

Fox Joseph Salerno
CDOC 164490
P.O. Box 999
Canon City, CO.81215
IN Pro Se

19-5095

U.S. SUPREME COURT

Fox Joseph Salerno,

Vs.

Charles Ryan, Director of ADOC

NO: _____

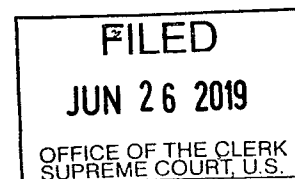
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ORIGINAL

QUESTION(S) PRESENTED

Petitioner Salerno hereby moves this court to issue a ruling on whether the following two cases are applied retroactively.

1. *Missouri v. Frye*, 566 U.S. 134 [2012].
2. *Lafler v. Cooper*, 566 U.S. 156 [2012].



Petitioner Salerno argues they are not retroactive, however, the State of Arizona is applying them retroactive to numerous cases in violation of the U. S. Supreme Court's wishes.

LIST OF PARTIES

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

Petitioner

Fox Joseph Salerno
CDOC #164490
P.O. Box 999
Canon City, CO. 81215
State Prisoner – Pro Per

Respondents

- State of Arizona
- Charles L. Ryan, Director ADOC
- Arizona Attorney General
1275 W. Washington
Phoenix, AZ. 85007
Attorney for all Respondents

TABLE OF AUTHORITIES CITED

1. *Missouri v. Frye*, 566 U.S. 134 [2012].
2. *Lafler v. Cooper*, 566 U.S. 156 [2012].
3. *Hernandez v United States* (2000, CA7) 226 F3d 839.
4. *Talbott v Indiana* (2000, CA7) 226 F3d 866 (criticized in *United States v Norris* (2001, ED NY) 128 F Supp 2d 739) and (criticized in *United States v Tosh* (2001, WD Ky) 141 F Supp 2d 738).
5. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App Div-1 2000);

STATUTES AND RULES

1. 28 USCS § 2254 or 2255

JURISDICTION

[X] For cases from state courts:

The date on which the highest state court decided Salerno's case was April 30, 2019.

State v. Salerno, 2019 Ariz. LEXIS 137: Jurisdiction Arizona Court Supreme: Date Apr 30, 2019.

- Arizona Superior Court NO: CR 2000-017362 – Trial Court Initial PCR Denial (June 17, 2014).
- Arizona Court of Appeals NO: 1-CA-CR 14-0728 PRPC – Review Granted, Relief Granted – remanded to Trial Court for evidentiary hearing (May 18, 2017). 2017 Ariz. App. Unpub. LEXIS 605.
- Arizona Superior Court NO: CR 2000-017362 – PCR Trial Court denial after remand (December 21, 2017).
- Arizona Court of Appeals NO: 1-CA-CR 18-0063 PRPC – Review Granted, Relief Denied (July 24, 2018).
- Arizona Supreme Court NO: CR-18-0416-PR – Review Denied (April 30, 2019).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a) & Article 3, Section 2.

STATEMENT OF THE CASE

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LEGAL ARGUMENTS

Salerno seeks review of his Trial Court decision (Exhibit A). His Appellate Court decision affirming is attached as Exhibit B, and the State Supreme Court denying review is attached as Exhibit C.

Salerno filed a post-conviction petition based upon ineffective assistance of counsel as his trial attorney failed to inform him of a mandatory probation plea; he then went through a jury trial in 2001 where he was convicted of theft and sentenced to 20 years in prison. Salerno became aware of plea offer in 2014 through F.O.I. Act requests and filed his post-conviction petition. The trial court ruled, after remand by the Appellate Court, that Salerno did receive ineffective assistance of counsel in that he was never informed of the plea offer, but that it was harmless error based upon the 2012 ruling in *Lafler v. Cooper* as Salerno failed to show that the State would have adhered to plea or that the Judge would have accepted plea. Prior to the 2012 *Lafler* ruling, Arizona Courts were abiding by the State ruling in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App Div-1 2000). This State ruling only required that a defendant show that he was never informed of plea and that he was prejudiced, i.e., a longer sentence, which Salerno had met those standards according to the trial court's ruling of harmless error. The *Donald* Court specifically stated in its decision that it did not want the Courts to mind-read what other judges or government officials may or may not have done, thereby conflicting with the later U. S. Supreme Court rulings in *Lafler & Frye*. Therefore the State Court ignored its Arizona case law in favor of Federal case law; which may or may not be valid determining on whether the U.S. Supreme Court intended *Lafler/Frye* to be retroactive, which they have failed to rule upon.

The Arizona State Courts usurped the authority of the U.S. Supreme Court by applying a new U.S. Supreme Court Constitutional rule retroactively even though only the U.S Supreme Court has the authority to determine if one of their cases should be retroactive. By the State Courts applying it retroactive and voiding its own precedent setting case law of *Donald*, in order to dismiss a valid claim, and the U.S. Supreme Court remaining silent on its retroactive use, Salerno is being denied any type of Federal review of his case as he has already filed a previous H.C. Petition (#CV 05-0976-PHX-ROS (LOA) – Decided July 18, 2005), and he cannot file another one unless or until the U.S. Supreme Court issues a ruling on retroactivity which would make his case ripe; all he needs is a decision. Normally the failure of the U.S. Supreme Court to specifically say the case is retroactive, means that the default position is that it is not. However, the Arizona Courts are under the illusion that without

the U.S Supreme Court specifically saying one way or the other, it is in their prerogative to determine if a U. S. Supreme Court case should be applied retroactive or not. This type of thinking should be squashed immediately by the U.S. Supreme Court in a decision right here and now.

Salerno believes the Supreme Court will rule that the *Lafler/Frye cases* are not a blue line rule and therefore not retroactive which would then allow Salerno an opportunity to challenge the State decision back in the State and if necessary be allowed to file a second or successive H.C. as the State would then be required to follow *Donald*.

- Potentially meritorious claims in second or successive motions under 28 USCS § 2254 or 2255 that rely on new rules of constitutional law are not ripe for presentation until Supreme Court has ruled on whether rules are retroactively applicable on collateral review. Hernandez v United States (2000, CA7) 226 F3d 839.
- Potentially meritorious claims in second or successive motions under 28 USCS § 2254 or 2255 that rely on new rules of constitutional law are not ripe for presentation until Supreme Court has ruled on whether rules are retroactively applicable on collateral review. Talbott v Indiana (2000, CA7) 226 F3d 866 (criticized in United States v Norris (2001, ED NY) 128 F Supp 2d 739) and (criticized in United States v Tosh (2001, WD Ky) 141 F Supp 2d 738).

Exhibit D are transcripts of the evidentiary hearing in which the State made several references to *Lafler* and argue the case and its requirements. Exhibit E is the State's Response brief in which they argue *Lafler*. These are important as the trial court, even though she never mentions *Lafler/Frye*, it was argued and she did dismiss for reasons cited in *Lafler*, per the State's arguments.

REASONS FOR GRANTING THE PETITION

- 1) To expand and clarify the protections given in *Lafler v. Cooper & Missouri v. Frye*.
- 2) To expand protections of the 6th Amendment.
- 3) To guarantee right to effective counsel.
- 4) To define if Counsel can cause default by incompetent behavior.
- 5) To protect the rights and sole authority of the U.S. Supreme Court over their cases being retroactive or not, and does the Supreme Court have make the determination or is there a default position on each case if retroactivity not specifically stated.
- 6) To guarantee Salerno's *First Amendment Right* for redress to the Federal government, Without this ruling Salerno cannot seek redress.

- 7) To stop the State of Arizona and potentially other States from applying U.S. Supreme Court cases retroactively when the Court does not intend them to be. This affects literally thousands of future cases because if they did it one they will do it again.

CONCLUSION

For the above reasons Petitioner prays this Court accept certiorari.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 17th day of June 2019.

A handwritten signature in cursive script, appearing to read "Fox J. Salerno", written over a horizontal line.

Fox. J. Salerno

Copy mailed this 17th day of June 2019 to:

Arizona Attorney General
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Phoenix, AZ. 85007

Maricopa County Attorney General
301 W. Jefferson
Phoenix, AZ. 85003