

EXHIBIT

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TENTH CIRCUIT

MANDAMUS

FOR H.C.

DISMISSAL/TRANSFER

FILED**United States Court of Appeals
Tenth Circuit****UNITED STATES COURT OF APPEALS****FOR THE TENTH CIRCUIT****June 6, 2022****Christopher M. Wolpert
Clerk of Court**

In re: FOX JOSEPH SALERNO,

Petitioner.

No. 22-1095
(D.C. No. 1:22-CV-00124-GPG)
(D. Colo.)**ORDER**Before **HARTZ, HOLMES, and MATHESON**, Circuit Judges.

This matter is before the court on Petitioner's "Motion for En Banc Review of Mandamus." We have construed this filing as a petition for rehearing en banc.

To the extent Petitioner seeks rehearing by the panel, the petition is denied.

The petition for rehearing en banc was transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS**FOR THE TENTH CIRCUIT****May 3, 2022****Christopher M. Wolpert
Clerk of Court**

In re: FOX JOSEPH SALERNO,

Petitioner.

No. 22-1095
(D.C. No. 1:22-CV-00124-GPG)
(D. Colo.)**ORDER**

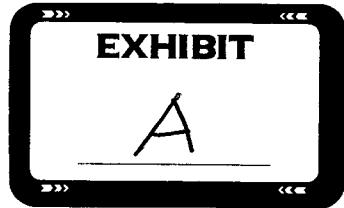
Before HARTZ, HOLMES, and MATHESON, Circuit Judges.

Fox Joseph Salerno filed a habeas application in the United States District Court for the District of Colorado. The District of Colorado concluded that the District of Arizona is the proper venue and transferred the case to that district.¹ Mr. Salerno now petitions for a writ of mandamus directing the District of Colorado to recall the case and adjudicate his habeas application “in whole or in part.” Pet. at 2.²

A “writ of mandamus is a drastic remedy.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). For that reason, “we will grant a writ only when the district court has acted wholly without

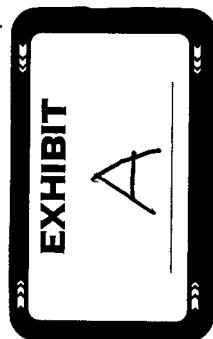
¹ We take judicial notice of the documents filed in the underlying case. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

² Mr. Salerno represents himself, so we construe his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). He has filed, in addition to his mandamus petition, a “NOTICE TO COURT OF A NEW LEGAL RULING,” and we have considered that filing.



jurisdiction or so clearly abused its discretion as to constitute usurpation of power.” *Id.* (internal quotation marks omitted). And “the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.” *Id.* at 1187 (internal quotation marks omitted).

Mr. Salerno has not shown an entitlement to a writ of mandamus under these standards, so we deny his petition. We grant his motion to proceed without prepaying costs or fees.



Entered for the Court

A handwritten signature in black ink.

CHRISTOPHER M. WOLPERT, Clerk

EXHIBIT

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DISTRICT COURT
ORDER TRANSFERRING

H.C. AND DISMISSING
ACTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-00124-GPG

FOX JOSEPH SALERNO,

Applicant,

v.

DEAN WILLIAMS, Colorado D.O.C. Executive Director, and
DAVID SHINN, Arizona D.O.C. Director,

Respondents.

ORDER TRANSFERRING CASE

Applicant Fox Joseph Salerno has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) challenging his state conviction and sentence. Applicant is serving his Maricopa County, Arizona Case Number CR 2000-017362 sentence in the Colorado Department of Corrections pursuant to the Western Interstate Corrections Compact. He claims that (1) his Arizona state sentence is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) his concurrent and consecutive sentences are being executed improperly by the Arizona Department of Corrections so that he is being held beyond his release date; (3) the Arizona state court did not have subject matter jurisdiction to try or sentence Applicant so that he is actually innocent of any criminal offense; and (4) "federal and state retroactivity prohibitions (Teague Rules) violates the Equal Protection and Due Process Clauses of the U.S. Constitution." For relief, he asks the Court to overturn his conviction and sentence and/or to be immediately released to community supervision.

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For the reasons stated below, this action will be transferred to the United States District Court for the District of Arizona.

Pursuant to 28 U.S.C. § 2241(a), a writ of habeas corpus may be granted by "the district courts and any circuit judge within their respective jurisdictions." The United States Supreme Court has interpreted this provision as requiring jurisdiction over the applicant's custodian "even if the prisoner himself is confined outside the court's territorial jurisdiction." See *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973). The Supreme Court reasoned that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95.

The proper respondent in a habeas corpus action is "the person who has custody over [the petitioner]." 28 U.S.C. § 2242; see also 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."). In most cases, there is "only one proper respondent to a given prisoner's habeas petition," and the proper respondent generally is "the warden of facility where the prisoner is being held." *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004). However, "the immediate physical custodian rule, by its terms, does not apply when a habeas petitioner challenges something other than his present physical confinement." *Id.* at 438. Instead, a habeas applicant "who challenges a form of 'custody' other than present physical confinement may name as respondent the entity or person who exercises legal control with respect to the challenged 'custody.'" *Id.* For example, the prisoner in *Braden* was serving a sentence in an Alabama prison pursuant to an Alabama conviction but he was challenging a detainer lodged against him in Kentucky state court. See *Braden*, 410



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U.S. at 486-87. The Supreme Court held in *Braden* that the Kentucky court, rather than the Alabama warden, was the proper respondent because the Alabama warden was not "the person who [held] him in what [was] alleged to be unlawful custody." *Id.* at 494-95.

The Supreme Court's conclusion was supported in part by traditional venue considerations because "[i]t is in Kentucky, where all of the material events took place, that the records and witnesses pertinent to petitioner's claim are likely to be found." *Id.* at 493-94.

In cases decided prior to *Padilla*, lower courts relying on *Braden* "have held that where a petitioner is housed in a state other than the state where he was convicted and sentenced, the 'true custodian' is the official in the state whose indictment or conviction is being challenged." *Holder v. Curley*, 749 F. Supp.2d 644, 645-46 (E.D. Mich. 2010). Furthermore, "[d]espite the broad language in *Padilla*, district courts have continued to hold that a case properly is transferred to the jurisdiction of conviction when the petitioner is housed in another state only for the convenience of and pursuant to a contractual relationship with the state wherein the conviction was rendered." *Id.* at 646.

Applicant concedes he is serving his Arizona sentence in the Colorado Department of Corrections pursuant to the Western Interstate Corrections Compact. Moreover, although he states that he is challenging the execution of his sentence, his claims challenge the validity of his Arizona conviction and sentence. Thus, the warden of the Colorado prison in which Applicant is confined (i.e., Sterling Correctional Facility) does not "exercise[] legal control with respect to the challenged 'custody.'" *Padilla*, 542 U.S. at 438. And this Court has no jurisdiction over the State of Arizona. Based on these circumstances, the State of Arizona is Applicant's "true custodian" in conjunction with

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his challenge to the legality of his conviction and sentence. See *Holder*, 749 F.Supp.2d at 647. See also *Fest v. Bartee*, 804 F.2d 559, 560 (9th Cir. 1986) (deciding habeas jurisdiction over prisoner convicted of rape in Nebraska but transferred to Nevada under Interstate Corrections Compact was in Nebraska).

In addition, 28 U.S.C. § 1391(b) sets forth the rules that govern venue in federal courts. In general, a civil action may be brought in:

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
- (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

Here, Applicant is challenging his conviction and sentence imposed by the State of Arizona. His allegations concern actions occurring in the District of Arizona and are related to his criminal case in the State of Arizona. As a result, venue is appropriate in the District of Arizona and not the District of Colorado.

"A court may *sua sponte* cure jurisdictional and venue defects by transferring a suit under the federal transfer statutes, 28 U.S.C. §§ 1406(a) and 1631, when it is in the interest of justice." *Trujillo v. Williams*, 465 F.3d 1210, 1222 (10th Cir. 2006). The Court finds that it is appropriate and in the interest of justice to transfer this habeas action to the federal district court in Arizona. Accordingly, it is

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ORDERED that the clerk of the court transfer this action to the United States District Court for the District of Arizona.

DATED March 24, 2022, at Denver, Colorado.

BY THE COURT:

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s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

**Additional material
from this filing is
available in the
Clerk's Office.**