

ORIGINAL

21-8223

NO: _____

UNITED STATES SUPREME COURT

In re: **Fox Joseph Salerno,**

Petitioner,

FILED
JUN 22 2022
OFFICE OF THE CLERK
SUPREME COURT U.S.

ORIGINAL

(Tenth Circuit# 22-1095 – Habeas Corpus Mandamus)

(Colorado DC# 22-cv-00124-GPG – Habeas Corpus)

ON PETITION FOR A WRIT OF CERTIORARI TO

**U.S. COURT OF APPEALS
IN AND FOR THE TENTH CIRCUIT**

Fox Joseph Salerno
CDOC #164490
P.O. Box 6000
Sterling, CO. 80751

QUESTION(S) PRESENTED**I.**

Should a 28 USC 2241 HC (not a 28 USC 2254 HC) be filed in State in which incarcerated or State in which conviction occurred, for a State prisoner serving his sentence in another State under Inter-state compact Act? Consequently, who is 'custodian' over a State Inter-State compact prisoner, sending or receiving State, or both?

II.

Does a Federal DC have Subject Matter Jurisdiction (SMJ) to hear a HC case when the person directly holding the prisoner is not required to abide by any of the court's orders?

III.

Can a Federal Court in a *Circuit* that recognizes a Habeas Corpus (HC) filed under 28 USC 2241 and the right for a State Defendant to file an action under this Statute, transfer case to a different Federal court in a *Circuit* that does not recognize or allow State prisoners to file HC under this statute, in so doing knowing the case will not be heard and will be summarily dismissed? In other words, the *Tenth Circuit* allows State prisoners to file HC under 28 USC 2241 while the *Ninth Circuit* does not as they only recognize State prisoner HC's filed under 28 USC 2254; so can *Tenth Circuit* transfer 2241 cases to the *Ninth Circuit*?

IV.

Can a State prisoner challenge validity of conviction and execution of sentence issues under 28 USC 2241?

LIST OF PARTIES

[] No respondents appear in the caption of the case on the cover page as *Rule 34(c)* requires caption in format as last court which heard case, *Tenth Circuit*.

Petitioner –

➤ Fox Joseph Salerno
Colorado D.O.C. #164490
P.O. Box 6000
Sterling, CO. 80751

IN Pro Per

Respondents -

Dean Williams, Colorado D.O.C. Executive Director
Academy Park Loop
Colorado Springs, CO. 80910

David Shinn, Arizona D.O.C. Director
1601 W. Jefferson
Phoenix, AZ 85007

RELATED CASES

Ninth Circuit Court of Appeals No. 22-15812 (Pending)
U.S. District Court of Arizona 2:22-cv-00558-ROS-DMF (Summarily dismissed, on Appeal)

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TABLE OF AUTHORITIES CITED**CASES**

- *Bird v. LeMaitre*, 2010 U.S. App. LEXIS 7112 [HN5].
- *Braden v. 30th Judicial*, 410 U.S. 484, 495 (1973).
- *Bradshaw v Stary* 86 F.3d 164, 166 (10th Cir, 1996).
- *Doyle v. Okla. Bar* 998 F.2d 1557, 1570 (10th Cir. 1993).
- *Fest v. Bartee*, 804 F.2d 559, 560 (9th Cir. 1986),
- *Gilbert v. U.S.*, 609 F.3d 1159, (11th Cir. - 2010), remanded 610 F.3d 716.
- *Holder v Curley*.
- *Jackson v. Schneider*, 207 Ariz. 325 (P10) (App. 2004).
- *Oliphant v. Schlie*, 544 F.2d 1007(9th Cir 1976) rev'd 435 U.S. 191 (1978).
- *re Pope*, 580 F.2d 620 (DC Cir 1978).
- *Rumsfeld v. Padilla*, 124 S.Ct. 2711 was decided in 2004
- *U.S. v. Suarez*, 2007 U.S. App. LEXIS19811 (10th Cir. 2007).
- *U.S. v. Suarez*, 244 Fed. Appx 921.
- *United States v. Giddings*, 740 F.2d 770, 771, 1984 U.S. App. LEXIS 19455, *1 (9th Cir. Wash. August 17, 1984).
- *White v. Lambert*, 370 F.3d 1002 (9th Cir – 2004

STATUTES AND RULES

- 28 USC 2241 HC.
- 28 USC 2254
- 28 USC 2255,

OTHER**OPINIONS BELOW**

JURISDICTION

[X] For cases from federal courts:

- Tenth Circuit's denial En Banc on June 6, 2022
- Tenth Circuit's Mandamus dismissal order on May 3, 2022.
- DC's Order of Transfer & dismissal which is being challenged, on March 24, 2022.

[X] For cases from state courts:

Salerno Has exhausted all remedies up to the State's Supreme Court before filing his 28 USC 2241 HC.

Highest State Court decision on: State v. Salerno, 2022 Ariz. App. Unpub. LEXIS 49 January 20, 2022, Filed.

[X] The U.S. Supreme Court also has original jurisdiction.

USCS Const. Art. III, § 2, CI 2**CI 2. Jurisdiction of Supreme Court.**

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

USCS Const. Art. III, § 2, CI 1, Part 1 of 3**CI 1. Subjects of jurisdiction.**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The U.S. Supreme Court has jurisdiction as he has exhausted all claims with the Arizona Supreme Court, state's highest court.

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Art. I, § 9, Cl 2
- 14TH Amendments.
- 28 USC 2254
- 28 USC 2241

STATEMENT OF THE CASE

Salerno filed a HC (28 USC 2241) with the Colorado District Court challenging the execution of his sentence (Salerno v. Williams, et al., 22-CV-00124 GPG) as he is confined in a Colorado State prison (CDOC). Salerno was convicted in an Arizona State Court, incarcerated in Arizona DOC (ADOC), and forcibly transferred to CDOC per the *Western Inter-State Compact Act*. On March 24,

2022 the CO. District Court, over Salerno's objection, ordered his HC be transferred to the Arizona District Court (DC) determining that the Arizona DC was a better venue, not specifically saying that it did not have jurisdiction but hinting that both court's had dual jurisdiction and it would be more judicious.

Salerno believes the transfer order to be unconstitutional and a Constitutional denial of HC's rights as Federal Courts in Arizona are prohibited by *Ninth Circuit* case law from entertaining a HC challenging the execution of sentence filed under 28 USC 2241. (SEE *White v. Lambert*, 370 F.3d 1002 (9th Cir – 2004)). Therefore Salerno filed a Mandamus with the *Tenth Circuit* requesting that the court order it be recalled and that the Colorado DC hear Salerno's HC as it is the only court to have jurisdiction and is legally able to hear cause of action.

During the pendency of Mandamus the Arizona DC summarily altered his 2241 HC to a 2254 HC and summarily dismissed as he had previously filed a 2254 HC in 2005 challenging the validity of his sentence, thereby ruling it to be a successive petition. Under 2241 there is no prohibition against a second filing and no requirement that the *Circuit* court allow a second filing.

REASONS WHY THIS PETITION SHOULD BE GRANT

- 1) There is absolutely no case law directing where a State prisoner under Inter-State Compact Act must file his 28 USC 2241 HC. Courts are citing unpublished opinions from DC's in other jurisdictions, and some DC's are allowing filings in receiving State while others are transferring cases to sending state. (SEE DC's: Order to cure deficiencies & Order of transfer).

- 2) The Tenth Circuit allows State prisoners to file HC actions under 28 USC 2241 for the execution of their sentences which is where Salerno is confined and filed his case. The Ninth Circuit, where Salerno was convicted, prohibits State prisoners from bringing any action in its Circuit under 28 USC 2241 and requires they only have access to Federal HC under 28 USC 2254.

Salerno v. Williams, CV 22-00558-PHX-ROS (DMF); Document 10, P.1):

"Because 28 USC 2254 is 'the exclusive vehicle' for a habeas corpus petition by a state prisoner in custody pursuant to a state court judgment, the Court will construe the Petition as filed pursuant to 28 USC 2254."

There is a conflict between Circuits as to whether 2241 applies to State prisoners. Four Circuits allow 2241 filings for State prisoners while three do not; Salerno is unsure about the other Circuits.

- 3) 2254 has numerous procedural bars to jump through which 2241 does not, including the successive petition application process.

As Salerno filed a 2254 in 2005 challenging the validity of his conviction, he is now barred in the Ninth Circuit from filing a second HC even though he is only challenging the execution of his sentence. Under 2241 Salerno would not be barred from this second HC. After transfer, the Arizona DC summarily changed Salerno's HC from a 2241 to a 2254 and promptly dismissed as successive.

So the question is a conflict in Circuit case laws. How can a DC in one circuit transfer a case, in which it has jurisdiction, to another Circuit's DC, knowing that that circuit will not entertain the case and will summarily dismiss?

- 4) There is a conflict among Circuits as to whether 28 USC 2241 HC's can hear only execution of sentences or both execution and validity of sentences.

FACTS MATERIAL TO A CONSIDERATION & LEGAL ARGUMENT

No case law can be found that specifically addresses a State prisoner who is being held passed his release date and resides in another State's prison per

inter-state compact act, on which jurisdiction they must file a 28 USC 2241 HC petition under. The CO. DC cites several cases but none are on point. Most are federal prisoners and federal law dictates the different federal courts for HC's filed under 2255, but law is silent for cases filed under 2254 and 2241. The State conviction cases cited by the court are all dealing with pending indictments or issues not related to Inter-State Compact and current custody of state prisoner. The one case that does discuss Compact Act is *Fest v. Bartee*, 804 F.2d 559, 560 (9th Cir. 1986), however that case was transferred back to the sending State's, State Court system for not exhausting State remedies, not to the sending State's federal court system like is being done to Salerno (Salerno did exhaust State remedies).

VENUE/JURISDICTION

Those District Court case laws cited in Court's order are muddled as both Arizona and Colorado would seem to have some jurisdiction over Salerno, according to them. Additionally no case law is directly on point as to inter-state compact prisoners. However, the 10th Circuit has two case laws which are not directly on point but stating that 28 USC 2241 must be "... filed in district where prisoner is confined." *Bradshaw v Stary* 86 F.3d 164, 166 (10th Cir, 1996); *U.S. v. Suarez*, 2007 U.S. App. LEXIS19811 (10th Cir. 2007).

Braden v. 30th Judicial, 410 U.S. 484, 495 (1973) says HC is over applicant's "custodian". The Director of AZ DOC and CO DOC may have joint custodianship, however, CO has physical control of body as needed in a HC proceeding and

direct jurisdiction over CDOC where Salerno is confined. AZ D.C. has no jurisdiction over CDOC.

BALLENTINE'S LAW DICTIONARY

- BALLENTINE'S LAW DICTIONARY

custody.

1. As applied to property, "custody" means control or care, not possession; the mere putting of one's property in the custody of another does not divest the possession of the owner. 42 Am J1st Prop § 42; 32 Am J1st Larc § 56. As applied to a person, "custody" means physical control of the person, sometimes by his imprisonment. For the purpose of **habeas corpus**: -- such restraint of a person by another that the latter can produce the body of the former at a hearing as directed by writ or order.
2. There is no such thing as custody of a person physically at large.

CDOC has the authority to determine the execution of Salerno's sentence and what is illegal and therefore void as to excess, per Arizona & Colorado laws. The *Inter-state Compact Act* does not mandate receiving State carry out an illegal sentence. It requires that prisoners abide by and fall under all policies and laws of the receiving State. CDOC's policy and Colorado & Federal laws require sentences be Constitutional, lawful, and not to keep prisoners past their release dates.

Still further, Salerno is challenging his present physical confinement and form of confinement based upon different issues. So if court believes it can only hear certain issues and not others, it should dismiss what it cannot hear and what must be heard in Arizona or under 28 USC 2254, and rule upon issues it has the authority and jurisdiction over under 2241, depending on whether the DC believes it can only hear execution of sentence and not validity of sentence. Dismissing or

transferring entire HC is wrong and unwarranted.

Braden, as DC court cited for example on top of page 4 in its order, is not on point. Both Alabama & Kentucky had charges pending or a conviction with applicant Braden and he had to file in the District that held the indictment of him as it held him in custody and was defacto custodian, and it only requires court have jurisdiction over custodian [HN4]. Salerno's case is factually different as CO has no charges against him, they are only acting as custodians, be they permanent or foster custodians. *Braden* was a federal prisoner and that court ruled under 28 USC 2255, which requires that a collateral attack on a federal sentence be filed in the sentencing court rather than the district court where prisoner is confined. No such law exists under 28 USC 2241 or 28 USC 2254. Therefore it is not an applicable comparison

DC cited *Holder v Curley*, which is a non-opinion case for a district court in Michigan and as no party appealed that order we don't know how the appellate court would have ruled. Plus it deals with two federal district court's within the same State and prisoners filing under 28 USC 2254/2255 not 2241, conviction Vs. execution. However, it does say "present physical confinement" not "AG or some other supervisory official" [HN5].

Rumsfeld v. Padilla, 124 S.Ct. 2711 was decided in 2004 and even with this precedence setting case, the 10th Circuit , after *Padilla* came out, determined in 2007 (*U.S. v. Suarez*, 244 Fed. Appx 921) that 28 USC 2241 should be filed in district that applicant is confined in. Besides, *Padilla* uses the term "immediate

custodian" and determined the first court lacked jurisdiction as the commander of the military base was resident of another district, Subject matter jurisdiction (SMJ) lies only in District of confinement [HN11].

Furthermore, *Padilla* [HN3, HN8, HN9,] ruled "HC jurisdiction was limited to the district court in which the detainee was confined and he, commander of the military confinement facility, was the only proper custodian official..." Although government (President & Secretary of defense) ordered confinement and had authority to order their release anywhere in America, they were still not custodians. This is identical to Arizona which has the same authority as the President & Secretary had, but are still not custodians for a HC proceeding. Former ADOC director Ryan determined placement of Salerno out of State knowing he was giving up custodianship to CDOC Executive Director Williams.

Furthermore, returning case to Arizona would deny Salerno his Constitutional right to a HC as the 9th Cir. Case laws only allow their courts to issue writs within their jurisdiction, which Salerno is not *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir 1976) *rev'd* 435 U.S. 191 (1978). Also, the 9th Cir. Doesn't recognize 28 USC 2241, only 28 USC 2254 *White v. Lambert*, 370 F.3d 1002 (9th Cir. 2004); *cert denied*; *over-ruled in part*, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010). If both CO & AZ decline jurisdiction, it is a denial of HC access.

A HC does not set upon a prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. Now ADOC Director can request CDOC Director to release Salerno, but so can any AZ court, or any court

in CO. Of course, the Courts in Colorado are the only ones that CDOC Director must follow or abide by, everything else is just a request or an ask.

Prisoner has residency at his place of confinement *re Pope*, 580 F.2d 620 (DC Cir 1978).

1391 (a) (2) venue determined without regard to whether the action is local or transitory in nature.

Salerno has met all three requirements in 28 USC 1391(B).

- (1) Applicant Salerno and Respondent William are both within this court's jurisdiction.
- (2) As Salerno is being illegally held within this district, it amounts to substantial part of events.
- (3) Salerno is subject to this court's personal jurisdiction.

Finally, the court found that the lower court could not have treated appellant's Rule 35 motion as a habeas petition under 28 U.S.C.S. § 2241 because a writ could issue only from **a court with jurisdiction over the prisoner.** United States v. Giddings, 740 F.2d 770, 771, 1984 U.S. App. LEXIS 19455, *1 (9th Cir. Wash. August 17, 1984).

EXECUTION vs. VALIDITY OF SENTENCE

Salerno is challenging the Constitutional execution of his sentence as allowed using 28 USC 2241, by claiming the execution violates the Constitutionality of his sentence. DC may have been swayed in its transfer by

believing that all issues were validity and not execution claims.

White v. Lambert, 370 F.3d 1002 (9th Cir – 2004).

| <u>HN2</u> | Habeas | Corpus, | Jurisdiction |
|--|---------------|----------------|---------------------|
| <p><u>28 U.S.C.S. § 2241</u> confers jurisdiction on a district court to issue a writ of habeas corpus when a federal or state prisoner establishes that he "is in custody in violation of the Constitution or laws or treaties of the United States." <u>28 U.S.C.S. §§ 2241(a) and (c)(3)</u>. <u>28 U.S.C.S. § 2254(a)</u> confers jurisdiction on a district court to issue "a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court on the ground that <u>he is in custody in violation of the Constitution or laws or treaties of the United States.</u>"</p> | | | |

Doesn't seem to distinguish or require only execution of sentence and not validity of sentence to file under 2241.

Under Arizona's unique statutes & case law, an illegal sentence that is in excess of what law requires, is void as to excess of that sentence and it does not require a court to say so; administrative or judicial decisions can correct unlawful sentence. - *Jackson v. Schneider*, 207 Ariz. 325 (P10) (App. 2004). Prison/Jail officials (custodians) have the lawful responsibility and authority to follow the law and not an illegal/unconstitutional sentence

Arizona's laws are different than most other State's, as a result, every single issue in Salerno's HC can be considered execution of sentence cognizable under 2241 as respondents can stop a prison term by releasing prisoner if sentence is unlawful when it surpasses its lawful part of sentence, failure to use this authority in execution of sentence falls under 2241.

Still further, Salerno can satisfy the actual innocence gate way, thus will have established a fundamental miscarriage of justice to overcome any alleged procedural bars DC outlined in its order. When a sentence is illegally/unconstitutionally enhanced, a petitioner is factually innocent of legal requirement for such enhancement and his continued incarceration for illegal enhancement was miscarriage of justice, for which he was entitled to relief under 28 USC 2241; *Gilbert v. U.S.*, 609 F.3d 1159, (11th Cir. - 2010), remanded 610 F.3d 716.

Neither ADOC nor CDOC can knowingly carry out an illegal or unconstitutional sentence. So if a court issues an unconstitutional sentence and the custodian of that person is aware of it, they are required to follow the law and not the sentence handed down by the courts – hence the execution or non-execution of an illegal sentence falls under 28 USC 2241. It is up to the State to show that validity of sentence takes precedence over the execution of sentence for all these issues, and that they are not cognizable under 2241.

Bird v. LeMaitre, 2010 U.S. App. LEXIS 7112 [HN5] – Salerno has a liberty interest that is cognizable under Due Process clause and has shown he is entitled to a Constitutional/legal sentence. Due process clause succeeds as Salerno has demonstrated a deprivation of a Constitutionally protected liberty interest in his sentence *Doyle v. Okla.* Bar 998 F.2d 1557, 1570 (10th Cir. 1993).

CONCLUSION

For the foregoing reasons Salerno moves this court accept to Cert and rule that the District Court of Colorado has jurisdiction over all claims involving the execution of his sentence under 2241 as inter-state compact prisoners must file in receiving State's Federal Court as it has jurisdiction over the petitioner's custodian, thereby recalling case back from Arizona DC. And ruling that no circuit may transfer a 2241 HC action to another circuit that does not allow their courts to hear 2241 cases. Finally order 28 USC 2241 causes can hear both execution and validity claims, and is available to all state convictions in all circuits.

Respectfully submitted this 12th day of June 2022.


 Rex J. Salerno

Copy mailed this 12th day of June 2022 to:

Dean Williams
 David Shinn