOR A WRIT OF CERTIORARI

Giuseppe Viola respectfully petitions for a writ of certiorari to review the orders of the Supreme Court of Arizona in its Nº. CR-18-0268-PR, issued 31 December 2018. (Bales, CJ; Bolick, Gould, Lopez, JJ)

OPINIONS BELOW

The opinion of the Supreme Court of Arizona appears at Appendix C to the petition and is not known to be published. The opinion of the Arizona Court of Appeals appears at Appendix A to the petition and is not known to be published. The memorandum decision of the Court of Appeals appears in Appendix F.

JURISDICTION

The Supreme Court of Arizona decided this case on 31 December 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Art. 1, § 10, Cl. 1

> "[N]o state shall...pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." US Constitution, 17 September 1787 *(emph. added)*

Amendment V

> "[N]o person shall...be deprived of life, liberty, or property without due process of law" Bill of Rights, 15 December 1791

Amendment VI

> "[T]he accused shall enjoy the right to a speedy and public trial." *Id.*

STATUTORY PROVISIONS

Ariz. R. Crim. Proc. 32.1 – 32.9

ARS §§ 13-4231 – 4239

Virtually verbatim statutes under the Arizona Criminal Code underlying, respectively, each of the subsections of Rule 32. No amendments to the application using sentencing, as distinct from date of alleged offense, were made to these statutes.

7 USC § 13a-2

Preemption of state regulatory authority over field of commodity futures.

Cf.

ARS § 13-2301(D)(4)(b)(xviii) – (xx) Definitions for ARS § 13-2310 Charges

And

ARS § 44-1801(3) – (7); (12); (26) Definitions of futures terms contrary to 7 USC § 13a-2

See, generally, Appendix D; E

28 USC § 2403(b) may apply under S. Ct. R. 29.4(c), but the Attorney General of Arizona has been served as representative of the party state, with notice that the above Arizona provisions are drawn into question as to their status under the United States Constitution.

STATEMENT OF THE CASE

A comprehensive statement of the case in Maricopa County N°. CR 1990-010323, and of its progeny in which the name in that indictment of Joseph Viola, for a distinct and distinguishable individual, is found in Appendix E, from the petition for certiorari from its direct appeal in N°. 13-6802 of this court.

The infection of the record in each of the other related cases from that falsely ascribed to the petitioner, and his life in San Francisco, is pervasive and utterly prejudicial, tarring the otherwise impeccable and visionary efforts that expressed itself in a wide array of operations centered on the Italian lifestyle, most completely embodied in the production of exotic sports cars, which garnered a starring role in the HBO series "True Blood," and which themselves served as the developmental platform for a hydrosolar energy system.

A cursory representative cross-section of documents from the cases is included in Appendix F, to demonstrate their adoption of the name of the foil persona from Arizona, for falsely attributed activities in San Francisco over two decades later.

Hopefully, certiorari is granted, or in the alternative, leave for an extraordinary writ under 28 USC § 1651 and Rule 20, in aid of the jurisdiction of this court, that the artificial time constraints found among and between the cases, does not improperly frustrate the ends of justice in providing relief, in which case, a comprehensive set of documentary excerpts may serve the inquiry of the court at that time.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE SUPREME COURT OF ARIZONA IS ERRONEOUS.

A. Constitutional Disqualification – *Ex Post Facto*

In its disposition of the Notice of Post-Conviction Relief, and of the petition submitted concurrently with it, the trial court of the Hon. Daniel G. Martin relied upon his perception that the Notice and Petition were one, and that it had been untimely presented. The Memorandum Decision, and those matters submitted to the Court of Appeals are appended hereto. *See,* Appendix D.

His reasoning appears to have been based on a reference found in Moreno v. Gonzalez, 192 Ariz. 131, 135, 962 P. 2d 205, 209 (1998) (Az. S. Ct.) (*en banc*), in which it noted that its order, 171 Ariz. XLIV, issued 24 September 1992, effective 30 September 1992, was for the applicability of the amendments to Arizona Rule of Criminal Procedure 32 for Post-Conviction Relief.

The court held in Moreno, in explanation of its promulgation order:

> "Our order promulgating the 1992 amendments made them 'applicable to all post-conviction relief petitions filed on and after September 30, 1992, except that the limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to a defendant sentenced prior to September 30, 1992, who is filing his first Petition for Post-Conviction Relief' 171 Ariz. XLIV (1992)" (emph. added)

The roots of the problem we now confront, emanating from that Order, now over a quarter century past, extend not just to the date of its issuance, but rather almost exactly two hundred five years earlier, to the bedrock of the history of the United States as a nation, upon the adoption at convention of the Constitution, and in particular, of its Art. I, § 10, cl. 1:

> "[N]o state shall...pass any Bill of Attainder, *ex post facto* law, or law impairing the obligation of contracts," (17 September 1787). *(emph. added)*

The meaning of *ex post facto* or "done after the fact; retroactive," in Latin, was not long in waiting for its full expression. In an opinion authored by Justice Chase in the early watershed decision in Calder v. Bull, 3 US 386, 390 (1798), the Court held:

> "1st, every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punished such action. 2nd, every law that aggravates a crime, or makes it greater than it was, when committed. 3rd, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th, every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *(emphasis added)*

As these central pertinent issues arose under the Constitution of the United States, and, of necessity, were adopted by each of the several states as a prerequisite to union, any review of the dimensions and nuances of *ex post facto* jurisprudence must be based upon federal authorities, as the progeny of Supreme Court opinions.

B. Constitutional Disqualification – Due Process

Within the scope of application of the *ex post facto* clause lie two significant items. The First is the analysis of the nature of any statute which may be susceptible to the requirements of its provisions, which are aimed at criminal, as distinct from civil laws. These considerations center on those laws with punitive effect, or where a liberty interest is present. In such laws, to be proscribed, they must exhibit two critical elements: (1) it must be retrospective, which is to say, applying to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. Weaver v. Graham 450 US 24, 29 (1981).

The Second consideration is, that by its own terms, the *ex post facto* clause applies to legislatures, proscribing their enactment of retroactively applied criminal laws, and are not directed to courts, except where

> "judicial alteration of a common law doctrine of criminal law serves to violate the due process clause, where it is 'unexpected and indefensible' by reference to the law which had been expressed prior to the conduct in issue." Bouie v. City of Columbia 378 US 347, 354 (1964).

More recently in Rogers v. Tennessee, 532 US 451, 457 (2001), the Court proclaimed

> "if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the construction must not be given retroactive effect."

Later in that opinion, the Court observed, *citing* Bouie:

> "[i]f 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." Rogers at 459 *quoting* Bouie, at 353-54.

Most significantly, perhaps, lies not within what was found among the authorities and citations, but, rather, what was not found – a plain, concise statement neither among the statutes in question, the Criminal Rules, nor in any commentary attached to them – of any notice whatsoever, advising that Rule 32 amendments of 1992, applied retroactively to all those who were sentenced after the entry of Supreme Court Order 171 Ariz. XLIV of 24 September 1992, made effective, *nunc pro tunc* 30 September 1992, other than the arcane reference noted above. That lapse of required notice essentially serves as the exemplar of proscribed judicial construction, where limits on *ex post facto* judicial decisions must be based upon the

> "core due process concepts of notice [foreseeability], and in particular, the right to fair warning." Bouie, *supra*, at 354.

Its existence at present is precisely "unexpected and indefensible," as being without proper or sufficient notice, while its use of the arbitrary and relatively meaningless metric of sentencing, in comparison to the over two centuries of consistent federal jurisprudence which references the state of any criminal law as it was expressed at the time of the alleged offense. *Cf.* previously emphasized cited phrases herein.

C. Statutory Challenges

However, it can now be easily corrected and qualified by substituting

> " defendant whose offense was alleged to have occurred prior to" –

for

> "A defendant sentenced prior to" - September 30, 1992,

on a *nunc pro tunc* basis, and publishing it in all subsequent editions of the "Arizona Rules of Court".

That small qualification would definitely allow the full consideration of the petition as presented under Rule 32, which is part of the transferred record, and incorporated herein by reference, as are those items in the general docket of the appellate court, here included by attachment, to the effect:

> "If Moreno was sentenced before September 30, 1992, and had never filed a petition for post-conviction relief in the superior court, then it may well be that a first petition for post-conviction relief filed even at this late date would not be untimely, despite the unavailability of the exception afforded by Rule 32.1(f)." Moreno, *supra*, at 135, 209 ¶ 23.

Therefore, the petition was not untimely filed, and remains fully reviewable by this Court on a *de novo* basis.

II. IMPORTANT ISSUES OF LAW HAVE NOT BEEN DECIDED.

A. The Court of Appeals deprived the petitioner of the right to self-represent on direct appeal

Although the Arizona Supreme Court recognized this right granted under Article 2 of the Arizona Constitution, the Court of Appeals failed to grant that upon motion. Additionally, the deprivation of the right to self-represent on appeal and to instead foist an extremely ineffective appellate counsel upon him, who did not in any way represent the wishes or interests of this petitioner, effectively denied his right to appeal; and therefore now leaves indeterminate the date from which any Rule 32 petition must be filed, yielding another independent ground upon which relief should be granted.

B. The trial court failed to properly sentence the petitioner

In another instance of *ex post facto* applicability, is the significant difference between the current 85% to parole release, compared to that in effect when the charges were alleged, where release was available at one-half of the sentence, and absolute discharge after two-thirds, from the consecutive 18-year sentences imposed from 10 March 2010. Also, as a pre-trial offer of 9.25 years had been given, and rejected, upon the advice of appointed advisory council, its terms became available under Lafler v. Cooper, 132 S. Ct. 1376, 1385 (3/21/12), concurrent with the direct appeal Opening Brief, filed 4/17/12. This would have yielded an absolute discharge date of 7 July 2016. *See*, Appendix D, Petition for Review

C. The trial court abused discretion in denial of a motion for acquittal under ARCrP 20

An extensive set of instances demonstrated the failure to prove all of the elements necessary to sustain a conviction beyond a reasonable doubt, and indeed, showed that the alleged matters were acts of others, and that significant immutable identifiers of another, as reviewed by Kenneth R. Moses, the pre-eminent biometrics expert, were inconsistent with those of this petitioner, comprehensively pointing to actual innocence.

D. The trial court ignored the federal preemption under 7 USC § 13a-2

The State, in its indictment, used "artful pleading", as held in Lambert Run Coal v. Baltimore, Ohio R.R. Co., 258 US 377, 382 (1922), to assert claims involving futures contracts under the exclusive jurisdiction of the Commodity Exchange Act, and which *inter alia*, referenced such contracts as "securities," as defined under ARS § 44-1801, in specific conflict with that of the Act, and of authorities of the Supreme Court. The State lacked subject matter jurisdiction. *See*, Appendix F, Memorandum Decision.

E. The trial court deprived the right of statutory and constitutional speedy trial.

A number of instances of speedy trial violations occurred, which prejudiced the outcome, and acted to the detriment of the petitioner, under both state and federal statutory requirements, as well as the constitutional violations of an indictment not prosecuted, through no fault of the petitioner, until twenty years later, where the State failed to prosecute or pursue their indictment after its second year.

The prosecution's own investigative report written a year before becoming aware of this petitioner, after contacting numerous US agencies, concluded the actual suspect was still in Italy; but hadn't pursued the prosecution for over 19 years. Barker v. Wingo, 407 US 514, 534 (1972); Doggett v. US, 505 US 647, 651 – 52 (1992). *See*, Appendix F, Department of Justice Letter, District Court Docket Maricopa County Attorney's Office Supplemental Report;.

III. THE DECISION SERVED TO FORECLOSE ACCESS TO CONSTITUTIONAL GUARANTEES AND PERMITTED DISPOSITIONS IN THE ABSENCE OF JURISDICTION.

A. In the Subject Arizona Action

The initial presence of the highly prejudicial reference to the petitioner under the name found only in a two decade old indictment also served to deprive due process rights from not only the Arizona case in which state statutes were used to attempt invasion of an area preempted under Federal law, but also the other closely related cases in (1) the derivative federal criminal proceeding; and (2) the involuntary bankruptcy used to seize all assets.

The Arizona appellate court's references in its Memorandum Decision, taken from the trial record and State's brief, without the input of the petitioner, as he had been denied the right to self-represent on appeal after having done so at trial, conflict with the intent of Congress to preempt the field of futures transactions, as expressly provided in general, under the Commodity Exchange Act (CEA), 7 USC § 1 et seq., as this court held in Commodity Futures Trading Commission (CFTC) v. Schor, 478 US 833, 836-37 (1986) and Merrill Lynch v. Curran, 456 US 353, 368 FN 40 (1982).

The predecessor of the latter, Curran v. Merrill Lynch, 622 F. 2d 216 (6th Cir 1980), decided *in pari materia* with the more explicit Kelly v. Carr, 691 F. 2d 800, 805 (6th Cir 1980) under 7 USC § 13a-2, by virtually the same panel, within four days of each other, clearly established the bright line for preemption in the subject areas, as noted in the above authorities, and most recently reemphasized generally in Arizona v. US, ___US___, WL2368661, *5 - *8 (2012).

B. In the Derivative Federal Action (N°. CR-10-05880 EJD (ND CA)

In the related federal criminal proceeding, another instance of lack of subject matter jurisdiction occurs where both the indictment and plea agreement derived therefrom acknowledged that the subject loan participation notes were all executed after thorough consultation on a face-to-face basis, and not through the instrumentality of the mails, thus outside of the applicability of the statutory element necessity of 18 USC § 1341, which requires the execution of any transaction under its authority, and not merely any subsequent derivative usage, as held in US v. Kann, 323 US 88, 95 (1944), US v. Parr, 363 US 370, 389 (1960), and US v. Maze, 414 US 375, 400 (1974). *See*, Indictment, 8/3/10, p. 2 ¶ 2, 4; p. 4, ¶ 8; p. 5, ln 5; Plea Agreement, 11/2/11, p.2, ln 5, 21; p. 3, ln 8, ln 26-28 (Appendix in N°. 14-7262)

Such matters can be challenged as to their constitutionality or jurisdiction without bar from any guilty plea. Class v. US, 583 US___, (2018).

Subject matter jurisdiction cannot be waived, forfeited, or stipulated. US v. Cotton, 535 US 625, 630 (2002). If a court is without jurisdiction, it cannot hear an action, much less enter judgment in it, thus establishing actual innocence, and grounds for vacating the judgments in both of the criminal actions, and the entry of the involuntary bankruptcy, as well as the renewal of the counterclaim dismissed improvidently by the bankruptcy court. Stern v. Marshall, ___US___, 131 S. Ct. 2594, 2605 (2011); Granfinanciera, S.A. v. Nordberg, 492 US 33, 50 (1989).

C. In the Related Involuntary Bankruptcy Used to Seize Assets (N°. 10-30904 DM) (ND CA)

Here, the obligation of the bankruptcy court, as a threshold matter, was to have initially ascertained its subject matter jurisdiction under 11 USC § 303(b) of a petition submitted in involuntary bankruptcy, citing this Court's seminal opinion in Canute Steamship Co. Ltd. v. Pittsburgh & W. Va. Coal, 263 US 244, 248 (1923), on which decisions in the Ninth Circuit relied, as applied by *In re* Quality Laser Works, 211 B.R. 936, 941 (9th Cir BAP 1997):

> "A petition on Official Form N°. 5 is regular on its face if the boxes next to the preprinted essential allegations are checked and if the form is otherwise correctly completed." Quality Laser at 941 *citing In re* Kidwell, 158 B.R. 203, 209 (Bkr ED CA 1993).

Which was precisely the condition of the petition presented, both as to its failure to check the box at the lower left of Official Form 5, and for its numerous incorrectly entered facts, including the improper identification of the parties, and that both Kirsch and Wherco had been fully reimbursed, as outlined in the motion to proceed on appeal *IFP*, as well as to the personal successful history of this petitioner to so

proceed on numerous previous occasions recognized under FRAP 24(a)(3). *See,* Appendix F, Bankruptcy Declaration.

Additionally, a full copy of *In re* Caucus Distributors, Inc. 106 B.R. 890 (Bkr ED VA 1989), had been cited, the definitive historical treatise by Chief Judge Martin V.B. Bostetter, Jr., of the Bankruptcy Court of the Eastern District of Virginia, in which another proceeding involving the concurrent criminal and involuntary bankruptcy actions occurred, which could raise the additional question of whether the involuntary petition used to seize assets retained its civil aspect under § 1915, or had through coordination, served as a proxy for an action in forfeiture as a matter of prosecutorial strategy. It is also a comprehensive authority for the **bar-to-joinder** doctrine proscribing subsequent creditors from joining a petition representing a circuit split and which, as filed as to entities not in the name, nor under control of the petitioner, and as such, lacked jurisdictional sufficiency. *See,* Appendix F, Claims Register.

IV. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

As briefly referenced above, but for the critical failure of the Supreme Court of Arizona to resolve this initiating matter in favor of the *ex post facto* guarantees provided under both state and federal constitutions, to thereby afford relief from the deprivation of proper state appellate and collateral review, which had prejudicially spawned both a derivative federal criminal, as well as an involuntary bankruptcy proceeding, used to seize all assets, including those not in the name, nor even under the direct control of the petitioner, a number of associated harms were visited upon him and his enterprises.

Perhaps chief among them was the crushing damages to the development of a hydrosolar energy system which had been established to provide petroleum and emission free motive power for transportation applications, but capable of also being used in stationary or grid generation usages. The interrelated proceedings served to pace this special area of national importance into suspension, during a time of its particular necessity. *See,* Appendix F, Privileged Communication, p.3 cl.8, 9/8/2011.

CONCLUSION

A critical and essential constitutional protection has been demonstrated to have been violated in the promulgation of an amendment to the statute-based Rules of Criminal Procedure in Arizona. This has deprived this petitioner of exercising his right to collateral review as those rules existed in 1990 when an indictment was issued from which a prosecution was eventually begun in March 2010.

The State Court of Appeals had previously also denied his request to self-represent on appeal, as he had at trial and instead, forced representation upon him, as Justice Scalia had noted in quoting Justice Frankfurter:

> "[T]o require the acceptance of counsel 'is to imprison a man in his privileges and call it the constitution.' " Martinez v. Court of Appeal, 528 US 152, 165 (2000), quoting Adams v. US *ex rel* McCann, 317 US 269, 280 (1942).

Those insults to the United States Constitution were then further magnified by the usage of the name found in the Arizona indictment, in a petition for involuntary bankruptcy, converted from a then pending civil suit in the petitioner's name that arose from a controversy with a litigious client, operating with two grizzled bankruptcy practitioners who fancied themselves as prosecutors, and who coordinated their efforts with those in Arizona, together with an FBI Special Agent, conspiring among themselves to use a sealed indictment to effect extradition to Arizona, and to there increase the bond set at $411,000, to $10 million.

But in the end, the Arizona prosecution should have been terminated at its inception, due, *inter alia*, to its age at over twenty years without meaningful efforts to pursue its indictment after its second year, and the preemption of its subject matter, where Arizona had sought to invade the area intended to be under the exclusive jurisdiction of Congress with charges that were artfully plead into state law terms in anything but allowed general application.

In like manner, the involuntary bankruptcy fashioned to avoid the more rigorous requirements of criminal forfeiture or restitution was similarly absent of jurisdiction, as the petition at its inception was void upon application of authorities of this court and the Ninth Circuit. Completing that vacancy of authority, the federal charges were knowingly brought without their proof of the elemental requirement of execution through the instrumentality of the mails.

Calling upon the plenary authority of this Court, then, the petitioner prays that upon the relatively simple review of lack of subject matter jurisdiction in each of the component proceedings that make up this consolidation of legal misery, that this court:

1) Recognize the absence of jurisdiction in each, along with the several constitutional flaws, to wit:

   a) The Arizona charges relating to commodity futures, as discussed above, were preempted by the Commodity Exchange Act.

   b) The involuntary bankruptcy petition was void upon filing, without its proper completion, and failure to invoke the jurisdiction required by Congress.

   c) The federal action attempted to operate without the necessity of execution of agreements under the statutory elemental requirements of 18 USC § 1341.

2) That the court vacate, or order vacated, all orders arising from the several proceedings and order expungement of any and all derogatory record entries, resulting therefrom.

3) Finally, to reinstate the counterclaim improvidently dismissed by the bankruptcy court, and arrange to expeditiously settle the damages incurred, for a sum not less than $1 billion.

4) If accomplished with due dispatch, the petitioner will still honor his offer to develop military applications of his energy system for the United States, and to establish a fund, paid into the US Treasury, for the general benefit of the American people from the future proceeds of revenues from such technological developments.

Respectfully submitted this 24th day of May, 2019.

/s/ Giuseppe Viola
Petitioner pro se