NO: 23-5438

UNITED STATES SUPREME COURT

Fox Joseph Salerno,

Petitioner,

Vs.

State of Arizona,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. District Court
District of Arizona

[redacted]

Fox Joseph Salerno
CDOC #164490
49030 State HWY 71 South
Limon, CO. 80826

QUESTION(S) PRESENTED

ONE

Does *Apprendi* decision apply to Arizona Defendants on the date that the U.S. Supreme Court ruled on *Apprendi* (June 26, 2000), or on the date that the *Blakely* decision came out (June 24, 2004), which only re-interprets the meaning of *Apprendi?*

TWO

Is *Blakely* retroactive to *Apprendi?*

THREE

If a defendant does not admit aggravating factors nor does a jury convict him of these aggravating factors as is now required under *Apprendi*, does the court or did the court have SMJ or any jurisdiction, to issue an enhanced sentence using these aggravating factors?

FOUR

Does the Rule of Lenity or Rule of Finality take precedence? They are in conflict in this case and the lower court is choosing Finality.

FIVE

Did the Ninth Circuit violate *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000);* see also 28 U.S.C. § 2253(c)(2); in denying Certificate of appealability, by relying on their own conflicting ruling in *United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015); Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993)*

LIST OF PARTIES

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

Petitioner – Fox Joseph Salerno
CDOC #164490
49030 State HWY 71 South
Limon, CO. 80826

IN Pro Per

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2023 U.S. App LEXIS 9842; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2022 U.S. Dist. LEXIS 207262; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

RELATED CASES

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Exhibit B - Salerno v. Schriro, 2022 U.S. Dist. LEXIS 207262 (Decision To be reviewed (Rule 14.1(d))

JURISDICTION

[**X**] For cases from federal courts: NINTH CIRCUIT Decision on April 24, 2023 (EXHIBIT A).
[ ] For cases from state courts:
Highest State Court decision on: No: 23-15126

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

Cl 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, Cl 1, Part 1 of 3

Cl 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, and it is an appeal from the Ninth Circuit.

CORAM NOBIS – Trial was tainted by Fundamental [illegible]and a manifest injustice occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Ninth Circuit denied certificate of appealability stating:

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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); see also 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-41, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012); United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015); Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993)* (Exhibit A).

Salerno filed a *Rule 60* Motion in order to get back in court on his Habeas Corpus denial. He did so by alleging fraud by the Arizona Attorney General's office back in 2005 when this cause of action was being litigated. Their brief contained intentional misrepresentation as to facts and the law (*Rule 60(A) (3)*).

This also falls under *Rule 60(A) (6)* as an illegal sentence which constitutes fundamental error, and caused by opposing parties intentional misconduct, justifies relief, and/or abuse of discretion by the court.

Filing this action is within a reasonable time as he is still being held illegally by the State. A Pro Se litigant who was conned and misled by State Attorney's is extraordinary circumstances that prevented Salerno from taking action sooner. It is a pattern of practice of corruption by the Arizona Attorney General as Arizona Federal Courts have sanctioned them numerous times for their misconduct over the last 20 years.

Salerno was sentenced in 2001 after *Apprendi,* and his mandate came out in March 2004, 89 days before *Blakely*. The Ninth Circuit court in 2000 ruled in *U.S. Nordby, 225 F.3d 1053, 1059 (9th Cir. - 2000)* and concurred with *Apprendi* stating (over-ruled on other grounds):

> "*Apprendi* makes clear that the 'prescribed statutory maximum refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury."

And even though Salerno's H.C. was not decided until 2007, the D.C. ruled in essence that for Arizona defendants, the *Apprendi Rule* did not apply to them until the *Blakely* decision came out, which unfortunately was after Salerno's mandate, therefore Salerno was SOL as *Blakely* was not retroactive (no court was ever able to review that order as certificate of appealability was denied).

Salerno's position is that "clearly established Supreme Court precedent" had been established at the time of his sentencing, (SEE *Apprendi* & *U.S. Nordby*). *Blakely is* irrelevant and need not be retroactive as all it did was re-interpret what

Apprendi and this Court had previously said and ruled upon because Arizona and other states were dragging their feet.

The Assistant Arizona Attorney General handling this case for Respondents during H.C. made many false legal claims intentionally, including what the State laws were. At that time (2001) sentences began under *A.R.S. 13-702,* then that statute referred you to go to *A.R.S. 13-604* for some other enhancements, then to enhance further that statute told you to go to *A.R.S. 13-702.01* (Salerno was sentenced under all three statutes).

The Respondent's attorneys confused and made false claims as to how they related in which allowed the District Court to create a miscarriage of justice by not following a Supreme Court precedence or Ninth Circuit's precedence, thereby allowing an unconstitutional sentence to stand.

Rule 60 was designed to permit desirable legal objectives so cases could be decided on their merits and not through deceit or confusion which were occurring at that time. It also attempts to strike a proper balance between conflicting principles such as finality vs. justice.

I.

Lower Court concluded that Subject Matter Jurisdiction (SMJ) only entails a Court's right to hear a case and does not pertain to the Court's authority over aggravating factors (Pg. 2, Par. 1). This is an error in law.

Subject-matter jurisdiction of the Arizona judicial system is to try a criminal offense. Aggravating factors, after *Apprendi,* requires a trial. As a result, the courts need SMJ over the aggravating factors in order to hold the aggravation portion of trial.

Thus, when a court has jurisdiction to sentence a defendant, "sentencing errors do not necessarily implicate the court's jurisdiction." *Payne, 223 at 560 ¶ 11.* This means that if a court has jurisdiction, an erroneous order is considered voidable or binding and enforceable until reversed or vacated. *Bryant, 219 Ariz. at 517 ¶ 13.* Conversely, when a court lacks jurisdiction such as over aggravating factors as no jury found him guilty of them, any judgment or sentence is void; "a 'nullity' [*5] and 'all proceedings founded on [a] void judgment are themselves regarded as invalid and ineffective for any purpose.'" *Espinoza, 229 Ariz. at 429 32 (quoting State v. Cramer, 192 Ariz. 150, 153, 962 P.2d 224 ¶ 12 (App. 1998)).* "Unlike a void order that can be vacated at any time, a voidable order must be modified on appeal or pursuant to *Rule 24.3." Bryant, 219 Ariz. at 518 ¶ 14.*

In *U.S. v. Juvenile Male, 595 F.3d 885 (9th 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,* Supra, 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."

II.

Does *Apprendi* decision apply to Arizona Defendants on the date that the U.S. Supreme Court ruled on *Apprendi* (June 26, 2000), or on the date that the *Blakely* decision came out (June 24, 2004), which only re-interprets the meaning of *Apprendi*?

This is important as Salerno was sentenced on July 18, 2001, after *Apprendi* thus falling under *Apprendi,* nevertheless the Court's claimed ignorance of what *Apprendi* stood for or meant, and chose not to apply it to him. The lower Courts & other Courts have ruled that because they were too stupid to know what *Apprendi* required until *Blakely* came out to tell them, that Salerno actually falls under *Blakely* which came out after his mandate therefore he is not eligible. All *Blakely* did was to interpret *Apprendi,* so Salerno should fall under *Apprendi* and not *Blakely.*

Apprendi requires any enhancements, other than priors, that increased penalties above presumptive sentence must be decided by jury, BRD.

Salerno's trial court concluded for "enhancements", that Salerno had two priors that could be used. The court made no record if these enhancements were for historical priors, aggravators or both. Neither did the Court state whether they determined this BRD per *Apprendi* or by preponderance as the Arizona statutes required back then.

At sentencing [R.T. 7/18/21 at 20-22] the court listed two aggravating factors, again no mention of standard of proof used.

Judge Jones [P. 21, Lines 5-24]:

> "There are several aggravating circumstances. First and foremost the fact that you have four previous felony convictions. Secondly, the emotional, physical harm which has been caused in this case to the victims, and when I say victims I use that term broadly so as to include Ms. Faust in this case as well. The corporation certainly didn't suffer emotional harm, but the people involved with the corporation I believe have suffered because of the, quite frankly, complicated web that you weave in this case.
>
> You have caused a number of people in management at Taco Bell a great deal of grief, extra time that they normally would not have had to spend away from their families to unravel the mess, the con that you perpetrated on Taco Bell. You are intelligent, charismatic, charming person, but you are also a con man. You are one of the best con men I have seen come through our courtroom here. And with four prior convictions which are theft related, I am convinced a term greater that the [presumptive is appropriate in your case.
>
> I will order punishment..."

Consequently Salerno was sentenced under:

§ 13-702. Sentencing [2001 Archived Version]:

A. Sentences provided in **section 13-701** for a first conviction of a felony, except those felonies involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another or if a specific sentence is otherwise provided, may be increased or reduced by the court within the ranges set by this subsection. Any reduction or increase shall be based on the aggravating and mitigating circumstances contained in Subsections C and D of this section and shall be within the following ranges:

	Minimum	Maximum
1. For a class 2 felony	4 years	10 years
2. For a class 3 felony	**2.5 years**	**7 years**
3. For a class 4 felony	1.5 years	3 years
4. For a class 5 felony	9 months	2 years
5. For a class 6 felony	6 months	1.5 years

B. The upper or lower term imposed pursuant to section **13-604,** 13-604.01, 13-604.02, **13-702.01** or 13-710 or Subsection A of this section may be imposed only if the circumstances alleged to be in aggravation or mitigation of the crime are found to be true by the trial judge upon any evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge at the trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

A) *A.R.S. 13-604(D)* [2001 Archived Version]:

D. Except as provided in subsection I, J, K or S of this section or section 13-604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, and who has **two** or more historical prior felony convictions, shall be sentenced to imprisonment as prescribed in this subsection and shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of section **13-702,** subsections B, C and D. The terms are as follows:

Felony	Minimum	Presumptive	Maximum
Class 2	14 years	15.75 years	28 years
Class 3	**10 years**	**11.25 years**	**20 years**

B) *A.R.S. 13-702.01 (E)* [2001 Archived Version]:

E. Notwithstanding section **13-604,** subsection C or D, if a person is convicted of a felony offense and has **two** or more historical prior felony convictions and if the court finds that at least **two** substantial aggravating

factors listed in section 13-702, subsection C apply, the court may increase the maximum term of imprisonment otherwise authorized for that offense up to
the following maximum terms:

1. Class 2 felony	35 years
2. Class 3 felony	**25 years**
3. Class 4 felony	15 years
4. Class 5 felony	7.5 years
5. Class 6 felony	5.75 years

C) *A.R.S.13-702(c) [2001* Archived Version*]:*

C. For the purpose of determining the sentence pursuant to section 13-710 and Subsection A of this section, the court shall consider the following aggravating circumstances:
1. Infliction or threatened infliction of serious physical injury, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13-604.
2. Use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13-604.
3. If the offense involves the taking of or damage to property, the value of the property so taken or damaged.
4. Presence of an accomplice.
5. Especially heinous, cruel or depraved manner in which the offense was committed.
6. The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
7. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
8. At the time of the commission of the offense, the defendant was a public servant and the offense involved conduct directly related to the defendant's office or employment.
9. The physical, emotional and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the victim's immediate family.

10. During the course of the commission of the offense, the death of an unborn child at any stage of its development occurred.
11. The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense. A conviction outside the jurisdiction of this state for an offense which if committed in this state would be punishable as a felony is a felony conviction for the purposes of this paragraph.
12. The defendant was wearing body armor as defined in section 13-3116.
13. If the victim of the offense is sixty-five or more years of age or is a disabled person as defined by section 38-492.
14. Evidence that the defendant committed the crime out of malice toward a victim because of the victim's identity in a group listed in section 41-1750, Subsection A, paragraph 3 or because of the defendant's perception of the victim's identity in a group listed in section 41-1750, Subsection A, paragraph 3.
15. The defendant was convicted of a violation of section 13-1102, section 13-1103, section 13-1104, Subsection A, paragraph 3 or section 13-1204, Subsection A, paragraph 1 or 2 arising from an act that was committed while driving a motor vehicle and the defendant's alcohol concentration at the time of committing the offense was 0.15 or more. For the purposes of this paragraph, "alcohol concentration" has the same meaning prescribed in section 28-101.
16. Lying in wait for the victim or ambushing the victim during the commission of any felony.
17. The offense was committed in the presence of a child and any of the circumstances exist that are set forth in section 13-3601, Subsection A.
18. Any other factor that the court deems appropriate to the ends of justice.

NOTE: Compare these statutes from 2001 to new statutes that came out after *Apprendi* and you will see a change in the law, contrary to lower court's belief. Including the number of aggravators necessary to increase a sentence, what is an aggravator, who must determine an aggravator, etc.

Salerno received an enhanced and aggravated sentence of 20 years. Salerno argues that per *Apprendi* and State laws in affect in 2001, that his maximum sentence should have been the presumptive term with two historical priors of 11.25 years, not aggravated. This belief is based upon:

First aggravator was for priors per [2001] 13-702 (C) (11) which was allowed. The second aggravator Judge found, he had no authority (SMJ) to use as it should have been a jury decision and should have been made BRD. Therefore as Judge only had one lawful aggravator and [2001]*13-702.01 (E)* required <u>two</u> – sentence was enhanced unconstitutionally.

The new *13-701(C)* only required <u>one</u> aggravator to be found to increase sentence to max sentences, not <u>two</u> as the 2001 version did. And the new case law allows a judge to determine additional aggravators after the first one has been found; so if a defendant has a prior which the judge can find, then the judge can find other aggravators and no jury requirement. But this was not so in Salerno's case as his sentencing statute required <u>two</u> aggravators to be found thus a jury had to find one; it's a two tiered system as defined by Ninth Circuit in *Kaua v. Frank, 436 F.3d 1057, 1058 (9th Cir 2006) [HN 6 thru HN 10]).*

A.R.S. 13-702 (<u>2007</u> Archived Version):

> **B.** The upper or lower term imposed pursuant to <u>section 13-604</u>, <u>13-604.01</u>, <u>13-604.02</u>, <u>13-702.01</u> or <u>13-710</u> or subsection A of this section **<u>may be imposed only if one or more</u>** of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant, except that an alleged aggravating circumstance under subsection C, paragraph 11 of this section shall be found to be true by the court, or in mitigation of the crime are found to be true by the court, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

A.R.S. 13-702 (2001 Archived Version):

> **B.** The upper or lower term imposed pursuant to section **13-604,** 13-604.01, 13-604.02, **13-702.01** or 13-710 or Subsection A of this section **may be imposed only if the circumstances alleged to be in aggravation** or mitigation of the crime are found to be true by the trial judge upon any evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge at the trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

So you see, laws in affect at time of Salerno's sentence (2001) did not specify only one aggravator as it did in *Van Norman v. Schriro (2007),* it relied upon *A.R.S. 13-702.01* and *subsection E* which specifically required two aggravators:

A.R.S. 13-702.01 (E) [2001 Archived Version]:

> **E.** Notwithstanding section 13-604, subsection C or D, if a person is convicted of a felony offense and has two or more historical prior felony convictions and if the court finds that at least **two** substantial aggravating factors listed in section 13-702, subsection C apply, the court may increase the maximum term of imprisonment otherwise authorized for that offense up to
> the following maximum terms:

Furthermore, *subsection f of 13-701(C)* of the new statute also allows judges to find by preponderance any other aggravating factor after one has been found by trier of fact, so the State says that when the Judge found Salerno had a prior conviction, the judge could then find all the other aggravators instead of the jury. This was not the case in 2001. And even if it was the case, that statute would have been and is unconstitutional as the Ninth Circuit has determined that Arizona's

sentencing laws for aggravators is a two tiered system *Kaua v. Frank, 436 F.3d 1057, 1058 (9th Cir 2006) [HN 6 thru HN 10])*.

In other words, judge found priors as a trier of fact, so everyone thinks he had the authority to find second aggravator himself and use preponderance standard. They have that authority now but in 2001 the statutes did not give them this authority. All we has was *Apprendi* contradicting Arizona law, and as we know *Apprendi* must reign supreme. Everyone's been applying these newer laws which Salerno contends amounts to fraud as they must have known they did not apply to Salerno's sentencing, and them ignoring *Apprendi* until *Blakely* came out.

Apprendi requires priors to be found BRD, judge never made a record of standard of proof used, and in 2001 statute still allowed preponderance standard. *Apprendi* voided statutes preponderance standard so neither first prior or second prior qualify as aggravators.

The second aggravator the court used, which was not found by judge or jury BRD, does not even qualify as an aggravator as it is not listed in [2001] *13-702(C)*.

The victim was the four billion dollar Taco Bell Corporation. The judge determined the aggravator was the emotional harm to the 'witnesses', simply because they had to spend time away from their family to testify against a former employee who misused the company's credit card in the amount of $3,500.00.

There is no listed aggravator for emotional harm to witnesses. [2001] *13-702(C) (9)* is the only emotional aggravator and it clearly states only for victims or victims family if victim died.

The only other aggravator which emotional harm to witnesses could fall under would be the catch-all:

"18. Any other factor that the court deems appropriate to the ends of justice."

This aggravator was removed from statute as it was determined to be unconstitutionally vague and over broad, thus it cannot be used to describe second aggravator:

State v. Schmidt, 220 Ariz. 563 (S.Ct. 2008)

Overview: The trial court could not, consistent with due process, U.S. Const. amend. XIV, and *Apprendi*, increase a defendant's maximum potential sentence based solely on a so-called "catch-all" aggravator, defined as any other factors which the court may deem appropriate to the ends of justice, Ariz. Rev. Stat. § 13-702(D)(13).

HN1 Imposition of Sentence, Statutory Maximums
under Arizona law, those convicted of a crime are subject to longer sentences when certain aggravating factors are proved. A court may not, consistent with due process, increase a defendant's maximum potential sentence based solely on a so-called "catch-all" aggravator, defined as any other factors

P7 This Court has recognized that HN4 under Arizona law, "the statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved . . . is the presumptive sentence established" by statute. *State v. Martinez, 210 Ariz. 578, 583, P 17, 115 P.3d 618, 623 (2005)*. An aggravating factor that subjects a defendant to an

> increased statutory maximum penalty is thus the functional equivalent of an element of an aggravated
> offense. Because [**217] [*566] protection [***6] against arbitrary government action is the quintessence of due process, the rationale of *Apprendi* and subsequent cases requires that we assess the vagueness of the catch-all aggravator in Arizona's sentencing scheme when it alone is used to increase a defendant's maximum potential sentence.

Trial court simply made up the second aggravator. So even if judge had authority to determine second aggravator and to use preponderance standard, what he cited was not a lawful aggravator.

Still further, [2001] *13-702.01 & 13-702(B)* and even new statutes require aggravators to be submitted to the court before sentencing or be evidence heard by the court. The witness's emotions or being away from family, never came up before, during or after trial. Accordingly, as judge never heard it nor was it submitted to him, it cannot be a lawful aggravator.

Using priors both to enhance sentence under [2001] *13-604(D); 13-702.01(E),* and to increase by aggravation under [2001] *13-702(11),* violates double jeopardy.

Apprendi in 2000 made it clear that:

> "...additional facts, raising statutory maximum, must be proven to jury beyond a reasonable doubt."

The Ninth Circuit in *U.S. Nordby, 225 F.3d 1053, 1059 (2000)* also concurred stating:

> "*Apprendi* makes clear that the 'prescribed statutory maximum refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury."

Both decision are prior to Salerno's sentencing and conviction. For an unknown reason, the Arizona Supreme Court did not address the Constitutionality

of the Arizona sentencing scheme subsequent to *Apprendi* nor prior to *Blakely*. No Arizona Court issued a published opinion prior to *Blakely* evaluating Arizona's sentencing scheme under *Apprendi* principles.

Apprendi spelled it all out, any fact (i.e., aggravator) must be determined by jury BRD, except priors. State Courts refused to apply standard claiming ignorance, so the U.S. Supreme Court in *Blakely* bitch slapped the State Courts and said, 'since you guys are too stupid to understand simple English, we'll talk to you like a five year old':

> "Statutory maximum for *Apprendi* is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

The Arizona Court's knew this was the definition already as they ruled in *Ring v. Arizona, 536 U.S. 584 (2002);* and their 2003 decision prohibiting retroactivity of *Apprendi* in - *State v. Towery, 204 Ariz, 386.* Not to mention them citing the 2001 Kansas case that had a sentencing scheme similar to Arizona - *State v. Gould, 271 Kan. 394, 23 P.3d 801 (2001).*

Just because the Arizona Courts were playing games and falsely claiming ignorance, Salerno still fell under *Apprendi*. All *Blakely* did was to define words in *Apprendi* for the less educated, Salerno doesn't have to fall under *Blakely* as the same sentiment and meaning were already there in *Apprendi.*

Salerno's sentence was illegal under *Apprendi* which is a fundamental error, and as the Court had no subject matter jurisdiction (SMJ) for the second

aggravator required to enhance Salerno's sentence, there can be no procedural or time bars to question of jurisdiction.

Rule of lenity applies to conflicts between *Apprendi* requirements and Arizona State laws that were in conflict at that time.

Salerno's position is that "clearly established Supreme Court precedent", i.e. *Apprendi,* had been established at the time of his sentencing.

State v. Schmidt, 220 Ariz. 563, 565, 208 P.3d 214, 216, 2008 Ariz. LEXIS 246, *5 (Ariz. September 26, 2008)

> The Court held that ***HN3*** "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The thrust of the *Apprendi* line of cases is that any fact that "the law makes essential to the punishment" is the "functional equivalent of an element of a greater offense," and is to be treated accordingly. *See Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)**; *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002);(prior to Salerno's mandate).**

1) Salerno's attorney failed to object to this illegal sentence, and failing to object to an illegal sentence is ineffective assistance of counsel *U.S. v. Parks, 995 F.3d 241 (D.C. Cir. 2021).*
2) *Failure to object is waived for fundamental error* U.S. v. Olano, 507 U.S. 725 (1993); State v, Henderson, (P19) 210 Ariz. 563 (S.Ct. 2005).
3) Imposition of an illegal sentence constitutes fundamental error *State v. Snider, 233 Ariz. 243 (Div. 2 – 2013).*
4) Fundamental error cannot be waived *Stewart v. Smith, 202 Ariz. 446 (2002).*

5) Court can review for fundamental error *State v. Munninger, 209 Ariz. 473 (Div. 1 – 2005).*

6) It is a violation of Due Process and a structural error to sentence a person in excess of that which the law allows *State v. Resendis- Fekiz, 209 Ariz. 292 (Div. 2 – 2004); Sullivan v. Louisiana, 508 U.S. 275 (1993).*

7) Courts lack authority to impose an illegal sentence *State v. Robertson, 249 Ariz. 256, 261 (S.Ct. 2020).*

8) *Apprendi* can be argued on a collateral attack *Allen v. Reed, 427 F.3d 767, 769 (10th Cir – 2005).*

9) Rule on lenity applies to sentencing statutes *Bifulco v. U.S., 447 U.S. 381, 387 (1980).* In 2001 Arizona State law was in conflict with the *Apprendi* decision, and even though *Apprendi* reigns supreme, as *Apprendi* was still in process of being misapplied and/or misinterpreted, rule of lenity should be applied to pick up the slack.

NOTE: Salerno is serving a consecutive 15.75 year sentence form *CR 2001-006753.* Salerno's sentence in this cause has not expired as he has not served his community supervision (CS) portion. However, if court resentences Salerno to presumptive 11.25 years, it will kill this conviction and he would be immediately released to finish his CS on consecutive sentence.

REASONS FOR GRANTING THE PETITION

1) No Federal Court law has determined if the Rule of Lenity or Rule of Finality take precedence; they are in conflict in this case and the lower court is choosing Finality.
2) No court ever ruled in this case or any case setting precedence on whether *Apprendi* decision applies to Defendants on the date that the U.S. Supreme Court ruled on *Apprendi* (June 26, 2000), or does it take effect on the date that the *Blakely* decision came out (June 24, 2004), which only defines the

Apprendi decision? This affects sentences that became final between these two decisions, like Salerno's.

3) This Court has not found a case to determine if *Blakely* if retroactive to *Apprendi*.
4) There is so much confusion from lower Federal and State Courts on the meaning of Subject Matter Jurisdiction & just Jurisdiction.
5) The Ninth Circuit's opinions on granting or denying certificate of appealabilities conflicts with this court's ruling.

CONCLUSION

As Salerno's sentence was unconstitutional and the State intentionally misled the court in its previous filings/cases by miscasting statutes, using newer statutes that required only one aggravator, falsely claiming Salerno fell under *Blakely* thereby not retroactive, as well as Salerno's ignorance of the law and procedures he did not know any better or how to properly phrase or argue the issues, it is in the best interest of justice to correct this injustice and order certificate of appealability be issued and/or any other relief the court deems appropriate.

For the foregoing reasons Salerno prays this Court accept Review and appoints counsel.

15th July (Resubmitted)

Respectfully submitted this ~~20th~~ day of ~~June~~ 2023.

Fox J. Salerno

Fox J. Salerno

15th July

Copy mailed this ~~20th~~ day of ~~June~~ 2023 to: (FILED)

- ~~Appellate~~ Supreme Court Clerk & Arizona Attorney General.
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