

22-5052

NO: \_\_\_\_\_

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

UNITED STATES SUPREME COURT

ORIGINAL

**Fox Joseph Salerno,**

Petitioner,

**Vs.**

**State of Arizona,**

Respondent(s).

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ON PETITION FOR A WRIT OF CERTIORARI TO

**Arizona Court of Appeals**

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

## QUESTION(S) PRESENTED

### I.

Should the U.S. Constitutional Fifth Amend requiring indictments be applied to the States, thereby overturning precedence from 1884; *Hurtado v. California*, 110 U.S. 516 (1884)?

### II.

Must Aggravating factors be presented to a State grand jury and be in the State indictment in order to have Subject Matter Jurisdiction (SMJ) over aggravating factors used to enhance a State sentence?

### III.

If the Trial Court does not have Subject Matter Jurisdiction (SMJ) over a defendant or case and they are convicted by a jury, does this make him actually or factually innocent of the crime, thereby allowing lower courts to disregard time and other procedural violations in challenging his conviction?

### IV.

Does Lack of Notice to an indigent, Pro Se criminal defendant, of the Court's time frames and other procedural requirements by any Court or Federal, State or local government official, and in so doing causing a procedural default due to defendant not knowing of time/procedural requirements, violate 14<sup>th</sup> Amendment Due Process, equal protection (poor vs. rich people with lawyers) and/or access to the courts, or any other Constitutional violation?

### V.

Can a State or any Court prohibit the requirements for sentencing under *Apprendi* because of time or procedural requirements/violations (other than retroactivity); in other words, if a defendant squarely falls under *Apprendi* but the court sentences the defendant outside of what *Apprendi* requires and the defendant never objects or becomes aware of it until years later, can a court default the request for resentencing under the Constitutional requirements of *Apprendi*, thereby requiring the Defendant to completely serve this knowingly unconstitutional sentence?

### **LIST OF PARTIES**

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

#### **Petitioner –**

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

IN Pro Per

#### **Respondents -**

- State of Arizona.

#### **Attorney for Respondents:**

- Arizona Attorney General  
1275 W. Jefferson  
Phoenix, AZ 85007

### **RELATED CASES**

Cert recently filed, number unknown:

In re: Fox Joseph Salerno, (10<sup>th</sup> Circuit APPEAL).

Ninth Circuit Court of Appeals No. 22-15812 (Pending).  
U.S. District Court of Arizona 2:22-cv-00558-ROS-DMF (Summarily dismissed,  
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- ▷ *Alleyne v. U.S.*, 570 U.S. 99 (2013).
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- ▷ *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).
- ▷ *Bailey v. U.S.*, 516 U.S. 137 (1995).
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- ▷ *Chaparro v. Shinn*, 459 P.3d 50, 51, 248 Ariz. 138, 139 (S.Ct. 2000).
- ▷ *Crane v. Kentucky*, 476 U.S. 683 (1986).
- ▷ *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).
- ▷ *Haines v. Kerner*, 404 U.S. 519 (1972).
- ▷ *Hurtado v. California*, 110 U.S. 516 (1884).
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- ▷ *Jackson v. Schneider*, 207 Ariz. 325 (P10) (App. 2004).
- ▷ *Madison v. Alabama*, 139 S.Ct. 718 (2019).
- ▷ *People v. Swink*, 150 Cal. App.3d 1076 (1984).
- ▷ *State v. Murray*, 451 P.3d 9-803 [HN4] (Div. 2 -2019).
- ▷ *State v. Resendis-Fekiz*, 209 Ariz. 292 (Div. 2 – 2004).
- ▷ *State v. Brown*, 209 Ariz. 200 (S.Ct 2004).
- ▷ *State v. Chacon*, 221 Ariz. 523 (App 2009).

- ## STATUTES AND RULES
- ### OTHER

- OPINIONS BELOW**

State Courts: Reported at: State v. Salerno, 2022 Ariz. App. Unpub. LEXIS 49  
January 20, 2022, Filed.  
Reported at: State v. Salerno, 2020 Ariz. App. Unpub. LEXIS  
1419 December 31, 2020, Filed

## JURISDICTION

[X] For cases from state courts:

Highest State Court decision on: \_\_\_May 9, 2022 (AZ Supreme Court).

Direct Collateral Review under *28 USC 1257(a)*.

[X] The U.S. Supreme Court also has original jurisdiction, not requiring exhaustion and over-coming any perceived procedural violations or lower Court violations resulting in no decision on merits..

Although Salerno has exhausted all remedies and meets the time requirements, he begs this Court to disregard the total exhaustion Rule created by this Court in *Rose v. Lundy, 544 U.S. 509 (1982)* and time limits which this Court created by Court Rules, as they are unconstitutional roadblocks which violate the separations of powers. It is the Executive & Legislative branches responsibility to create laws and time periods affecting those laws like statute of limitations, retroactivity, and time periods to file or what needs to be exhausted.

### **USCS Const. Art. III, § 2, Cl 2**

#### **Cl 2. Jurisdiction of Supreme Court.**

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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, Cl 1, Part 1 of 3**

#### **Cl 1. Subjects of jurisdiction.**

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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**

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(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

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- (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**

- *5<sup>TH</sup>, & 14<sup>TH</sup> Amendments*
- *14<sup>th</sup> Amendment requiring notice*
- *28 USC 2254*
- *Jurisdiction Vs. Subject Matter Jurisdiction*

### **STATEMENT OF THE CASE**

Salerno was convicted in State Court of theft a class 3 felony, a lesser included class of felony, after a jury trial in 2001 and sentenced to the aggravated maximum term of 20 years. Each section has relevant facts listed.

### **REASONS WHY THIS PETITION SHOULD BE GRANT**

- 1) Salerno is asking this Court to overturn a precedence case from 1884 which was wrongly decided and affects every State and every citizen in this nation; *Hurtado v. California*, 110 U.S. 516 (1884). Thereby ruling that the right to indictment applies to the States, which would add more protections to citizens against an over reaching and more polarized State criminal justice system.
- 2) As the federal courts recently determined that the Constitution requires aggravating factors be alleged in indictment for Federal criminal defendants in order for them to receive a fair trial, it should also be required for State criminal Defendants so they too can be entitled to a fair trial? How can one American Court system require something to be Constitutional but not require it for another American Court system, even

though both are under the same Constitution? The federal courts have ruled this to be the Constitutional norm for federal prisoners but it has not yet been extended to State prisoners, which it must. And now if juries must prove these aggravators beyond reasonable doubt, it is reasonable that the next step would be notice to State defendants and require State GJ's to indict them on it.

- 3) To expand *Arbaugh v. Y & H Corp*, 546 U.S. 500 (2006) as 33 States allow trial courts to amend indictments and 17 plus federal government do not. *Arbaugh* gives jurisdiction to Courts only if congress (Legislative/Executive branches) clearly says so. It would be the same for the States for amendments to indictments. Courts (Judicial) do not have jurisdiction over issues not charged in indictments, and Amendments by the Courts themselves to give them jurisdiction is not adequate.
- 4) There is no uniformity in either the State or Federal Courts as to the definitions of jurisdiction & Subject Matter jurisdiction (SMJ). They are used interchangeably and applied differently by different jurisdictions, including this Court. A clear definition of each needs to be established to clarify case law decisions.

There is also no uniformity among the Courts as to what gives a trial court jurisdiction over a criminal defendant and/or his criminal charges. Some courts say once charges are filed by indictment on an individual, they have complete jurisdiction over that person and all and any new charges which may be added or altered by the Judge or prosecutor. While other courts have determined that trial courts only have jurisdiction over the charges and defendants that are given to them by grand jury, meaning if the grand jury indicts on felony for "theft of currency", trial court does not have SMJ over "theft of property", i.e., property other than currency, unless GJ changes indictment. So courts altering the indictment voids a Court's jurisdiction/SMJ. *Expand on states v. cotton, 535 U.S. 625 (2002), does court have jurisdiction over crime/offense also?*

- 5) When Courts creates barriers (time & procedural requirements) for unrepresented criminal defendants, which take away a Constitutional right such as right to file a federal Habeas Corpus, must the Courts or Federal, State or local prosecuting authorities give notice of these time & procedural barriers in open forum or some other specific way, as they do with the right to appeal, in order for due process rights and equal protections (defendants with attorneys) to be preserved and met? This court should expand and clarify that the Court's and/or government entities in criminal cases must give notice for all avenues of relief from conviction & sentence, if they choose to put time frames or other procedural requirements for such relief.



- 6) To expand *Haines v. Kerner*, 404 U.S. 519 (1972) as it requires Pro Se filings to be held to a "...less stringent standard..." this should be expanded to time and procedural violations that pro se litigants were not given direct notice of.
- 7) To expand *Crane v. Kentucky*, 476 U.S. 683 (1986) which concluded that "Due Process requires that a defendant receive a fundamentally fair trial, including a meaningful opportunity to present a complete defense". A meaningful opportunity to be heard on appeal should also be a due process requirement, and if a defendant is unaware of time/procedural issues and their filing is dismissed on technicalities, they have no chance let alone a meaningful opportunity, to be heard and present a defense on substance of issues (Rule of lenity).
- 8) How is it fair for the thousands of imprisoned defendants who fall under *Apprendi* or some other new case law but who had IAC or who simply did not know of this decision or that they were eligible for it, to have to continue to serve a lengthy, knowingly unconstitutional sentence? How does America benefit or show its exceptionality when our courts require, based on technicalities, citizens to be imprisoned unconstitutionally? As long as this court allows this in America, Americans have no right to judge or criticize the way Russia is imprisoning Americans or Russian dissidents; the result is the same, even though motivation is different as American courts do it to create 'finality', while Russian courts do it for vengeful reasons – nevertheless, human are being wrongly imprisoned.
- 9) This is the last resort under *DCR* as *AEDPA* forbids this Court from granting relief and Salerno does not have an unobstructed procedure any other way *Madison v. Alabama*, 139 S.Ct. 718 (2019),
- 10) The savings clause created by this court in the 1990's for federal prisoners in Federal H.C. cases, should be expanded and apply to State prisoners *Bailey v. U.S.*, 516 U.S. 137 (1995).
- 11) To expand *Alleyne v. U.S.*, 570 U.S. 99 (2013) and make it retroactive as anyone not found guilty of enhancements by a jury is actually innocent of those enhancements, thereby making this a Substantive Rule that must be applied retroactively (*Schriro v. Summerlin*, 542 U.S. 348 (2004)) and this Court must say so in order for lower Courts to accept and stop dismissing on procedure.

## FACTS MATERIAL TO A CONSIDERATION OF ISSUES PRESENTED:

### ARGUMENTS

#### I.

*U.S. Constitutional Fifth Amend* requiring indictment, must apply to the States, thereby overturning 125 years of precedence; *Hurtado v. California*, 110 U.S. 516 (1884)?

#### **Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Salerno argues that States, and not just the Federal government, are required to follow the *U.S. Constitutional Amendment 5*, which requires all charges of defendants by indictment, thereby making Arizona's *Rule 13.5(b)*, allowing amendments to indictments by prosecutors & judges, to be unconstitutional.

This Court has stated that Stare decisis is not an "inexorable command" and that it can give way to countervailing considerations.

On November 13, 2000 an indictment was issued (Doc #1). On May 10, 2001 (R.T. 13-17) Judge Michael D. Jones, out of the blue, informed/advised prosecutor in open court that Salerno was only charged by Grand Jury (GJ) with theft of "currency". Later on that day the state filed a motion to amend indictment (Doc #60) to include the theft of "money and or property". On May 14, 2001 after opening statements the court over Salerno's attorney's objection, granted motion (M.E. 5/14/01).

Adding theft of "property" along with theft of "currency", is a broadening of the charges, which violates both federal constitution by way of *5th & 14th Amendments*, and state constitutions (*Ariz. Const. Art. 2, Sec. 30*). And considering

that the State never even alleged theft of “currency” during the trial as they merely alleged property items valued at approximately \$15,000, it can only be that Salerno was convicted of the unindicted theft of property as jury determined value of property theft to be \$3,000 - \$3,500 (lesser included offense).

As a result Salerno is actually innocent of the only offense he was indicted on. The trial court did not have subject matter jurisdiction to hear or sentence Salerno for theft of property. The indictment had been amended and broadened without resubmission to grand jury. *Amendment 5* guarantees right to grand jury indictment *U.S. v. Apodaca*, 843 F.2d 421 (10<sup>th</sup> Cir 1988); *U.S. v. Miller*, 471 U.S. 130 (1985). In *Stirone* he was indicted on transportation of “sand” but convicted on transportation of “cement” – this is the same nuance as “currency” versus “property”.

138 Years ago the U.S. Supreme Court in *Hurtado v. California*, 110 U.S. 516 (1884) ruled that Due Process by way of 14<sup>th</sup> Amendment was not violated by a 5<sup>th</sup> Amendment violation of not being indicted in State courts. They believed the indictment requirement of the 5<sup>th</sup> Amendment did not apply to the States. Salerno argues it was wrongly decided. As a consequence, since federal courts have determined no amendments to indictments, state courts must be duty-bound to come to the same conclusion. It is also a violation of separation of powers for prosecutors & trial Courts to alter indictment when the Constitutional responsibility is solely on the grand jury.

Justice Harlan’s stated dissent [\*542] in *Hurtado*:

“5<sup>th</sup> Amendment applies to states individually and by way of 14<sup>th</sup> Amendment and states cannot make up any old process and claim

due process. U.S. Constitutional *5<sup>th</sup> Amendment* was meant to apply to states before *14<sup>th</sup> Amendment*."

The U.S Supreme Court has recently altered their previous case laws dealing with State courts and what they can and cannot do per U.S. Constitution as interpreted now, after over 200 years of doing things differently:

- 1) Now requires unanimous jury verdicts.
- 2) Jury's must determine aggravating factors and do so by beyond reasonable doubt standard.
- 3) Gave the right to affective counsel during plea negotiations.
- 4) Numerous other, more moderate changes.

*Hurtado* decision has already been declared, in part, unconstitutional and wrongly decided, as later courts over ruled the *Hurtado* decision that State criminal trials need not be by jury. *Hurtado* seems to even predict its demise:

[HN2} "...it (*Constitution*) was made for an undefined and expanding future..."

So why are we now following an outdated case law that talks about *Magna Carta*, English Lords and the cutting off of body parts?

Violations of the *5<sup>th</sup> Amendment*, which applies directly to the States and also by way of the *14<sup>th</sup> Amendment* due process, is at least a structural error and egregiously wrong to be tried and convicted on unindicted offenses; and/or for the trial court to amend indictment and alter the theft item which the GJ had already determined they should be, cannot stand.

In *Stirone v. U.S.*, 361 U.S. 212 (1960) the court stated:

[Led HN 8, 13] it is a "...substantial right to be tried only on charges presented in an indictment returned by GJ."

[Led HN 9] "The purpose of the requirement of the *5<sup>th</sup> Amendment* that a man be indicted by a GJ is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge; this purpose is defeated by a devise or method which subjects the defendant to prosecution for an act which the GJ did not charge."

This "substantial right" and to be independent of prosecutors & judges cannot be allowed for federal defendants only.

Finally, how is it that the *5<sup>th</sup> Amend* has four requirements; and only GJ requirement is not applicable to states?

- (1) No person held except by GJ indictment.
- (2) Double jeopardy.
- (3) Not testify against himself.
- (4) Not deprived of life, liberty, or property without due process of law.

And as the *5<sup>th</sup> Amendment* applies, violating indictment requirement, violates SMJ, thus cannot be time barred.

## II.

**Aggravating factors must be presented to a State grand jury and be in the State indictment in order to have Subject Matter Jurisdiction (SMJ) over aggravating factors used to enhance a State sentence.**

Salerno was not indicted or given notice of aggravating factors. The judge determined aggravating factors by preponderance of the doubt and enhanced sentence from presumptive 11.25 yrs. to 20 years. Salerno's sentence came out after *Apprendi* but as no one apparently knew of it and by time Salerno challenged the Court's unconstitutional enhancement, it was too late and time barred. Consequently he is serving an unconstitutional sentence because of procedural requirements and the court's belief that finality is more important than constitutionality.

The federal courts have ruled this to be the Constitutional norm for federal

prisoners but it has not yet been extended to State prisoners, which it must. And now if juries must prove these aggravators beyond reasonable doubt, it is reasonable that the next step would be notice to defendants and require GJ indict them on it.

If aggravating factors are not charged in the State indictment and notice was not given to the defendant prior to trial as to aggravating factors, the Court cannot have subject matter jurisdiction over aggravating factors in which it used to render the sentence it did. Consequently, this issue cannot be waived and can be raised on collateral appeal without being time barred as it amounts to actual innocence. *State v. Chacon*, 221 Ariz. 523 (App 2009); *State v. Marks*, 186 Ariz. 139 (App 1996\_); *State v. Payne*, 223 Ariz. 555 (Div. 2 – 2009); *State v. Flores*, 218 Ariz. 407 (Div. 1 – 2008); *U.S. v. Cotton*, 535 U.S. 625, 630 (2002).

*Jones v. U.S.* 227, 243 n.6 (1999).

“Any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in indictment, submitted to jury and proved beyond a reasonable doubt” Time bars waived if manifestly unjust *Black v. D.A. of Philadelphia*, 246 Fed Appx. 795 (3<sup>rd</sup> Cir. 2007).

### III.

**The State Court did not have Subject Matter Jurisdiction (SMJ) to try or sentence Salerno, consequently, Salerno is actually innocent of any criminal offense and sentence.**

As Salerno was only indicted on theft of Currency but the Jury convicted him on theft of property other than currency, Salerno is actually innocent of what he was indicted on, and was deprived of Due Process notice of charges against him.

*Alleyne v. U.S.*, 570 U.S. 99 (2013) is a substantive Rule that must be applied

retroactively to those who are actually innocent of the crime or innocent of enhancements *Schriro v. Summerlin*, 542 U.S. 348 (2004).

Adding theft of “property” along with theft of “currency”, is a broadening of the charges, which violates both federal constitution by way of 5<sup>th</sup>, & 14<sup>th</sup> Amendment, and state constitution (*Ariz. Const. Art. 2, Sec. 30*).

The current State case law wrongly & incorrectly interpreted “SMJ” and “Jurisdiction” as one meaning the same thing.

The court had jurisdiction over Salerno only for the crime of “theft of currency” as given to it by grand jury (GJ), as it was a felony. They do not have jurisdiction over Salerno for other felony criminal offenses which he was not indicted on. Jurisdiction is not just a defendant and a felony *State v. Fimbres*, 2021 Ariz. App. Unpub. LEXIS 870, \*1, 2021 WL 3855696 (Ariz. Ct. App. August 30, 2021).

*IN EX PARTE BAIN*, 121 U.S. 1 (1887), (partially reversed) contended that: “...the amendment to the indictment that he was prosecuted under was fatal to the trial court’s jurisdiction to entertain this cause.”

The *Bain* trial court struck out some words in the indictment just like Salerno’s trial court which struck out “currency” and replaced it with “property and/or money”. Thus the jurisdiction of trial court was gone. The U.S. Supreme Court ruled lower court did not have jurisdiction to hear case.

[HN6] “...there can be no amendment of an indictment.”

“The declaration of *Article 5* of amendment to the Constitution... Is jurisdictional...” [Syllabus].

As both federal & state constitutions are identical, as a result even if 5<sup>th</sup> Amendment not applicable to the states, the 14<sup>th</sup> Amendment Due Process does.

The AZ Supreme Court in *State v. Smith*, 66 Ariz. 376, 379 (S.Ct. 1948) determined:

“...the sufficiency of an indictment is an issue of SMJ.”

In *State v. Murray*, 451 P.3d 9-803 [HN4] (Div. 2 -2019); *State v. Freeney*, 220 Ariz. 435 [HN4] (Div. 1 – 2008); *State v. Flores*, 245 Ariz. 303 [HN6] (Div. 1 – 2018), all these courts concluded that “An indictment limits the trial to the specific charges stated in the indictment”.

In *U.S. v. Juvenile Male*, 595 F.3d 885 (9<sup>th</sup> Cir 2010) the court concluded just because court had “general SMJ” over juveniles or classes of acts, did not give them SMJ to all “specific acts”. There is a limit to jurisdiction of superior courts which is not defined in Arizona law and which is contradicted when allowing indictments to be amended.

In *State v. Espinoza*, 229 Ariz. 421 (Div. 2 – 2012), they determined: [HN4]

“An order or judgment is void if the issuing court lacked SMJ” [HN9] “Just because superior court has jurisdiction over felonies, does not give it jurisdiction over everything.”

Finally, as Salerno was convicted of a crime on an unindicted offense, and no lawful waiver was made, this makes him actually innocent, hence any procedural or time bars which may be brought up or has been brought up by the State or lower federal court (28 USC 2254) cannot be used to exclude this writ.



#### IV.

**Lack of Notice to a criminal defendant of a Court's time frames and other procedural requirements by any Federal, State or local government official, in so doing causing a procedural default due to defendant not given notice of it, violate Due Process.**

Lack of Notice allowing a procedural default violates Due Process as the Supreme Court reaffirmed in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), the main ingredient of due process is the opportunity to be heard. If a defendant is not aware of time periods or procedural requirements due to being a lay person without counsel's assistance, and the Court's dismiss actions for these reasons, it is a denial of *Due Process 14<sup>th</sup> Amendment*, a fundamental requirement..

Salerno, an indigent State prisoner, has limited resources to obtain information, due to being incarcerated by the State and the State not having to provide sufficient access/material because the judicial branch of government does not require it (*Casey v. Lewis*), nor are the State's required to give notice of time frames or other avenues of appeal other than the very first appeal after sentencing, lack of notice and information to file and challenge violated his fundamental rights/requirements of the due process clause of both Arizona & U.S. Constitutions, when a person faces a deprivation of a liberty interest.

Simply allowing a challenge to a State or Federal action does not afford an individual a fair opportunity to be heard if there is no requirement that he or she be given notice of the right to make challenge *In re Harris*, 446 P.2d 148 (Cal. 1968). As Salerno had no notice of violations or ways and time notices to correct, he was denied

due process without notice.

Notice must be reasonably calculated to apprise interested parties of pendency's of actions (new case law, new statutes, retroactive case laws, etc.), and afford them an opportunity to present their objections. The notice must afford a reasonable time for these interested to make their appearance *People v. Swink*, 150 Cal. App.3d 1076 (1984). Salerno had no notice of new court decisions (*Apprendi*), time frames, or procedural requirements.

Time bars waived if manifestly unjust *Black v. D.A. of Philadelphia*, 246 Fed Appx. 795 (3<sup>rd</sup> Cir. 2007). This brings us to Salerno having to serve his unconstitutional sentence as he was never given notice of *Apprendi* prior to his mandate being issued and his first federal HC filing under 28 USC 2254.

a) UNCONSTITUTIONAL SENTENCE

Salerno was sentenced in 2001 in Maricopa County CR 2000-017362 to an aggravating term of 20 years imprisonment for theft, a class 3 felony, after a jury trial. This was an illegal sentence based upon *Apprendi v New Jersey* (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348, and a fundamental miscarriage of justice.

The minimum mandatory term was 11.25 years with two priors, it was enhanced by the Court who determined aggravating factors by preponderance standard, and not the jury by beyond a reasonable doubt standard as was/is required by *Apprendi - State v. Moody*, 208 Ariz. 424 (S.Ct. 2004); which was law

at time of Salerno's trial & sentencing, and Salerno was not given notice of these aggravating factors nor admitted to any of them. Salerno's appointed Trial, Appellate, & PCR of right counsel failed to file on this issue as it was new and they were IAC, not to mention trial counsel not objecting to sentence.

*Chaparro v. Shinn*, 459 P.3d 50, 51, 248 Ariz. 138, 139 (S.Ct. 2000), allows an appeal for an illegal sentence but with time limits, so as counsel never filed it amounts to IAC, a structural & fundamental error & as Salerno was never personally informed of these time periods or new case law, it violated 14<sup>th</sup> Amendment.

Salerno did file a Pro Se PCR on *Apprendi*, but it was precluded as time barred, even though he was not aware of this issue.

NOTE: Salerno has a consecutive 15.75 year sentence to serve in CR 2001-006753.

b) Violation of *Apprendi v. New Jersey*, 530 U.S. 466 (U.S. June 26, 2000):

Salerno falls under *Apprendi* ruling and no one denies this. Therefore he has received an uncontested unconstitutional sentence. It is a violation of Due process and a structural error to sentence a person in excess of that which the law allows, *Sullivan v. Louisiana*, 508275 (1993); *State v. Resendis-Fekiz*, 209 Ariz. 292 (Div. 2 – 2004).

As Salerno's maximum sentence was 11.25 yrs. at time of sentencing, and he has served 18 years thus far on this conviction, he is being held passed his sentence and therefore is entitled to immediate release from prison on this cause.

This follows ruling in *Jackson v. Schneider*, 207 Ariz. 325 (P10) (App. 2004) which stated that when trial court exceeds sentencing authority, sentence void as to excess. Thus, any sentence over 11.25 years is void, which includes both imprisonment & CS portions of sentence.

*Apprendi* was the law of the land at time of Salerno's offense date & sentencing, nevertheless it was not followed. This is not a point in dispute. What is in dispute is whether the State and Federal Courts can use procedural and technical grounds to allow this unconstitutional and illegal sentence to stand or is it a structural error that cannot be waived for failure to timely argue or by IAC?

*State v. Brown*, 209 Ariz. 200 (S.Ct 2004); *State v. Martinez*, 210 Ariz. 578 (S. Ct 2005); *State v. Schriro*, 465 Ariz. F.3d 397 (9<sup>th</sup> Cir. 2006):

"The maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence established by ARS 13-701.C.1".

Salerno's presumptive term was 11.25 years with two priors, and no aggravating factors were presented to the trial jury, the grand jury, admitted by Salerno, nor notice given in indictment. Therefore Salerno's sentence must be vacated and he be resentenced to the presumptive term allowed by law & Constitution. His 20 year sentence is unconstitutional and it serves no legitimate purpose to keep a non-violent offender imprisoned for an extra 8.75 years because of procedural or technical errors caused by IAC, lack of notice by State, and his limited financial means.

## CONCLUSION

For the foregoing reasons Salerno prays this Court accept Cert for any and all, appoint counsel, and grant any relief the court deems appropriate.

Respectfully submitted this 21<sup>st</sup> day of June 2022.

  
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Fox J. Salerno

Copy mailed this 21<sup>st</sup> day of June 2022 to:

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