No. 21-5286

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Gerald M. Calmese, Petitioner

vs.

State of Arizona, Respondent

PETITION FOR WRIT OF CERTIORARI

AND APPEAL OF STATE COURT OPINION

Maricopa County Superior Court No. CR 2010-008080-001

Arizona Appeals Court No. 1 CA-CR 12-0328 / 1 CA-SA 17-0149

Arizona Supreme Court No. M-21-0029 / M-21-0041

Gerald M Calmese

#074142

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Gerald M. Calmese Pro Se

Questions Presented for Review

Is there legally sufficient evidence to establish beyond a reasonable doubt the required element for fraudulent schemes for which the petitioner was convicted?

Was the petitioner's due process and double jeopardy violated when the Superior court imposed an unlawful double punishment by sentencing petitioner to a consecutive term on the Theft of a Credit Card by Fraudulent Means?

The petitioner's indictment was insufficient as a matter of law, it failed to allege the essentials elements that could not be cured by the trial court, or prosecution by amendment or through jury instructions.

Did the state present insufficient indictment of Multiplicity?

Parties To The Proceedings

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INDEX OF AUTHORITIES

Petitioner, Gerald M. Calmese prays that this honorable court will issue a writ of certiorari to review the judgement and opinion of the Supreme Court of Arizona entered in the above proceedings on May 19, 2021, and June 28, 2021.

CITATIONS OF OPINION AND ORDERS IN CASE

The Petitioner submitted a Special Action of the Arizona Appeals Courts opinion to the Supreme Court of Arizona is attached hereto as appendix A

The opinion and order of the Arizona Supreme Court is unpublished and attached hereto as appendix B

The Petitioner submitted a Special Action to the Arizona Supreme Court is attached hereto as appendix C

The opinion and order of the Arizona Supreme Court is unpublished and attached hereto as appendix D

JURISDICTION STATEMENT

The judgement of the Arizona Supreme Court was entered on May 19, 2021, and June 28, 2021. The jurisdiction of this court is invoked under U.S.C.S. Const. Art. III § 2, C12. " Supreme Court has appellate jurisdiction both a to law and fact." Ableman v. Booth, 662 U.S. 506, 16 L.Ed. 169, 1858 U.S. 686 (1859). " Supreme Court in exercise of its appellate jurisdiction has power not only to correct errors in judgement under review but to make such dispositions of case as justice requires." Honeyman v. Hanan 300 U.S. 14, 57 S.ct 350, 81 L.Ed 476 (1937).

STATE COURTS

" Supreme Court has appellate jurisdiction to review and correct judgement of state court..." Mathew v. Zane, 8 U.S 382, 2 L.Ed. 654, 1807 U.S 396 (1807) Supreme Court has appellate jurisdiction over judgement of state courts. Cohen v. Virginia, 19 U.S 264, 5 L.Ed. 257, 1821 U.S 362 (1821).

"United States Supreme court has jurisdiction to review state criminal conviction raising issue issue of indigent defendant's constitutional right..." have been violated. Ake v. Oklahoma, 470 U.S. 68, 105 S.ct 1087, 84 L.Ed. 2d 53, 1985 U.S. 52 (1985).

CONSTITUTIONAL PROVISIONAL AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution Provides No person shall be... deprived of life, liberty, or property without due process of law nor shall be compelled in any criminal case to be a witness against himself and protection Against Double Jeopardy/ Punishment.
2. The Sixth Amendment to the United States Constitution Provides: In all prosecutions the accused shall enjoy the right to... by an impartial jury of the state... and to be informed of the nature and cause of the accusation, and to have the Assistance of Counsel for his defense.
3. The Fourteenth Amendment of the United States Constitution provides: ...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 law.

STATEMENT OF THE CASE

On December 14, 2010, a Maricopa County Grand Jury indicted Petitioner, Gerald M. Calmese, one count of fraudulent schemes and artifices (count I), theft of credit card by fraudulent means (count III, IV, VI, VII, VIII) and aggravated taking the identity of another (count V). R.O.A. at 1. The State alleged petitioner committed the offenses (which involved six victims) on or between February 1, 2009, and September 27, 2010, for pecuniary gain and in an especially cruel and heinous manner. Id. RT 01-26-2010 pg.18. After an unsuccessful settlement conference, Petitioner proceeded to trial on January 18, 2012.

On January 26, 2012, the jury returned guilty verdicts on counts I, III-VIII and a hung on count II. Id., pg. 15, 16. Petitioner stipulated to the State's aggravating factors, pecuniary gain, and admitted he had five prior convictions. Id., pg. 4, 19. On May 09, 2012, the judge sentenced the petitioner to serve a presumptive sentence of twenty years on count I, the maximum of six years on count III, IV, VI, and VIII, and a presumptive term o fifteen years imprisonment on count V. RT 05-09-2012 pg, 26-28. The judge ordered counts I and V to run concurrently with each other and with consecutive terms imposed in counts III, IV, VII, and VIII. Id., pg, 28.

Petitioner filed a timely Notice of Appeal. This Court has jurisdiction to consider review under USCS Const. Art. III § 2, C12.

COURSE OF PROCEEDINGS IN THE CASE BEFORE THIS COURT

On November 21, 2012, petitioner filed an opening brief on his appeal.

On June 15, 2015, petitioner filed rule 32 for post-conviction relief.

On February 18, 2021 petitioner filed a special Action with the Arizona Supreme Court.

On May 19, 2021 Arizona Supreme Court ordered that the petition for special action be dismissed.

On June, 04, 2021, petitioner filed a Special Action with the Arizona Supreme Court.

On June 28, 2021, Arizona Supreme Court ordered that the petition for special action be dismissed.

ARGUMENTS PRESENTED

I. Was there legally sufficient evidence to establish beyond a reasonable doubt the required elements for the fraudulent Schemes for which the petitioner was convicted?

The petitioner contends the due process clause of the Fifth Amendment, the prosecution is required to prove beyond a reasonable doubt every element of the crime with which the petitioner was charged. The trial court is required to enter a judgment of acquittal before the verdict if there is no substantial evidence to warrant a conviction. State v. Molina, 211 Ariz. 130 (App. 2005). Evidence is substantial if reasonable persons could accept it as adequate and sufficient to support a conclusion of the petitioner's guilt beyond a reasonable doubt. State v. Davolt, 207 Ariz. 191 (App. 2000).

The court should have found that there was insufficient evidence presented in the fraudulent schemes and artifices count pursuant to the Arizona Supreme Court's holding in State v. Johnson, 179 Ariz. 375 (1994), because, like Johnson, the petitioner did not obtain a benefit by means of a false pretense, representation or promise.

A.R.S. § 13-2310 provides that a person violates that statute if the person, " pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representation, promise, or material omissions ." To establish a violation of § 13-2310, the state must first prove the existence of a scheme to defraud, for example, " some ' plan, device, or trick' to perpetrate a fraud." State v Haas, 138 Ariz. 413, 423 (1983), quoting State v. Stewart, 118 Ariz. 281, 283 (App. 1978). It must then prove that the petitioner,

knowing the purpose of the scheme, obtained a benefit pursuant to the scheme by means of false or fraudulent pretenses. State v. Bridgeforth, 156 Ariz. 60, 64 (1988) State v Watson, 459 P.3d 120, (2020). The criminal conduct punishable under §13-2310 is the scheme to defraud, not solely an act committed in furtherance of the scheme. See State v. Suarez, 137 Ariz. 368, 373 (1983). Suarez also illustrates that Arizona's fraudulent schemes and artifices statute criminalizes the scheme, itself, not the individual acts, events, or transactions that occur, or benefits that are received, pursuant to the scheme. See State v. Smith, 121 Ariz. 106, 588 P. 2d 848 (App. 1978).

False pretense is the key element of fraud. State v. Rios, 246 Kan. 517, 792 P.2d 1065, 1070 (1990) (" reliance upon the false pretense which includes the owner to part with his property is generally considered to be an essential element of the crime.. throughout this country"). false pretense, created through words of omission, is the act that separates fraud from routine theft. the statute's language means that the false pretense must actually cause the victim to rely upon and, as a result, give property or money to the petitioner. see id. At 1072 State v. Hauck, 190 Neb. 534, 209 N. W. 2d 580, 584 (1973). Her, petitioner's romantic relationships and false names did not induce his victims to willingly part with their credit cards. The other two elements of fraud are satisfied in almost every theft because theft generally occurs pursuant to a plan and result in the perpetrator receiving a benefit.

Haas contrasted the fraud statute with the theft statute, A.R.S. § 13-1802, and focused primarily on § 13-1802 (A) (2), which codifies common-law embezzlement. There is a difference between fraud and theft. although breaching a trust relationship may lead to fraud, it does not do so unless the distinguishing element of fraud is present. see Parr v. United States, 363 U.S.

370, 393-394, 80 S.Ct. 1171, 1185 4 L.Ed. 2d 1277 (1960) (holding that commission of embezzlement did not establish mail fraud conviction) see also the United States v. Beall, 126 F.Supp. 363 (N.D.Cal. 1954) (treasurer of a charitable agency diverted contributions for his own use and attempt o cover up the crime by claiming the funds had been turned over to another employee held that " the mail fraud statute was not meant to apply to persons who violate a position of trust and confidence by embezzling funds that come into their hand... lawfully.... ") Id. at 366.

In Haas, the Supreme Court noted the fraudulent schemes and artifices statute must be broad enough to " cover all of the varieties made possible by boundless human ingenuity." 138 Ariz. 424, 675 P.2d at 684, including the use of " deceitful statements or half-truths or even the concealment of material facts." Id at 418, 675, P.2d at 678. Thus, it concludes, "[t]here is a misrepresentation whenever the combination of what is said, what is half-said and what is not said results in misrepresenting the nature of the transaction." Id at 424, 675, P.2d at 684. This was the scenario in State v. Proctor, 196 Ariz. 577, 2 P.3d 647 Ariz. App. Div 2, 1998, the case upon which the trial court ultimately relied. Through a careful strategy of representations, promises, and omissions, appellants misled sellers as to the nature of the related property transactions.

The issue here is whether the petitioner obtained benefit by means of his false pretense? Although, petitioner pretense need not be by affirmative misrepresentation, it must be by more than the implied promise alleged by the state. State v. Watson, 459 P.3d 120 (2000) State v. Haas, 138 Ariz. at 419, 675 P.2d at 679 State v. Johnson, at 424, 675 P.2d at 684. The betrayal of an implicit belief in the honesty of one's friend or employee, alone, does not support the misrepresentation element of fraud. See United States v. Pinto, 548 F.Supp. 236, 245 (E.D.pa 1982) (" the breach of an employee's fiduciary duty, without more, does not constitute [fraud]"). Hence, though the petitioner's victims may have felt betrayed by the petitioner's romantic advances, these overtures alone did not support the misrepresentation element of fraud. Given the explicit wording of A.R.S § 13-2310 (A), the state must prove specific facts that the petitioner obtained some benefit " by means of " a specific false picture or pretense. Haas, 138 Ariz. at 423, 675 P.2d at 683.

Here. Petitioner arguably received two different benefits: the credit cards that permitted petitioner to obtain various purchases without the owner's consent, the second the items themselves. The question for this court's consideration is whether the petitioner's actions misled his victims in some way to induce them to give the petitioner the credit cards and/or the items the petitioner purchased. The state produced no such evidence. In fact, in several instances, the victims testified that the petitioner fostered a relationship with them through online " chatting " sometimes for months before actually meeting in person. RT 03/07/2012 pg. 10. Further, that petitioner used various aliases with his victims had nothing to do with their willingness to give petitioner their credit cards. in fact, some of the victims loaned the petitioner cash based on his representations that the petitioner suffered a temporary financial hardship that had nothing to do with the petitioner's false identity. Further, the state offered no evidence that the petitioner lacked conviction in his relationships with the woman, or that he was insincere in his communications with each other online. In short, the petitioner's romantic interests had nothing to do with his later thefts of the victim's credit cards.

The State failed to prove a fraudulent scheme and therefore under the due process clause of the Fifth Amendment, the State is required to prove beyond a reasonable doubt every element of the crime with which the Petitioner is charged. See Sullivan v. La. 508 U.S. 275, 278 (1993). The standard protects the Petitioner's liberty interest. See Winship, 397 U.S. at 363.

Second, it protects from stigma of conviction. Id Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence, Id at 363-64. The reasonable doubt requirements apples to elements that distinguish a more serious crime from a less serious one, as well as those elements that distinguish criminal from noncriminal conduct.

The criminal conduct punishable under § 13-2310 is the scheme to defraud, not any act committed in furtherance of the scheme. See State v. Suarez, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983). A scheme to defraud may involve numerous acts and multiple victims, See id. (" A scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan.") State v. Schneider, 141 Ariz. 441, 445, 715 P.2d 297, 301 (App 1985) (Single scheme involving forty victims).

II. Was the Petitioner's due process and double jeopardy violated when the Superior court imposed an unlawful double punishment by sentencing Petitioner to a consecutive term on the Theft of a Credit Card by Fraudulent Means?

The Double Jeopardy Clause of the Fifth Amendment states that no person shall " be subject for the same offense to be twice put in jeopardy of life or limb." The petitioner was sentenced to the maximum of six years on counts III, IV, VI, VII, VIII theft of a credit card by fraudulent means. The double jeopardy clause of the United States and Arizona Constitutions protects criminal defendants from multiple prosecutions and punishments for the same offense. U.S Const. amend. V Ariz. Const. art. II §10. See. U.S v. Bonilla, 579 F.3d 1233, 1241-44 (11 Cir. 2009) State v. Eagle, 196 Ariz. 188,190, 5, 994 P.2d 395, 397 (2009) (federal and Arizona double jeopardy clause generally provide the same protection). See Blockburger v. United States, 284 U.S. 299, 301 (1932). The greater and lesser-included offenses are considered the " same offense " the double jeopardy clause forbids the imposition of a separate punishment for a lesser crime when a defendant has been convicted and sentenced for the greater offense. see Illinois v. Vitale, 447 U.S. 410, 421, 100 S.Ct 2260 65 L.Ed 2d (1980) State v. Chabolla-Hinojosa, 192 Ariz. 360, 362-63, 10-13, 965 P.2d 94, 96-97 (App. 2014).

Statutorily, as in the case at hand, the prohibition of multiple punishments for the same act is codified in A.R.S §13-116, which provides: " An act or admission which is made punishable in different ways by different sections of the law may be punished under both, but in no event may sentence be other than concurrent." See U.S v. Naas, 775 F.2d 1133 (CA5 1985) "[absent clear language to the contrary, it is presumed that the sentence imposed on more than one

offense at the same time, or at different times, will run concurrently " Schurmann v. United States, 658 F.2d 389, 391 (5th Cir. 1981) [.]

Under the facts in this case, the fraudulent schemes and artifices offense was the ultimate charge concerning each victim the underlying theft of a credit card, stem directly from the petitioner's scheme to obtain the pecuniary gain from the victims' by creting the false pretense. The State, in the exercise of its broad charging discretion, chose to charge the petitioner with a single count of fraudulent schemes that encompassed every theft of a credit card petitioner committed. State v. Peltz, 242 Ariz. 23, 278, P.3d 1215, 1219 (2017) State v. Via, 146, Ariz. 108, 116, 704, P.2d 238, 246 (1985).

Moreover, the state's claim that obtaining "any benefit" is chargeable as a separate offense simply cannot be squared with the analysis set forth in Via, Suare and Schneider. In Via, the Arizona Supreme Court did not find a separate scheme each time Via obtained "any benefit" by using either of the stolen credit cards. 146 Ariz. at 116. In Suarez, the court did not find a separate scheme each time Suarez obtained "any benefit" from Lake Havasu City during his "one scheme to defraud" the city. 137 Ariz. at 373 Finally, the court did not find a separate scheme each time Schneider obtained "any benefit" from any of the multiple investors involved in his scheme. 148 Ariz. at 446-47. Even though there are multiple victims, the testimony that the acts were committed in the same way, act, or manner solidifies that they were based on the same scheme. so regardless if petitioner took credit cards, or cash, cars, the overall scheme was to defraud regardless of the benefit.

The state must now subtract the evidence necessary to satisfy the elements of the ultimate charge and determine whether the remaining evidence and meet the statutory elements of theft of a credit card, which proves that Petitioner knowingly controlled property of another with the intent to deprive the other person of such property, A.R.S. § 13-1802 (A)

(1). Considering the elements of each offense and the facts surrounding both the theft of a credit cards and fraudulent schemes and artifice crimes, there is insufficient evidence to convict the petitioner of theft of credit card once the evidence necessary to convict him of fraudulent schemes and artifices is subtracted. Under the facts of this case, the petitioner obtained control of the victims' credit cards at the same moment he received pecuniary gain through his false pretense and misrepresentation. Thus, because the state would be unable to prove theft of a credit card without the evidence required for fraudulent schemes and artifice, the first prong of Gordon test. See State v. Watson, 459 Ariz. P.3d 120 (2020). In this case, the second and third prong of the Gordon test did not satisfy. Watson could not have obtained the funds from the victims' account using fraudulent schemes and artifices without simultaneously committing theft. Gordon, 161, Ariz. at 315, 778, P.2d at 1211.

As for the third prong, the harm to the victims caused by the thefts---that they were deprived of their property--is the same harm they suffered as a result of the fraudulent schemes and artifices. Based on how the state charged the offense in this case, the petitioner committed a single crime resulting in the commission of a series of crimes. the consecutive term for theft of credit card charge was, therefore, unlawful double punishment. Under Watson, the review of the sentence proceedings left the Appeals court unable " to determine... that the trial court would have imposed the same sentence if it had been aware that consecutive sentence were not available," with that said the appeals court vacated all of Watson's felony sentence and remanded for resentencing. Petitioner is asking for the same consideration in his case.

III. Petitioner's indictment was insufficient as a matter of law, it failed to allege the essential elements that could not be cured by the trial court, or the prosecutor by amendment or through jury instructions. Did the State present insufficient indictment of multiplicity?

The Supreme Court has stated, the very purpose of the requirement that a person be indicted by the grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. The indictment filed on December 14, 2010, failed to allege all victims in count 1 which is one of the main essentials for the crime for which the petitioner is charged. Failure to do so constitutes a fatal defect: United States v. King, 587, F.2d 956, 963, (9th Cir 1978) Russell v. United States, 369 U.S. 749, 771, 82 S.Ct 1038, 1051, 8L.ed 240 (1962) Costello v. United States, 350 U.S. 359, 362 76 S.Ct 406, 407, 100 L.ed 397, see eq, Hamling v. United States.

On or between the 1st day of March 2011, the petitioner filed a motion to amend the indictment. The motion was denied. On October 18, 2011, the state filed a motion to amend the indictment for typographical error (Appendix B). On January 18, 2021, during the trial setting hearing, the court inquired about the motion to amend the indictment, the judge Stated he would like to see the grand jury transcripts (Appendix C). the motion was never ruled on by the judge. U.S v. Dowdell, 595 F.3d 50 (CA 1 2010).

The petitioner argues that it is the duty of both the trial court and prosecutor to review the indictment for defects to see if it will hold a conviction. If not, resubmit the indictment back to the grand jury. The indictment must be specific U.S. v O'Donnell, 608 F.3d 546 (CA 9

2010)

United States v. Cruikshank, 92 U.S. 542-558 L.ed 588. To allow the state prosecutor to make a subsequent guess as to what was in the mind of the grand jury at the time they returned the indictment would deprive the petitioner of basic protection that the grand jury was designed to secure, because the petitioner could then be convicted on the basis of facts not found by, and perhaps not even presented to the grand jury that indicted the petitioner. see, Jeffers v. United States, 392 F.2d 749, 752-53, (9Cir 1968) Russell 369 U.S. at 770, 8 S.Ct 1038. Williams v. United States, 265 F.2d 214, 218, (9th Cir 1959) Bunkley v. Florida, 538 U.S. 835, 155 L.ed. 2. d 1046 123 S.Ct 2020.

(A). The guard against " Multiplicity " see United States v. Douglas, 780 F.2d 1472, 1477 (9th Cir 1986). Multiplitous indictments are generally improper, they may prejudice the defendant or result in multiple punishments for the same offense, which violates the petitioner's constitutional right to be free from double jeopardy. U.S. Const. amends. V, XIV Ariz, Const. art II § 10 State v. Powers, 200 Ariz. 123 (App. 2001) aff'd, 200 Ariz. 363 (2001) U.S. v. Kerley, 544 F.3d 172 178-79 (2d Cir 2008) U.S. v. Bonilla, 579 F.3d 1233, 1242-43 (11th Cir 2009). Furthermore, the ban on multiplicity protects defendants' rights under the double jeopardy clause of the Fifth Amendment. Since a defendant is for the same offense twice, defendant is put in jeopardy whenever he/she is made to stand trial on an indictment charging the same offense in more than one count. United States v. Reed, 639 F.2d 896, 904, (2d Cir 1981) United States v. Fiore, 821 F.2d 127, 130 (2d Cir 1987). In this case here, the state failed to test whether each charge required proof of a fact which the other does not, and the state used the same evidence in all charges to convict. This clearly violated the analysis under the test announced by the Supreme Court in Blockburger v United States, 284 U.S 299 304 (1932) United States v. Kennedy, 726 F.2d 548. In the petitioner's case, the petitioner submits that counts 1, 2, 3, 4, 6, 7, 8, of the indictment, are " Multiplitous " Note, the same action as all the counts incorporated by reference each of the overt acts alleged. Counts 1, 2, 3, 4, 6, 7, 8,

alleged the same evidence. U.S. v. Anderson, 872 F.2d 1508, 1520 (11th Cir 1989). In this case the only remedy for sentencing resulting from multiplicity is to vacate all sentencing and remand for resentencing, 278 F.3d 880 (9th Cir 2002) Blockburger v. U.S 299, 304 (1932). In the petitioner's case, the state proved every element necessary to obtain a conviction under counts 2, 3, 4, 6, 7, 8. Thus all the counts are presumed to be the same offense under Blockburger. Id. Certainly, nothing in the legislative history of the export administration act suggests that the presumption arising under Blockburger should be ignored. Therefore, the court errored in convicting the petitioner on the indictment multiplicity which is an illegal sentence which is an illegal sentence and " miscarriage of justice." 2002) Blockburger v. U.S, 284 U.S 299, 304 (1932). In the petitioner's case, the state proved every element necessary to obtain a conviction under counts 2, 3, 4, 6, 7, 8. Thus all the counts are presumed to be the same offense under Blockburger. Id. Certainly, nothing in the legislative history of the export administration act suggests that the presumption arising under Blockburger should be ignored. Therefore, the court errored in convicting the petitioner on the indictment multiplicity which is an illegal sentence which is an illegal sentence and " miscarriage of justice."

There are only five types of dismissal within any court of lower equity. They are outlined by the Federal Rules of Civil Proc. 41(a) is a voluntary dismissal. Here, the defending party must initiate it. This requires a motion from the defending party in an action to file for lack of prosecution on behalf of the complaining party. However, a dismissal under this venue operates as an adjudication on the merits.

The other three dismissals are dismissals by the court, and they are as follows:

1) a dismissal for lack of jurisdiction.

2) a dismissal for improper venue.

3) for failure to join party under Ariz.R.Crim.D,19

In this case, the Petitioner's "Notice of Post-Conviction Relief" were dismissed by the Court with no objection or motion from the State. Therefore, the dismissal cannot be a dismissal without an adjudication on the merits.

The venue was the right venue. It has long since been held that, "The party who brings the suit is the Master to decide what law he will rely upon, The Fair v. Kohler Dre & Specialty Co, 288U.S.22,228U.S.25. Nor can the court claim that its ruling was based on lack of Jurisdiction. State v. Lopez,96 Ariz. 169,393p.2d 263 (1969). And for the court to claim its dismissal for failure to join a party under Rule 19 would be totally absurd.

With the judge mentioning the timeliness of the "Claim Notice," we can only assume that the judge was attempting an adjudication on the merits. However, it is evident to adjudicate and not the "Claim Notice" to blame this on ignorance, would be To turn a blind eye to one who has attempted to deprive a U.S. citizen of his rights under the color of the law, is a violation of 18U.S.C & 242, also known as the Klu Klux klan Act.

The courts have addressed these issues numerous times. S.C.D.T.U.S. made a clear ruling on this situation in Eberhart v. U.S.125 (2005). Because time is in fact a defense, a court, who issues a dismissal under the pretense of timeliness has become part of the litigation and not the unbiases disinterested arbiter of the rights that is required from the judiciary seal of a judge. Honorable Daniel Martin, who acting on his own will (Sua Sponte), has obstinately seized the jurisdiction of the standing in violation of the Petitioners 1st, 6th, and 10th and 11th & 14th Amendments rights.

Also, standing in violation of Ariz.Const.Art. 2 & 11. Ariz.R. of Civil Proc, 11 & A.R.S.& 12-349

Because of the violation of the Petitioners Due Process rights to state a claim and access to the courts, the Petitioner seeks relief of vacating his sentences and convictions and remand back to a trial court, for a new trial and /or for resentencing.

3) THE TRIAL COURT ERRED WHEN IT DISMISSED Calmese' Notice for Post- Conviction For Relief for nor raising grounds for relief.

As evidence provided in the previous argument, a pending case cannot be exhausted unless it is based on the merits. A Notice presents no merits and cannot be dismissed on its merits.

A Notice for Post-Conviction Relief is to notify the court and adverse party on the filing party's intentions to file a Petition for Post-Conviction Relief. A notice is not a vehicle to seek any kind of relief. There are no assertive substantive grounds that can be brought up in a notice.

The trial court cited State v. Manning in making its ruling/order. State v. Manning

mostly focuses on a Writ of Habeas Corpus and a "PETITION "for Post- Conviction Relief. It has nothing to do with a notice. This has no bearing of the present case. It is a fact you cannot file a Notice for Post- Conviction Relief and assert substantive grounds with the expectations of relief.

The trial counsel ruling/ order causes unnecessary delay which stands in violation of Ariz.Const.Art 2 & 11 and the Petitioners Due Process rights to both Constitution Arizona and the United States, which is binding by the Fourteenth Amendment to the States. Petitioner seeks relief of vacating his convictions and sentences or whatever relief warranted.

LAYMAN OF LAW

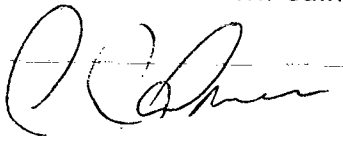
Defendant contends he is a layman of the law, and submit this pleading with no help or Legal professionals that this petition for review be read generously and liberally to be exhaust, Rainey v Varnes, 603 F3d 189 (2010, and to be interpreted less stringently. Williams v. Lockheart, 849F.2d 1134(1988), and must construed liberally. Ray v. Lanpert, 465F.3d 964(CA9 2006).

CONCLUSION

Wherefore, the Petitioner respectfully request this petition and relief of vacating the convictions and sentences or whatever relief that warrant the situation to be granted.

RESPECTFULLY SUBMITTED this the 26 day of July 2021.

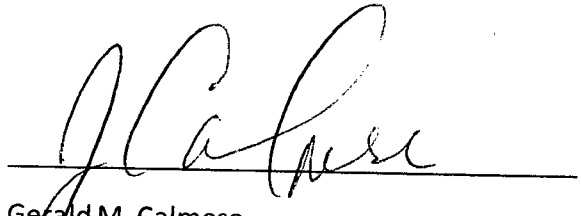
Gerald M. Calmese Pro Se



CONCLUSION

Petitioner, Gerald M. Calmese, has been deprived of basic fundamental rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and seek relief in This court to restore those rights. Based on the arguments and authorities presented herein. Petitioner's conviction and sentence was sustained in violation of due process. A.R.S. § 13-2310 is entitled "[f]raudulent schemes and artifices." The criminal conduct punishable under §13-2310 is the scheme to defraud, not any acts committed in furtherance of the scheme. Giso at I 11. This has been settled law in the Arizona Supreme Court and both divisions of this court for decades. The state now apparently wants this court to overrule all of these cases and uphold the practice of dividing a single scheme into separate acts in order to subject the petitioner to serve a consecutive sentence. The theft and fraudulent schemes and artifices offenses constituted a single act for sentencing purposes under A.R.S. § 13-116. For the reason stated, Petitioner prays this court will issue a writ of certiorari and reverse the judgment and sentence affirmed by the Arizona Supreme court.

Respectfully Submitted this 26th day of July, 2021.



Gerald M. Calmese

Pro-se Representation