

EXHIBIT

A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

SEP 29 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOX JOSEPH SALERNO,

No. 22-15812

Petitioner-Appellant,

D.C. No. 2:22-cv-00558-ROS-DMF

v.

District of Arizona,  
Phoenix

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

ORDER

Respondents-Appellees.

Before: CLIFTON and VANDYKE, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

*Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

**DENIED.**

SALERNO Never asked for certificate of appealability.  
This court just decided this so as to prohibit a cert  
petition to save their unconstitutional case law of  
White v. Lambert, 370 F.3d 1002, 1009-10 (9<sup>th</sup> Cir. 2004), prohibiting  
state prisoners from access to 28 USC 2241.

EXHIBIT

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

MAY 25 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

In re: FOX JOSEPH SALERNO.

No. 22-70083

FOX JOSEPH SALERNO,

D.C. No. 2:22-cv-00558-ROS-DMF  
District of Arizona,  
Phoenix

Petitioner,

ORDER

v.

UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ARIZONA, PHOENIX,

Respondent,

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

Real Parties in Interest.

Before: BYBEE, HURWITZ, and R. NELSON, Circuit Judges.

The petition for a writ of mandamus manifests an intent to appeal from the district court's judgment entered on April 11, 2022, in district court case No. 2:22-cv-00558-ROS-DMF. Accordingly, the petition is construed as a notice of appeal. *See In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189, 1193-94 (9th Cir. 1990) (stating that document not formally denominated notice of appeal may be treated as one if it clearly evinces the intent to appeal).

The Clerk shall transfer the petition the clerk of the district court for docketing as a notice of appeal. The notice of appeal shall be deemed filed in the district court on May 3, 2022. *See* Fed. R. App. P. 4(d).

Upon transmittal of the petition to the district court, the Clerk shall close this original action.

Petitioner's motion to proceed in forma pauperis (Docket Entry No. 2) is denied as moot.

EXHIBIT

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Fox Joseph Salerno,  
Petitioner,  
v.  
Dean Williams, et al.,  
Respondents.

No. CV 22-00558-PHX-ROS (DMF)

**ORDER**

On January 18, 2022, Petitioner Fox Joseph Salerno, who is confined in the Sterling Correctional Facility in Sterling, Colorado, filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Colorado and paid the filing fee. In a March 24, 2022 Order, the District of Colorado transferred the action to this Court. Petitioner challenges his conviction and sentence in Maricopa County Superior Court, case #CR 2000-017362. Because 28 U.S.C. § **2254** is “the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment,” *White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004), the Court will construe the Petition as filed pursuant to 28 U.S.C. § 2254.

This is Petitioner’s **second** petition for a writ of habeas corpus challenging his conviction and sentence in Maricopa County Superior Court, case #CR 2000-017362, for felony theft. On April 29, 2005, Petitioner filed his first petition for a writ of habeas corpus regarding that conviction, *Salerno v. Schriro*, CV 05-01277-PHX-ROS (LOA). In a March

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30, 2007 Order (Doc. 64 in CV 05-01277), the Court denied the petition, and the Clerk of Court entered Judgment accordingly (Doc. 65 in CV 05-01277).

Under 28 U.S.C. § 2244, a petitioner may not file a second or successive § 2254 petition in the district court unless the petitioner has obtained a certification from the Ninth Circuit Court of Appeals authorizing the district court to consider the second or subsequent § 2254 petition. A habeas petition is “‘second or successive’ if it raises claims that were or could have been adjudicated on their merits in an earlier petition.” *Cooper v. Calderon*, 274 F.3d 1270, 1273 (9th Cir. 2001) (per curiam). The current petition, therefore, is a second or successive petition.

Petitioner has not presented a certification from the Ninth Circuit authorizing the Court to consider a second or subsequent § 2254 petition. Accordingly, the current Petition and this action must be dismissed as a successive petition. The Court, however, will dismiss the case without prejudice so that Petitioner can seek certification from the Ninth Circuit to file a second or successive § 2254 petition.

**IT IS ORDERED:**

(1) Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1) and this action are **dismissed without prejudice**, and the Clerk of Court must **enter judgment** accordingly.

(2) The Clerk of Court must provide Petitioner with a copy of the form recommended by the Ninth Circuit Court of Appeals for filing an Application for Leave to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

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1 (3) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the  
2 event Petitioner files an appeal, the Court declines to issue a certificate of appealability  
3 because reasonable jurists would not find the Court's procedural ruling debatable. *See*  
4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

5 Dated this 11th day of April, 2022.

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9 Honorable Roslyn O. Silver  
10 Senior United States District Judge  
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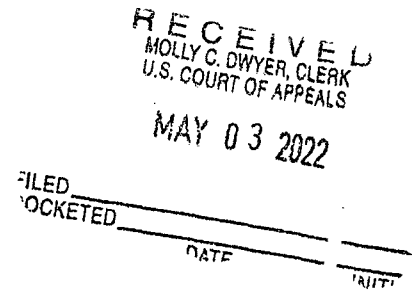
EXHIBIT

D

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

IN Pro Se

**U.S. COURT OF APPEALS  
FOR THE NINTH CIRCUIT**



**Fox Joseph Salerno,**  
**Petitioner,**

**Vs.**

**Roslyn O. Silver, District Court Judge**  
**Respondent.**

)  
) NO: 22-70083  
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) **MANDAMUS**  
) (CV 22-00558-PHX-ROS (DMF))  
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Petitioner Salerno hereby files this mandamus requesting this court to  
intervene and:

- 1) Order that the Arizona District Court (AZ DC) transfer Salerno's 28 USC 2241 HC back to the Colorado DC (CO DC).
- 2) Reverse the AZ DC's order reverting Salerno's 28 USC 2241 habeas corpus (HC) to a 28 USC 2254 HC. (Document 10, order dated April 11<sup>th</sup> and Salerno received on April 21<sup>st</sup>).

Salerno filed a HC (28 USC 2241) with the Colorado District Court (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 inter-state compact act. On March 24, 2022 the CO. DC, over Salerno's objection, ordered his 28 USC 2241 HC be transferred to the Arizona District Court (DC) determining it lacked jurisdiction.

Salerno believes the transfer order to be unconstitutional and requests that this court order case be returned to CO DC as AZ DC does not have jurisdiction.

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 HC petition under 28 USC 2241. The CO DC cites several cases but none are on point. Most are federal prisoners and federal law dictates the different federal courts. 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 (9<sup>th</sup> 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).

Those District Court case laws cited in CO DC's order are muddled. Additionally no case law higher than a DC, or any case law in the 9<sup>th</sup> or 10<sup>th</sup> Circuits, are 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).

Whenever there is joint jurisdiction, an applicant, petitioner, or plaintiff in civil case can file where they choose, and if court has jurisdiction, they cannot pass off to another jurisdiction without motion from a party and good cause if objection is made, and Salerno objects to any transfer.

*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

##### **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.

If Salerno would escape from CDOC would or could he be charged in CO for escape if CO was not his custodian? If the answer is yes then no more need be said.

CDOC has the authority to order Salerno released from its custody, and not back in the custody of ADOC. They can also just order release and then if a detainer or warrant from AZ pops up, released back to them so they can pick him up. Salerno could then file another HC in AZ DC and that court would be bound by res judicata & collateral estoppel. If CO DC orders release, then Respondents appeal, and with the 10<sup>th</sup> Circuit agreeing with release which would then be a federal appellate court decision that an Arizona District court could not disregard, which is a benefit for Salerno to file in CO DC jurisdiction. (Note: in all actuality even though CDOC is Respondent, Arizona's Attorney General will be their attorney of record.

It is also argued that 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. Inter-state compact does not require sentence be carried out under the laws of the sending state, and it does not prohibit interpretation by receiving state. It requires that prisoners abide by and fall under all policies and laws of the receiving State. CDOC's policy & 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.

*Braden*, as CO DC cites 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.

The exception to immediate custody rule allows Salerno to name Directors instead of wardens and only CDOC Exec. Director exercises legal control with regard to challenged custody *Padilla at 2720 citing Braden*.

*Holder v Curley*, is a non-opinion case for a district court in Michigan and there is no precedence or requirement that this court follow it, and no party appealed that order so 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 10<sup>th</sup> 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, and 9<sup>th</sup> Circuit (Arizona) also made this same 2007 ruling all the way back in 1984 which *Padilla* never over-turned and in which 11 other courts have cited positively since *Padilla* came out. Besides, *Padilla* supports the filing in CO as they use the term "immediate custodian" and determined the first court lacked jurisdiction as the commander of the military base was resident of another district, 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. ADOC director determined placement of Salerno out of State knowing he was giving up custodianship to CDOC Executive Director.

There is no contractual relationship that requires HC be filed in AZ as court says, nor is convenience a legal authority or remedy when not sought by a named party. And as Arizona will E-File documents no matter which court case is in, and any hearing can be held by video conferencing, which is now more readily available thanks to Covid, as a result convenience and expense is not a factor,



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 (who holds the body - which is CDOC Director). Now ADOC Director can request CDOC Director to release Salerno, but so can the AZ sentencing court, AZ Appellate Judges and this Court or any court in CO. Of course, the Courts in CO 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 <sup>Co.</sup> ~~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. § 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 12455, \*1 (9th Cir. Wash. August 17, 1984).*

Furthermore, returning case to Arizona would deny Salerno his Constitutional right to a HC as the 9<sup>th</sup> Cir. Case laws only allow their courts to issue writs within their jurisdiction, which Salerno is not *Oliphant v. Schlie*, 544 F.2d 1007(9<sup>th</sup> Cir 1976) rev'd 435 U.S. 191 (1978).

Also, the 9<sup>th</sup> Cir. Doesn't recognize 28 USC 2241, only 28 USC 2254 *White v. Lambert*, 370 F.3d 1002 (9<sup>th</sup> Cir. 2004); cert denied; over-ruled in part, *Hayward v. Marshall*, 603 F.3d 546 (9<sup>th</sup> Cir. 2010). If both CO & AZ decline jurisdiction, it is a denial of HC access.

On April 11<sup>th</sup> the AZ DC did just this and reverted Salerno's 2241 to 2254, and promptly dismissed as Salerno filed a 2254 in 2005. Salerno argues that the *White* decision was wrongly decided and that this court should reconsider it so it matches up with the majority of other Circuit Courts that allow 2241 HC's for State prisoners challenging the execution of their sentence, and that the transferring of a 2241 HC case to a circuit in which does not have legal authority to hear 2241 cases, is unlawful and violates Due Process and the HC clause in the U.S. Constitution. NOTE: allowing 2241 filing would not require permission from a Circuit court as does 2254 filing.

### **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.

*White v. Lambert, 370 F.3d 1002 (9<sup>th</sup> Cir – 2004).*

<b><u>HN2</u></b>	<b>Habeas</b>	<b>Corpus,</b>	<b>Jurisdiction</b>
<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. As a result, Respondents should have acted on that authority to follow the law/Constitution and released Salerno.

Arizona criminal courts also have this duty and can act, consequently it is dual jurisdictional, for either the courts or prison/jail officials to correct an unlawful 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, 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 perceived procedural bars. 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, (11<sup>th</sup> Cir. - 2010), remanded 610 F.3d 716.

As a result, Salerno's max sentence was 11.25 years and he is now on his 18<sup>th</sup> year, it is about the execution of his sentence as the law required, and neither ADOC nor CDOC can knowingly or unknowingly 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, not for court to summarily dismiss.

*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 (10<sup>th</sup> Cir. 1993).

### **CONCLUSION**

For the foregoing reasons Salerno moves this court to rule that the District Court of Colorado has jurisdiction over all claims involving the execution of his sentence and return case to that Court, and if that is not done, at least order the AZ DC to hear the case as a 28 USC 2241 HC which does not require this Circuits approval under a second or successive HC requirement.

Respectfully submitted this 25<sup>th</sup> day of April 2022.

  
Fox J. Salerno

Copy mailed this 25<sup>th</sup> day of April 2022 to:

➤ Judge Roslyn O. Silver

EXHIBIT

E



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.

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ORDER TRANSFERRING CASE

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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.



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. 30<sup>th</sup> 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



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



his challenge to the legality of his conviction and sentence. See *Holder*, 749 F.Supp.2d at 647. See also *Fest v. Barte*, 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

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:

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

