NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

FRANK COSTELON - Petitioner,

v.

STATE OF NEW MEXICO et. al., - Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORAR

FRANK COSTELON (PRO SE)

REG. REG. NO. 79711-280

U.S. PENITENTIARY

P.O. BOX 1000

LEAVENWORTH, KS 66048

QUESTION PRESENTED

[1] Whether the District Court err in concluding that it did not have jurisdiction because Petitioner herein was no longer in in the custody of the judgment of the New Mexico State Court of whose prior conviction he was attacking while being in Federal custody?

[2] Whether the Ruling of the Tenth Circuit Court of Appeals err in misunderstanding this Court's Ruling in LACKAWANNA CNTY. DIST. ATT'Y v. COSS, 532 U.S. 394 (2001), and in failing to acknowledge that 28 U.S.C. § 2244(d) is subject to Equitable Tolling Principles?

[3] Whether a CRONIC VIOLATION is analougus to a GIDEON TYPE VIOLATION thus equal too and meeting the LACKAWANNA EXCEPTION as articulated in LACKAWANNA supra, pursuant to the holdings of AVERY V. ALABAMA, 308 U.S. 444, (1940), Hence, is a Constructive Denail of Counsel AKIN, as to not having counsel appointed at all.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Frank Costelon, through PRO SE, (hereinafter "Mr. Costelon"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit that was entered on March 5, 2018 in case No.: 17-2208. Mr. Costelon's petition for EN BANC and petition for Rehearing by the panel was denied on April 2, 2018.

Mr. Costelon, informs this Honorable Court that he is a layman at the Profession of Law, and would therefore ask that this Honorable Court recognize its standards set forth in HAINES v. KERNER, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), and in doing so, not hold Mr. Costelon to the rigid standards of a Professional Legal Litigator.

OPINION BELOW

On March 5, 2018, a panel of the Tenth Circuit Court of Appeals entered its ruling affirming the denial of Mr. Costelon's Certificate of appealability ("COA"), and published its opinion under COSTELON v. STATE OF NEW MEXICO, 2018 U.S. App. LEXIS 5551 (10th Cir. March 5, 2018). The district court dismissed Mr. Costelon's 28 U.S.C. § 2254, holding that it lack jurisdiction because Mr. Costelon was not in State Custody pursuant to a Judgment of a State Court and on the grounds that the Petition was barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

JURISDICTION

The Court of Appeals entered its judgment on March 5, 2018, and denied Mr. Costelon's Combined petition for Rehearing and Rehearing EN BANC by the panel on April 2, 2018. Jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

Title 28 U.S.C. § 2254(d)(1)

Title 28 U.S.C. § 2253(c)(2)

Title 28 U.S.C. § 2244(d)(1)

OTHER AUTHORITY PROVISIONS:

U.S.S.G. § 4B1.1

N.M.R.A. RULE 1-060(B)

STATEMENT OF THE CASE

On or around January 31, 2003, Mr. Costelon was stopped by a Dona Ana County Sheriff's deputy for driving without a seatbelt. The deputy subsequently learned that

Petitioner had an outstanding warrant for a MISDEMEANOR OFFENSE (i.e., failing to appear for a speeding ticket violation). Mr. Costelon was thereafter arrested and a PAT DOWN SEARCH was conducted upon his person by the Sheriff Deputy and NO CONTRABAND was found on his person.

Mr. Costelon was thereafter taken to the Dona Ana County Detention Center ("DACDC") and was once again searched for a SECOND TIME. The Booking Correctional Staff of DACDC pat searched Mr. Costelon and also DID NOT FIND nothing of significance. (A PAT SEARCH is a search, where the officer makes physical contact with the detainee being searched but where the individual's clothing IS NOT REMOVED).

After the Second Pat Search was conducted upon Mr. Costelon, he was placed in a holding cell with other detainees who were awaiting payment of bond. Mr. Costelon was allowed to contact a bail bondsperson and was awaiting to be BONDED out of jail.

Nevertheless, 45, minutes upon his arrival at the DACDC, HE WAS CALLED TO BE STRIP SEARCH,--AS PART OF A BLANKET STRIP SEARCH POLICY IN EFFECT AT THE TIME-- at the DACDC. This Blanket Strip Search Policy was later found to be UNCONSTITUTIONAL.

While Mr. Costelon was forcibly undressed without any reasonable suspicion to do so, and while awaiting to be bonded by his mother and Bail-Bondswoman [BEFORE] the TWO-HOUR bond

grace period DACDC Correction Officer found TWO POUNDS of MARIJUANA taped under his armpits.

[A] PRIOR STATE CONVICTION:

Mr. Costelon was thereafter indicted by a Grand Jury on February 13, 2003, with one Count of Possession With Intent to Distribute Marijuana (NMSA 19 § 30-31-22(A)(1)(B)). Mr. Dennis Seitz was appointed as counsel for Mr. Costelon. During the course of his representation, Mr. Seitz ONLY filed two motions to reduce bond, but never filed ANY SUBSTANTIVE MOTIONS on behalf of Mr. Costelon.

During the Course of a pre-trial meeting in which Mr. Seitz advanced a plea offer from the state, Mr. Seitz [ADVISED] Mr. Costelon that [IT WAS] in his best intrest TO TAKE THE PLEA, based on the fact the Mr. Seitz believed that Mr. Costelon "HAD BEEN CAUGHT RED HANDED AND THUS DID NOT HAVE A DEFENSE FOR HIS CASE."

Thus, on July 16, 2003, approximately six months after his arrest, Mr. Costelon pleaded guilty to the indictment as advised by his Counsel, in exchange for a three-year prison term to be followed by two years of parole. This was the maximum allowable sentence.

[B] CURRENT ENHANCED FEDERAL SENTENCE DUE TO PRIOR STATE CONVICTION:

Nevertheless, after completing his State sentence in reference to this State conviction, Mr. Costelon was convicted

of federal charges in the United States District Court for the Western District Of Texas, Case No. CR 11-01895. Mr. Costelon was thereafter subjected to an [ENHANCED SENTENCE] as a Career Offender under the U.S. Sentencing Guidelines §4b1.1, based on his State Prior Conviction under Case No. D-307-CR-2003-00126, and is currently serving this lengthen sentence in Federal Prison.

HOWEVER, in 2008, a group of former detainees filed a class action suit in the Federal District Court of New Mexico against the Dona Ana County Detention Center, alleging that they had been the victims of [I]llegal Strip Searches (See JESUS LIRA et. al., v. DONA ANA COUNTY BOARD OF COMMISSIONERS et. al. No. 06-0179 WPJ/WPL (D. N.M. 2006)).

The plaintiff in the above mentioned case, alleged that the Detention Center's BLANKET POLICY of Strip SEARCHING ALL DETAINESS, [regardless] of the severity of the offense of detention, and/or if they were in TEMPORARY HOLDING CELLS, CLEARLY VIOLATED the Fourth Amendment Jurisprudence. Nevertheless, this LAW SUIT WAS SETTLED, and the defendants paid $5,000,000 to the plaintiffs. (See Order Granting Preliminary Approval of Class Action Settlement Agreement. (DOC 2. at APPENDIX "L").

[C] REOPENING OF PRIOR CONVICTION VIA N.M.R.A. RULE 1-060(B)/CORAM NOBIS:

On February 8, 2013, Mr. Costelon filed a (PRO SE) MOTION TO SET ASIDE THE JUDGMENT OF CONVICTION pursuant to

Rule 1-060(B) New Mexico Rule Annotated ("NMRA"), based on the fact that his State Trial Counsel had violated his SIXTH AMENDMENT right to Effective Assistance of Counsel by having failed to SUPPRESS the evidence that was obtained through a violation of his FOURTH AMENDMENT. Thus, which ultimately amounted to CONSTRUCTIVE DENIAL OF COUNSEL for entirely failing to subject the prosecution's case to meaningful adversarial testing.

Mr. Costelon had entered a guilty plea with the advise of his Counsel, when in fact law existed before his guilty plea, that such a Blanket Strip Search Policy was in fact UNCONSTITUTIONAL and the Tenth Circuit case law was well established since 1984. Thus, the evidence being the Two-Pounds of Marijuana that was obtained at DACDC, was in fact the fruit of an egregious Fourth Amendment violation.

In an affidavit attached to his petition, Mr. Costelon stated that:

"had counsel investigated the law... I would have insisted on going to trial; and not pled guilty..." See DOC 2. of Civil Action No. 2:16-CV-01327 filed on 12/5/2016.

On February 18, 2013, the New Mexico Third Judicial District State Court denied Mr. Costelon's motion without a hearing because a "voluntary plea of guilty or no contest 'waives objections to a prior defect in the proceedings and also operates as a waiver of statutory or constitutional right.'" (quoting STATE v. HDGE, 1994-NMSC - 087 118 N.M.

410). (See APPENDIX "K").

(i) REVERSED AND REMANDED STATE PRIOR CONVICTION REOPENED:

Mr. Costelon appealed the above decision, and the New Mexico Court of Appeals REVERSED. The Court of Appeals held that the waiver [was not] a proper basis for dismissing the motion, because a guilty plea DOES NOT act as a waiver of right if it is not knowingly and intelligently entered. The Court also noted in the corresponding [Calendar Notice] that Mr. Costelon pointed "to authority indicating that [THE BLANKET STRIP SEARCH POLICY] could give rise to a [MERITORIOUS MOTION TO SUPPRESS]," and thus held that Movant has "made a prima facie showing of [ineffective of counsel] sufficient to trigger an evidentiary hearing." See, STATE v. COSTELON, No 23,890 WL 6662782 (N.M. Ct. App. NOV 25, 2013 (non-presidential). (See. DOC 2. at APPENDIX "H", "I", "J").

(ii) EVIDENTIARY HEARING:

On remand for the evidentiary hearing, Mr. Costelon's case was assigned to the New Mexico Public Defenders Office and Assistant Public Defender "Caleb Kruckenberg" was appointed on March 06, 2014 to represent Mr. Costelon. In May 22, 2014, Mr. Kruckenberg filed a Motion to Set Aside the Judgment and Conviction, detailing Mr. Costelon's INEFFECTIVE ASSISTANCE OF COUNSEL. However, after filing the Motion and before the Evidentiary Hearing, Mr. Kruckenberg left the Law Office of the N.M. Public Defenders, and Mr. Ryan Byrd was appointed and substituted to represent Mr. Costelon as counsel. On September 26, 2014, the Court held the

Evidentiary Hearing.

Mr. Ryan Byrd [DID NOT] subpoena Mr. Seitz for the evidentiary hearing or presented other EXPERT WITNESSES who may have been able to testify regarding this potential deficient performance. The thrust of Mr. Byrd's argument was that the search of Mr. Costelon was UNLAWFUL, because the STRIP SEARCH POLICY at the DACDC was found to be UNCONSTITUTIONAL. However, Mr. Byrd did not provide any additional evidence to support that claim.

The State sought to prove that there was no blanket strip search policy at the time that Mr. Costelon was arrested in 2003, and that it was actually during a valid process called a "change-out" that the drugs were discovered on Mr. Costelon's person. The State called "Christopher Barela" to the hearing although Mr. Barela was a DEFENDANT in the CLASS ACTION SUIT against the DACDC as described above. However, Mr. Barela was [not] the Correctional Booking Officer who had Stripped Searched Mr. Costelon. The booking Officer that conducted the Unlawful Strip search, was "ERNESTO HOLGUIN HERNANDEZ" [Officer ID # 4062].

Nevertheless, this Correctional Booking Officer was never called to testify for the State, because he had been CONVICTED in the U.S. District Court for the District Of New Mexico Law Cruces Division under Criminal Action No. CR-03-2451 JB, for "MISPRISION OF A FELONY under 18 U.S.C. § 4."

Mr. Hernandez [was] convicted for FAILING TO TRUTHFULLY report the assault of an inmate in a timely manner. Mr. Hernandez took several steps, over a period of time, to CONCEAL his knowledge of the WRONGFUL and BRUTAL ASSAULT to Verdin-Rendon by HIS FELLOW OFFICERS. Only after he was confronted by the FBI with the confession of one of his fellow officers did he tell the truth. Hence, he was Convicted in Federal Court and the State District Attorney Heather Cosentino-Chavez [DID NOT] call him and/or brought this matter to the attention of the Honorable State Court.

Thus, Mr. Barela was called to testify and stated, "that he was the director and warden of the DACDC (and a Major at the time of Mr. Costelon's arrest back in 2003) and that he was unaware that a blanket strip search policy existed in 2003, and explained the difference between a strip search and "change-out." Mr. Barela explained that the bricks of marijuana were not found during a strip search, but instead during a change-out, in which arrestees change from STREET CLOTHES into JAIL ATTIRE. He testified that strip searches were conducted in a more private setting than change-outs, with one or more inmates stripping all clothes in front of ONE OR TWO OFFICERS [which in fact happened in Mr. Costelon's case].

Mr. Barela, described that the change-out rooms contained showers, and that the change-out were done in batches of inmates (up to four inmates at a time), and were supervised by detention officers for safety purposes. The

detention officers also supervised to collect and bag the inmates' clothes.

Although Mr. Barela, stated that he was unaware of any Blanket Strip Search Policy at the time he was a Major at the DACDC, he did testify that ONLY INMATES AWAITING POSTING OF BONDS [DID NOT] HAVE TO UNDERGO the CHANGE-OUT PROCESS, AND [WAS NOT] AWARE IF PETITIONER PLANNED TO BOND OUT.

Mr. Barela also testified and admitted that he was NOT present during the search of Mr. Costelon, and that if a [Detainee would sit in jail for more that TWO HOURS], a change out would then take place. (See, Aplt. Br. at 10, filed on 02/09/2018 Appeal No. 17-2208).

Therefore, Petitioner took the stand in his Evidentiary Hearing and explained that he had been forced to [S]TRIP OFF ALL HIS CLOTHES before the grace period of the TWO-HOURS, and had in fact been forced to strip within an hour and a half, of having arrived at he DACDC --although records show that it was within 45-minutes of his arrival at the DACDC. (See DOC 2. of Civil Action No. 2:16-CV-01327 filed on 12/5/2016, and at APPENDIX "M").

Petitioner [further testified] that when he arrived at the DACDC, he immediately placed a call to secure someone to help pay his bond. A friend who was a Bail- Bondsman (Lupita Gomez), was going to pick up his mother and both would come

and post the bond for Mr. Costelons' release.

(iii) STATE CONCLUSION OF LAW AFTER EVIDENTIARY HEARING THAT WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW:

NEVERTHELESS, the State District Court [rejected] his claim and issued an Order Dismissing Mr. Costelon's motion on October 21, 2014. In it, the Court found the following relevant facts:

[1] The Drugs and other evidence the defendant would seek to SUPPRESS were found taped to his person during a ROUTINE INVENTORY SEARCH at the DACDC while PROCESSING THE DEFENDANT FOR DETENTION IN THE GENERAL JAIL POPULATION.

[2] The Defendant had been arrested on an out standing [MISDEMEANOR] warrant and WAS NOT LIKELY (Court's ASSUMPTION) TO BE RELEASED IMMEDIATELY. Discovery of the Drugs secreted on his person was INEVITABLE.

The State Court then concluded as a matter of law:

[1] The inventory search was routine and appropriate and necessary to the maintenance of security in the detention center. ILLINOIS v. LAFAYETTE, 462 U.S. 640 (1983).

[2] A motion to suppress the drugs and other evidence sized from the defendant would not have succeeded. Counsel is not ineffective for failing to file motion than are unlikely to succeed. STATE v. TRUJILLO, 2022-NMSC-005. See, State District Court Order at APPENDIX "G".

(iv) EXHAUSTION OF STATE APPEALS AFTER EVIDENTIARY HEARING:

Thereafter, Mr. Costelon Appealed to the New Mexico Court of Appeals. The Appeals Court Affirmed (See, STATE v. COSTELON, SEP 29, 2015 N.M. App. No. 34,265, and he thereafter sought a Rehearing which was Granted though reaffirmed the denial on NOV 9, 2015 without the admonishment. Nonetheless, Mr. Costelon petitioned for a writ of certiorari to the New Mexico Supreme Court (See, STATE v. COSTELON, N.M. S. Ct. No. S-1-SC-35622. The State Supreme Court denied his Petition on Jan 6, 2016 and then Mr. Costelon thereafter filed a timely Federal Habeas Corpus Petition pursuant to 28 U.S.C. § 2254(d)(1), to the U.S. District Court for the District of New Mexico. (See, APPENDIX "D", "E", "F".)

[D] FEDERAL HABEAS CORPUS § 2254(D)(1):

Therein, Mr. Costelon's claims were:

(1) That the State Court's application of ILLINOIS v. LAFAYETTE, supra, involved an unreasonable application and was moreover applied contrary when it [assumed] that Petitioner was in the process of [being jailed] with the rest of the inmate population, and thus determined that Petitioners 2003 Trial Counsel provided effective assistance despite the fact that he failed to file a meritorious motion to suppress in reference to the unconstitutional blanket strip search policy of the DACDC.

(A) Mr. Costelon's STRIP SEARCH was NOT an INVENTORY SEARCH, based on the fact the HE WAS AWAITING BAIL and was NOT being jailed at the very moment when petitioner WAS STRIP

SEARCHED. Thus, the State District Court's application of ILLINOIS v. LAFAYETTE, 462 U.S. 640 (1983) involved an unreasonable application and was applied [contrary] to clearly established law.

(B) The Discovery of the drugs secreted on his person [WAS] EVITABLE, because Petitioner had been arrested on a Misdemeanor Traffic Violation Warrant and had already been patted down TWICE by the Sheriff Deputy and Correctional Officers of the DACDC; and because he was in the process of being Bonded-Out by the Bail-Bondswoman and his Mother.

(C) Petitioner's Strip Search was UNCONSTITUTIONAL and thus case Law Existed at the time of Petitioners Arrest and Conviction. Trial Counsel failed to investigate and to advise Petitioner of the fact and to SUPPRESS the evidence. See FOOTE v. SPIEGEL, 118 F. 3d 1416, 1425 (10th Cir 1997); COTTERLL v. KAYSVILL CITY, UTAH, 994 F.2d 730,734035 (10th Cir. 1993); HILL v. BOGANS, 735 F.2d 391 394 (10th Cir. 1984); UNITED STATES v. CALHOUN, 2002 U.S. DIST. LEXIS 23277 No. 02-10120-01-WEB (10th Cir. 2001) ([MOTION TO SUPPRESS GRANTED]).

Thus, a Motion to SUPPRESS WOULD HAVE SUCCEEDED, and the State Court would have found Counsel to be totally ineffective had ILLINOIS v. LAFAYETTE, supra, not been misapplied in Petitioner's State Case.

Nevertheless, the U.S. District Court DISMISSED Mr. Costelon's 28 U.S.C. § 2254, holding that it lacked

jurisdiction to adjudicate his Petition because Mr. Costelon was not in State Custody pursuant to a judgment of a State Court and on the grounds that the Petition was barred by the Statute of Limitations of 28 U.S.C. § 2244(d)(1), and a certificate of appealability was denied. (See. APPENDIX "B".)

[E] CERTIFICATE OF APPEALABILITY TO THE TENTH CIRCUIT COURT OF APPEALS:

On February 9, 2018 Mr. Costelon filed an Application and Memorandum of Law requesting a Certificate of Appealability pursuant to Fed. R. App. p. 22, under Title 28 U.S.C. §§ 1291 and 2253(c)(2).

Mr. Costelon sought to show that: (1) a denial of a federal constitutional right; and (2) whether the District Court's procedural ruling was correct in its [lack of jurisdiction ruling] by demonstrating that jurist could disagree (debate) with the district court's resolution of his constitutional claims or that jurist could conclude (agree) the issue presented are adequate to deserve encouragement to proceed further. The Issues raised in his COA were:

[1] DID THE U.S. DISTRICT COURT ERR IN CONCLUDING THAT IT DID NOT HAVE JURISDICTION BECAUSE HE WAS NO LONGER IN STATE CUSTODY PURSUANT TO A JUDGMENT OF A STATE COURT?

[2] DID THE DISTRICT COURT FURTHER ERR IN CONCLUDING THAT PETITIONER WAS BARRED BY THE STATUTE OF LIMITATIONS OF

28 U.S.C. § 2244(d)(1)?

Mr. Costelon's focused on the threshold question of law regarding the issuing of a COA on the grounds that he did meet the "IN CUSTODY" requirement of a § 2254(a) pursuant to the ["LACKAWANNA EXCEPTION" at 404] in light of this Honorable Courts Holdings in LACKAWANNA COUNTY DISTRICT ATTORNEY v. COSS, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). Mr. Costelon showed that at the very least jurists of reason would find it debatable on whether he had claimed a denial of a constitutional right and/or that jurist of reason would find it debatable on whether the district court was INCORRECT in its procedural ruling.

NEVERTHELESS, On March 5, 2018, the Tenth Circuit Court of Appeals denied Mr. Costelon's COA. The Court held that Mr. Costelon's contention regarding, "that the district courts jurisdictional dismissal was wrong under LACKAWANNA, and [MISPLACED]." It further held that LACKAWANNA provided relief only to prisoners who were challenging "A CURRENT SENTENCE" on the grounds that it was enhanced based on an alleged unconstitutional prior conviction for which the prisoner was still in custody for. The Court concluded that Mr. Costelon was not challenging his current FEDERAL SENTENCE, but his STATE SENTENCE for which he had already completed. See, COSTELON v. STATE OF NEW MEXICO, No. 17-2208 (10th Cir. March 5, 2018). (See, APPENDIX "A").

[F] PETITION FOR REHEARING AND REHEARING EN EN BANC:

On March 19, 2018, Mr. Costelon filed a Combined Petition for Rehearing with suggestion for rehearing En Banc pursuit to Fed R. App. P. Rules 35, and 40, asking two Question of Exceptional Importance:

(1) Did the Panel for the 10th Circuit Court of Appeals err in stating that LACKAWANNA supra was misplaced, thus contradicting the Supreme Court ruling of construing liberally the "in custody" requirement in order to reach and address the merits?

(2) Whether the Panel for the 10th Circuit Court of Appeals and the District Court err in failing to (i) acknowledge the LACKAWANNA supra case law and its' rule to the exception, (ii) thus failing to recognize its' controlling Supreme Court ruling where it liberally construed a petition as asserting a challenge to a prior unconstitutional conviction in order to meet the in custody requirement, (iii) thus Petitioner-Appellants' Federal sentence as enhanced by his invalid 2003 State of New Mexico prior conviction is analogues therefore a prisoner serving such an enhanced sentence meets the in custody prerequisite? (See, APPENDIX "C").

Insofar the Court denied Rehearing and the Rehearing En Banc on April 2, 2018. Hence, this Petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

-FIRST QUESTION-

[1] WHETHER THE DISTRICT COURT ERR IN CONCLUDING THAT IT DID NOT HAVE JURISDICTION BECAUSE PETITIONER HEREIN WAS NO LONGER IN THE CUSTODY OF THE JUDGMENT OF THE NEW MEXICO STATE COURT, OF WHOSE PRIOR CONVICTION HE WAS ATTACKING WHILE BEING IN FEDERAL CUSTODY?

This case at bar presents the rare instance where an inmate in the custody of the Federal Bureau of Prisons CAN bring a petition for writ of habeas corpus pursuant to Title 28 U.S.C. § 2254(d)(1).

Mr. Costelon filed a PETITION TO SET ASIDE THE CRIMINAL JUDGMENT in the Third Judicial District Court of New Mexico under Rule 1-060(B) of the New Mexico Rules Annotated ("N.M.R.A."). Mr. Costelons Motion was construed as an equivalent RULE 60(B)(6) under the above State Law that is akin to the Federal Rules of Civil Procedure. Thus whether the State of New Mexico Third Judicial District Court permitted for Mr. Costelons' Post Conviction proceedings to be RE-INSTATED was NOT a decision of jurisdiction do to the fact that Mr. Costelon was in fact Granted an EVIDENTIARY HEARING under the same Rule REOPENING THE CRIMINAL CASE on 02/07/2014. (See STATE OF NEW MEXICO DOCKET SHEET at APPENDIX "N"). Therefore, Mr. Costelons' case is STILL "OPEN...TO COLLATERAL ATTACK in its own right" (See LACKAWANNA at 403-04).

N.M.R.A. Rule 1-060(B) largely mirrors Rule 60(b) of

the Federal Rules of Civil Procedure. It provided that, on a motion and upon just terms, a court may relieve a party from a final judgment, order, or proceeding for:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence with by due diligence could not have been discovered in time to move for a new trail under Rule 1-059;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been revered or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) ANY OTHER REASON JUSTIFYING RELIEF from the operation of the judgment. N.M.R.A. 1-060(B). For example, Mr. Costelon pointed "to authority indicating that the blanket strip search policy could give rise to a meritorious motion to suppress" thus "made a prima facie showing of ineffective assistance of counsel sufficient to trigger an evidentiary hearing.. See. STATE v. COSTELON, No 23,890 WL 6662782 (N.M. Ct. App. NOV 25, 2013) (See. APPENDIX at "I", "J")

A motion under Rule 1-060(B) "shall be made within a reasonable time, and for reasons (1), (2) and (3) not more that one-year after the judgment, order or proceeding was

entered or taken." N.M.R.A. 1-060(B). Under New Mexico State Procedures Rule 1-060(B), a court has DISCRETION TO REOPEN a matter and relieve a party from a JUDGMENT. See MORA v. HUNICK, 100 N.M. 466, 468, 672 P. 2d at 297. In MORA, the plaintiff's complaint was dismissed sua sponte for lack of prosecution [m]ore that two years after it was filed, was reinstated, was dismissed again sua sponte on the same ground more than one year later, and was AGAIN REINSTATED, and the COURT STILL HAD JURISDICTION to hear the case on its merits. See 100 N.M. at 469, 672 P. 2d at 298.

New Mexico Law provides that final judgments and decrees "entered by the district court...shall remain under the control of such court for a period of thirty days after the entry thereof, AND FOR SUCH FURTHER TIME AS MAY BE NECESSARY TO... dispose any motion which may have been filed within such period." N.M.S.A. 1978, § 39-1-1. That statue further provides that "the provision of this section shall NOT be construed to amend, change, alter or repeal the provision of Section 4727 or 4230, Code 1915." N.M.S.A. 1978, § 39-1-1.

Hence, Mr. Costelon's State Motions proceeded under the proper State Statue that by New Mexico Law would [RE-STATE] his Post-Conviction proceedings, which were appealable to the New Mexico Court of Appeals and New Mexico Supreme Court to include the U.S. District Curt for the District of New Mexico. Mr. Costelons § 2254(d)(1) was [not] barred by the statue of limitations of 28 U.S.C. § 2244(d)(1), the

Honorable U.S. District Court did in fact have jurisdiction under LACKAWANNA supra, to address Mr. Costelons substantive issue that the State District Court had [MISAPPLIED] the application of ILLINOIS v. LAFAYETTE, 462 U.S. 640 (1983).

Mr. Costelons State Prior Conviction had been the product of an egregious FOURTH AMENDMENT violation. Based on a SIXTH AMENDMENT constructive denial of his State Counsel who had failed too not only investigate and SUPPRESS the States' evidence of the TWO POUNDS of marijuana that were obtained under the UNCONSTITUTIONAL "BLANKET POLICY OF STRIP SEARCHING ALL DETAINEES" at the DACDC back in 2003, which was contrary to Tenth Circuit Case Law that was well established since 1984 regarding strip searches of detainees. Mr. Sietz ultimately failed to subject the entire prosecutions case to adversarial testing.

-SECOND QUESTION-

[2] WHETHER THE RULING OF THE TENTH CIRCUIT COURT OF APPEALS ERR IN MISUNDERSTANDING THIS COURT'S RULING IN LACKAWANNA CNTY. DIST. ATT'Y v. COSS, 532 U.S. 394 (2001), AND IN FAILING TO ACKNOWLEDGE THAT 28 U.S.C. § 2244(d) IS SUBJECT TO EQUITABLE TOLLING PRINCIPLES?

As this Court is well aware of the statutory fact that Title 28 U.S.C. § 2254(a) empowers a District Court with jurisdiction to "entertain an application for a writ of habeas corpus on behalf of a person IN CUSTODY pursuant to the judgment of a State court only on the grounds that he is [in

custody] in violation of the Constitution or laws or treaties of the United States."

Now the "in custody" requirement is jurisdictional, and therefore it is the first question [the Court] must consider. Hence, it is the Passport in order to reach and adjudicated the merits of a petition, and nonetheless is the plight that Mr. Costelon confronted at the U.S. District Court, thereafter his State Court Evidentiary hearing while appealing from its October 21, 2014 ruling. Mr. Costelon exhausted his State Court appeals, and borough his claims up into Federal Court by appealing those claims through the filing of a § 2254(d)(1) to the U.S. District Court of New Mexico. Furthermore, Mr. Costelon continued to face this same "In Custody" plight at the Tenth Circuit Court of Appeals when it affirmed the denial of that petition while seeking a COA on appeal.

But Mr. Costelon is not alone, and respectfully informs this High Court, that he is one of many petitioner that has filed a § 2254, and who's claims buttress on the statue, and/or lower courts misapplying the [exception to the rule.] Therefore, based on prudential grounds, lower Courts are refusing to hear non frivolous issues and bypassing meritorious arguments pertaining to § 2254 Motions regarding a prior convictions like the one Mr. Costelon sought to be adjud icated on the merits. This is all due to the misapplication of the LACKAWANNA EXCEPTION which is akin to being granted ASYLUM verses the "in custody" passport. As above stated, Mr.

Costelon is not alone, but one of the few who has sought this Honorable Courts' review in hopes that it may Grant Certiorari on this issue and/or questions presented herein. Thus, Mr. Costelon invites this Court to scrutinize this matter not just for him but for all similar situated petitioners that have an illegally obtained prior conviction but cannot receive justice.

Numerous of similar situated Movant's from all circuits, such as Mr. Costelon, that have also petitioned a District and Appeals Courts, regarding a prior conviction have as well encountered this snag involving the same exact plight of the "IN CUSTODY" prerequisite. This plight has turned into a procedural blunder even though this High Court has given guidance to this matter and has answered the question in the affirmative. Though lower court seem to circumvent and/or misapply your Courts Holding of [construing liberally the "IN CUSTODY" requirement] in light of LACKAWANNA Supra,.

Therefore, although LACKAWANNA supra., was invoked by Mr. Costelon in order to meet the IN CUSTODY requirement of § 2254(a), some court such as U.S. District Court of New Mexico seem to not want to honor its' guidance in order to satisfies the Courts Subject Matter inquiry. Mr. Costelon advertently invoked LACKAWANNA EXCEPTION, thereby giving the Court an avenue in order to be able to move along into the next level of threshold inquire requirements of LACKAWANNA supra. Cf. Thus, Mr. Costelon being found to be "in custody", therefore the Court addressing and ruling the

petition on its merits of the SIX AMENDMENT VIOLATION.

As this High Court is well aware of the fact that Justice Sandra Day O'Connor wrote for the five-Justices: Antony M. Kennedy, Antonin Scalia and Clarance Thomas. The Lackawanna MAJORITY AGREED that a subsequently convicted defendant [IS] "IN CUSTODY" pursuant to an aggravating prior conviction. See LACKAWANNA 532 at 401. Therefore without a doubt Mr. Costelon was in custody and meeting the lower Courts subject mater jurisdiction over his petition. See CALAFF v. CAPRA 2017 U.S. App. LEXIS 22107 (2nd Cir.11/06/2017) ("Calaff is in custody pursuant to a 2004 sentence that was enhanced as a result of his earlier, allegedly unconstitutional 1993 conviction; FOOT NOTE 1. Construe petition liberally to challenge sentence as enhanced by the prior conviction, and thus conclude that we have subject matter jurisdiction to here this appeal.)

Although many lower Court have successfully rebutted this argument by citing MALENG v. COOK, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). "While we have very liberally construed the "in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction." but many lower Courts misconstrue, and omit thereby circumventing the part of MALENG supra, wherein it held, that HOWEVER MALENG had "satisfied the "in custody requirement for federal habeas jurisdiction" because his § 2254 petition" [could] be read as assèrting a challenge to

[his present sentence,] as enhanced by the allegedly invalid prior conviction." Id at 4390-94. Therefore, it is permissible for a court to consider a § 2254 petition as a challenge as did Mr. Costelons to his current sentence as enhanced by an improper prior conviction, but the U.S. District Court concluded otherwise eventhough his pleadings were scribed with the above key to the "in custody" crux.

MALENG supra, and LACKAWANNA supra involved petitioner just as Mr. Costelon who were no longer "in custody" under the conviction or sentence under attack. Instead, they were seeking habeas review of EXPIRED conviction used to enhance sentence for subsequent crimes that they were serving when they filed their petition. In LACKAWANNA, 532 U.S. at 394, the Supreme Court ["REFINED the RULE of MALENG, 490 U.S at 488"]. MALENG held that a habeas petitioner does not remain in custody "under a conviction after the sentence imposed for it has fully expired, merely because" that prior conviction could be or actually was used "to enhance the sentence imposed for any subsequent crime of which he is convicted." MALENG, 490 U.S. at 492. [HOWEVER,] if a Petitioner putatively challenging an earlier conviction for which the petitioner is no longer in custody ["CAN BE READ AS ASSERTING A CHALLENGE TO" a later sentence on which he remains in custody, on the grounds that the later sentence was "ENHANCED BY THE ALLEGEDLY INVALID PRIOR CONVICTION" the petitioner "HAS SATISFIED THE 'IN CUSTODY' REQUIREMENT for federal habeas jurisdiction." Id at 439-94.] As this Court knows that MALENG left UNDECIDED the question whether the

earlier conviction itself may be subjected to challenge in the attack upon the later sentence which it was used to enhance." at 494. Nevertheless this Honorable U.S. Supreme Court answered that question in LACKAWANNA. Therefore, by following this Court's case law, regarding the Courts' "explicitly" leaving unanswered" the "question [of]... "the extent to which the [prior expired] conviction itself may be subject to challenge in the attack upon the [current] senten[ce] which it was used to enhance.' See LACKAWANNA, at 402. points to the afirmative.

LACKAWANNA supra, involved a state prisoner whose current sentence had been enhances by a prior state conviction. Whereas herein, the case at bar, by contrast, Mr. Costelon is a federal prisoner whose current sentence was enhanced by a prior state conviction that he manage to REOPEN and was GRANTED an Evidentiary hearing, and now is appealing form that hearings MISAPPLICATION OF FEDERAL LAW ruling via § 2254(d)(1). Insofar, it appears that the Rule of LACKAWANNA supra as articulated by this Court applies to allow a federal prisoner such as Mr. Costelon to challenge an expired state conviction under § 2254(d)(1).

Although Mr. Costelon is NOT able to directly challenge the predicate State Court conviction in a motion under § 2255 as proposed by the Tenth Circuit Court of Appeal Order, because of this Courts holdings in DANIELS v. UNITED STATES, 532 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001) which precludes relief. HOWEVER, this Supreme Court

has instructed that if a defendant "is successful in attacking [his] state sentence, he may then apply for REOPENING of ANY FEDERAL SENTENCE ENHANCED BY THE STATE SENTENCE." CUSTIS v. UNITED STATES, 511 U.S. 485, [497], 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). This High Court explained that "[o]ur system affords a defendant convicted in state court direct appeal, in postconviction proceedings available under state law. For example [NMRA RULE 1-060(B)], and in a petition for a writ of habeas courts brought pursuant to 28 U.S.C. § 2254." DANIELS supra., at 381. See also, JOHNSON v. UNITED STATES, 544 U.S. 295, 125 S. Ct. 1571, 1578, 161 L. Ed. 2d. 542 (2005). Wherein, this Honorable Courts Holdings in the Id., noted that a federal prisoner "could proceed under § 2255 after successful review of the prior state conviction on federal habeas under § 2254 or favorable resort to any postconviction process available under state law."

Therefore, only after a petitioner is successful in vacating a prior state court conviction through one of those above mentioned avenues, may he then apply under § 2255 to reopen his federal sentence enhanced by the vacated state conviction. This is the same exact process that Mr. Costelon was doing before the misapplication of LACKAWANNA supra., happened; baring him from accomplishing this matter as case law points out contrary to the Appeals Courts Opinion.

Similar to the petitioner in LACKAWANNA Supra., Mr, Costelon is attacking his earlier (2003) State of New Mexico conviction, although Mr. Costelon is no longer serving the .

sentence imposed by that conviction. Mr. Costelon is, however, serving the sentence for his 2011 Federal conviction, which was enhanced by the 2003 State of New Mexico prior conviction pursuant to U.S.S.G. § 4B1.1. In LACKAWANNA, this Honorable Supreme Court found this sufficient to satisfy Section 2254's "in custody" requirement. See LACKAWANNA, 532 U.S. at 401-402. Though the U.S. District Court found that Mr. Costelon was not "in custody", and the Tenth Circuit Court of Appeals agreed and affirmed.

Therefore, in continuing to decipher this LACKAWANNA enigma that lower court have created into a labyrinth by MISAPPLICATION. There is absolutely no doubt that in certain situation, such as herein, a prisoner such as Mr. Costelon CAN challenge the legality of such a former conviction by filing a petition challenging the legality of the current sentence and ASSERTING that the current sentence has been or may be unlawfully ENHANCED or LENGTHENED by the allegedly illegal prior conviction. The KEY to this is by FRAMING the claim as a challenge to the Current sentence as ENHANCED or LENGTHENED by the FORMER CONVICTION, the prisoner SATISFIES the ["IN CUSTODY"] requirement as did Mr. Costelon indeed do while drafting his Petition in this fashion.

This Courts precedent establishes that a court may consider a statue of limitations or other threshold bar the State failed to raise in answering a habeas petition. See GRANDBERRY v. GREER, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987)(exhaustion defense); DAY v. McDONOUGHT,547

U.S. 198, 202, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006)(statue of limitation defense). In particular, when the government for example the (STATE OF NEW MEXICO) "does not strategically withhold the limitations defense or choose to relinquish it and when the Petitioner is accorded a fair opportunity to present his position," a district court may "consider the defense on its own initiative and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time-barred." WOOD v. MILYARD, 566 U.S. 463, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012).

The State of New Mexico's conduct fits the description of FORFEITURE, not waiver. "Waiver is accomplished by intent, whereas "forfeiture comes about through neglect." RICHISON v. ERNESTO GRP., 634 F. 3d 1123, 1128 (10th Cir. 2011). In sum, "[a] waived claim or defense is one that a party has knowingly and intelligently relinquish; a forfeited plea is one that a party has merely failed to preserve." WOOD 566, U.S. at 447 n. 4.

In other words the Supreme Court has explained that although courts of appeals may consider, sua sponte, a forfeited argument about the timeliness of a habeas petition, "appellate courts should reserve that authority for use in exceptional cases." Id. The State of New Mexico did not make such an argument leading up to, before or during the Evidentiary hearing nor in any of the State of New Mexico Appeals after the Evidentiary Hearing. Therefore the State of

New Mexico forfeited this argument. Thus, the U.S. District Court for the District of New Mexico abused its discretion and failed to acknowledge that 28 U.S.C. § 2244(d)(1) is subject to Equitable tolling principles.

In HOLLAND v. FLORIDA, 560 U.S. 631 (2010) this Court emphasized the need for flexibility, for avoiding mechanical rules, pointing to HOLMBERG v. ARMBRECHT, 327 U.S. 392, 396, 66 S. Ct 582, 90 L. Ed 743 (1946), we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a had and fast adherence to more absolute legal reus, which, if strictly applied, threaten the evils of archaic rigidity, HAZE-ATLAS GLASS Co. v. HARTFORD-EMPIRE Co., 322 U.S. 238, 248, 64 S. Ct. 997, 88 L. Ed. 1250 (1944). The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct...particular injustice."

Hence, Mr. Costelon argues that his circumstance is one of those rare situations and asks this court to take the above into consideration in this case at bar so as to avoid a miscarriage of justice.

-THIRD QUESTION-

[3] WHETHER A CRONIC VIOLATION IS ANALOGUES TO A (GIDEON TYPE VIOLATION) THUS EQUAL TOO AND MEETING THE (LACKAWANNA EXCEPTION) AS ARTICULATED IN LACKAWANNA, 532 U.S. at 404, 121 S. Ct. at 1574. PURSUANT TO THE HOLDINGS OF AVERY v. ALABAMA,

308 U.S. 444, (1940) THUS A CRONIC VIOLATION OF CONSTRUCTIVE DENIAL OF COUNSEL IS AKIN, AS TO NOT HAVING COUNSEL APPOINTED AT ALL.

Now once meeting the "In Custody" prerequisite. A Petitioner such as Mr. Costelon come to the next level of inquires that follow § 2254(a) Statues' threshold of the "In custody" requirement of a Court's Sua Sapnte Subject Matter Jurisdiction, which is know as the GIDEON EXCEPTION.

This Honorable Supreme Court in LACKAWANNA supra, carved out an exception to its general rule. The rule applies when a habeas petitioner "can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained where there was a failure to appoint counsel in violation of the SIXTH AMENDMENT[.]" id at 404.

[Generally], the validity of a fully-expired sentence cannot be challenged by way of a petition under 28 U.S.C. § 2254. There is HOWEVER, as stated above and explained further below an exception to this "general rule" as articulated in LACKAWANNA. A § 2254 petition may be brought to "challenge an enhanced sentence on the basis that the prior conviction used to enhance the current sentence, on the narrow basis that the prior conviction used to enhance the current sentence was obtained where there was a failure to appoint counsel in the prior conviction in violation of the Sixth Amendment, as set forth in GIDEON v. WAINWRIGHT, 372 U.S. 335 83 S. Ct. 9L. Ed. 2d 799 (1963). Mr. Costelon ANALOGOUSLY argued this point in

his pleadings to the U.S. District Court but the Court did not reach this portion of argument because it dismissing his petition based on LACK of Subject Mater Jurisdiction.

To recap: as Mr. Costelon points out above, [generally,] if the petitioner's sentence has fully expired, he does not meet the "in custody" requirement. Id. at 492, 109 S. Ct. at 1926. Moreover, Mr. Costelon also points out, that Case law suggest that [HOWEVER,] when the § 2254 petition can be construed as asserting a challenge to the current sentence that was enhanced by an allegedly invalid prior conviction, a petitioner such as Mr. Costelon IS "IN CUSTODY" for purposes of federal habeas jurisdiction. Id. at 493-94, 109 S. Ct. at 1926-27: see also LACKAWANNA CNTY. DIST. ATT'Y v. COSS, 532 U.S. 394, 339-402 (concluding § 2254 petition satisfied "in custody" requirement because the earlier state conviction he normally sought to challenge had been used to calculate his sentencing range for his later state conviction) Cf. Mr. Costelons Federal Case was enhanced pursuant to the U.S.S.G. § 4B1.1. due to this Prior Conviction that Mr. Costelon manage to reopen.

Although such a § 2254 petition satisfies the "in custody" requirement, a petitioner may not collaterally attack the prior expired state conviction UNLESS the petition alleges (such as Mr. Costelon did analogously) that the prior state co nviction was obtained in violation of his [Sixth Amendment right to counsel] announced in GIDEON supra., which brings us to the above Third question for consideration that is in

disagreement among lower courts.

In LACKAWANNA supra, this Court emphasized the nature of GIDEON claims, noting that such claims had a "special status...well established in [its] case law." 532 U.S. at 404. Mr. Costelon herein respectfully brings the above question to this High Court in the efforts to not only expand on the LACKAWANNA EXCEPTION but in order to resolve this matter once and for all. This Court somewhat addressed this question almost two decades ago and since then, lower Court have been deeply divided not only on the above articulated "IN CUSTODY" issue, but moreover, mainly with respects to this Courts plurality opinion in LACKAWANNA at 406 where more than one exception to the LACKAWANNA rule exist besides a GIDEON TYPE VIOLATION.

As part of the LACKAWANNA plurality opinion, Four Justices dissented in two separate opinion Id. at 408-10 (Souter,J. and Breyer, J., dissenting). Justice Souter's dissent, in which two other Justices joined, criticized the majority on a number of grounds, but primarily disagreed with the GENERAL RULE which denied habeas review for prior convictions. Id. at 408 (incorporating his dissent in DANIELS, 532 U.S. at 387). The dissent further disagreed with the finding that the prior conviction had no adverse effect on the most recent sentence, arguing that the issue should have been remanded. Id at 408-09. Last, it criticized the majority for denying the petitioner the benefit of the rare circumstances exception. Id at 408.

As far as Mr. Costelon can determine, as him being a Pro Se laymen to the Profession of Law, There has ONLY been ONE habeas petitioner that has gained relif, thus succeded pursuant to LACKAWANNA. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded in DUBRIN v. CALIFORNIA, 720 F. 3d 1095, 1099 (9th Cir. 2013) bases on the plurality opinion. The Ninth Circuit followed the lead of the Tenth Circuit as articulated in BROOMS v. ASHCROFT, 358 F. 3d 1251 (10th Cir 2004)(explaining exceptions exist when "no channel of review is available through no fault of the petitioner"); see also McCORMICK v. KLINE, 572 F. 3d 841 (10th Cir. 2009)(dismissing because petitioner failed to first bring his "as enhanced" challenge to his sentence in state court) Cf. Mr. Costelon REOPENED his state case in order to first bring his challenge to the State Court thereby giving it a fair opportunity and is now appealing after winning an evidentiary hearing but whose ruling was contrary to Supreme Court precedent.

The Ninth, and Tenth Circuit are the only Circuits that have recognized and applied LACKAWANNA exceptions to claims for relief not based on GIDEON supra. Although excepted by the both Circuits, only the Ninth Circuits has actually held that a petitioner is ENTITLED to federal habeas relief on his challenge to a 2008 Sentence as enhanced by his 2000 conviction. See, DUBRIN v. DAVERY, 2017 U.S. Dist. LEXIS 161339 (9th Cir. August 8, 2017).

Nevertheless the Issue has been recognized but it continues to be left unresolved by panels in the Fourth in LYONS v. LEE, 316 F. 3d 528, 535 (4th Cir. 2003); see also WILSON v. FLAHERTY, 689 F. 3d 332 (4th Cir. 2012)(Wynn, J., DISSENTING), and in UNITED STATES v. CLARK, 284 F.3d 563, 567 (5th Cir. 2002). In an unpublished decision, the Sixth Circuit in FERQUERON v. STRAUB, 54 F. App'x 18, 190 (6th Cir. 2002)(explaining that he did not fall within "TWO possible exception" to LACKAWANNA because counsel had been appointed.)

In the Eleventh Circuit, an unusual case of its only kind. GREEN v. PRICE, 439 F. App'x 777 (11th Cir. 2011) the Court held that LACKAWANNA meant that a habeas petitioner could bring a GIDEON challenge to his misdemeanor conviction for sexual abuse, that let the state court to revoke his probation and sentence him to serve the 10-years suspended sentence imposed for a prior conviction for felony sexual abuse. The Court reasoned that the petitioner's "probation was revoked, and his ten-year sentence reinstated, in large part because of his new conviction" rendering it similar enough to an enhancement to come within the LACKAWANNA exception.

Bases on the courts reasoning that the alleged constitutional defect in Petitioners failure-to-register conviction-that it was premised on a prior sodomy conviction potentially invalid under LAWRENCE-was akin to the failure to appoint counsel for an indigent. Both defects, the court held, "ris[e] to the level of a jurisdictional defect" and was

free under LACKAWANNA'S exception for GIDEON violation to entertain the collateral attack on Petitioners conviction. Having concluded that it could rule on the validity of his prior conviction.

The Court accordingly held that counsel was ineffective and that the State court of Appeals' decision to the contrary was based on "an unreasonable determination of the facts in light of the evidence presented" and granted a 28 U.S.C. § 2254(d)(1).

Thereafter, the State appealed the District Courts Ruling, arguing that the Court lacked authority to entertain petitioners challenge, based petitioner GREEN'S claim that LAWRENCE voided his prior conviction was UNEXHAUSTED and the U.S. District Court erred by entertaining it. Hence, the Appeals court REVERSED see GREEN v. GEORGIA, 882 F. 3d 978 (11th Cir 2018).

Based on the aforesaid, Mr. Costelon invited this High Court to settle this matter once and for all based on the fact that it seems fair to conclude that no consensus has emerged pertaining to LACKAWANNA supra.

Therefore Mr. Costelon profoundly argues by provide the following basis for this Supreme Court to concluding that Constructive Denial of Counsel under CRONIC supra., is AKIN too, as if NOT having counsel at all even though counsel was appointed. See AVERY v. ALABAMA, 308 U.S. 444, 446 (1940) The Constitutions guarantee of Assistance of Counsel [CANNOT] be satisfied by [mere formal appointment].

In AVERY v. ALABAMA supra. This Supreme Court said: But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, COULD CONVERT THE APPOINTMENT OF COUNSEL IN TO A [SHAM] AND NOTHING MORE THAT A FORMAL COMPLIANCE WITH THE CONSTITUTION'S REQUIREMENTS THAT AN ACCUSED BE GIVEN THE ASSISTANCE OF COUNSEL.

Hence, a CRONIC violation by way of CONSTRUCTIVE DENIAL OF COUNSEL as grounded by the record in Mr. Costelons State court proceedings supports the claim that his State counsel Mr. Seitz "'ENTIRELY failing to subject the prosecution's case to meaningful adversarial testing'", therefore, as in Mr. Costelons State case "there has been a denial of the ORIGINAL MEANING OF THE SIXTH AMENDMENT right that makes the adversary process itself presumptively unreliable" Id. at 659. Therefore by analogy it is argued that this line of reasoning supports Mr. Costelons assertion that a CRONIC claim is analogous too, and thus would qualify as a GIDEON TYPE violation thereby being a LACKAWANNA exception.

Insofar, Mr. Costelon has proven the premise, and this High Court can deduce that this line of reasoning is analogous, thus the U.S. District Court can therefore address the merits of his petition based on the fact that this Court is well aware that a CRONIC violation "is reserved for situations in which counsel has entirely failed to function as the clients advocate such as in Mr. Costelons State Prior Conviction case. Thus, the record and Case Law Provided to the U.S. District Court supports Mr. Costelons assertions.

As Justice Souter, with whom Justice Blakmun and Justice Stevens best put it in there dissenting opinion in CUSTIS v. UNITED STATES, 511 U.S. 485, 128 L ed. 2d 517, 114 S. Ct. 1732 at [505, - 509] to make Mr. Costelons point:

> "The language and logic of BURGETT and TUCKER are hard to limit to claimed violations of the right, recognized in GIDEON v. WAINWRIGHT, to have a lawyer appointed if necessary. As indicated by the uniformity of lower court decisions interpreting them, see supra at 500, an n 3, 128 L. Ed. 2d, at 531, BURGETT and TUCKER are easily (if not best) read as announcing the broader principle that a sentence may not be enhanced by a conviction the defendant can show was obtained in violation of any "'specific federal right'" (or, as TUCKER put it, that a sentence may not be "found [even] impart upon misinformation of constitutional magnitude," U.S. at 447, 30 L. Ed. 2d. 592, 92 S. Ct. 589) because to do so would be to allow the underlyning right to be "denied anew" and "suffer serious erosion, "BURGETT, supra, 116, 19 L Ed. 2d. 319, 88 S. Ct. 258; See also TUCKER, supra at 449, 30 L Ed. 2d. 319, 88 S. Ct. 589. The Court's reference in both BURGETT and TUCKER to the right discussed in GIDEON is hardly surprising; that was the "specific federal right" (and the record of the conviction obtained in violation of it the "misinformation of constitutional magnitude") that the defendant before it invoked. The opinion in both cases, moreover, made it quite clear that the discussion of GIDEON [was not meant to supply a limitation]. BURGETT described GIDEON not as unique but as "illustrative of the limitations of which the Constitution placed on the state criminal procedure," and it recounted as supportive of its holding cases coerced confessions, denial of the confrontational right and [ILLEGAL SEARCH and SEIZURES] 389 U.S. at 114, 19 L. Ed. 2d. 319, 88 S. Ct.

-and TUCKER made it clear that "the real question" before the COurt was whether the defendant's sentence might have been different if the sentencing judge had known that the defendants "previous conviction had been unconstitutionally obtained," 404 U.S., at 448, 30 L Ed. 2d. 592 92 S. Ct. 589. Even if, consistently with principles of stare decisis, BURGETT and TUCKER could be read as applying only to some class of cases defined to exclude claimed violations of STRICKLAND or BOYKIN, the question whether to confine the so is not easily answered for purpose of the ASHWANDER RULE. BURGETT, and TUCKER deal directly with claimed violations of GIDEON, and distingushing for there purposes between violations of GIDEON and STRICKLAND would describe a very fine line. TO establish a violation of the Sixth Amendment under STRICKLAND, a defendant must show that "counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' 466 U.S. at 687, 80 L ed. 2d. 647, 104 S. Ct. 2052. Its is hard to see how such a defendant is any better off than one who has been denied counsel altogether, and why the conviction of such a defendant may be used for sentence enhancement if the conviction of one who has been denied counsel altogether, and why the conviction of such a defendant may be used for sentence enhancements if the conviction of one who has been denied counsel altogether may not. The Sixth Amendment guarantees no more formality of appointment, but the "ASSISTANCE" of counsel, cf. STRICKLAND, supra at 685, 686, 80 L. Ed 2d. 674, 104 S. Ct. 2052 ("Thant a person who happens to be a lawyer is present at trial alongside the accused...is NOT ENOUGH to satisfy the [SIXTH AMENDMENT]" because 'the right to counsel is the right to the effective assistance of counsel'") and whether the violation is of GIDEON or STRICKLAND, the defendant has been denied that constitutional right." Id. Dissent.

In addition Mr. Costelon point to DUBRIN Supra. at 1099, wherein, the court held that "Congress has directed federal court to dispose of habeas petitions "as law and justice require," pursuant to 28 U.S.C. § 2243, which the Supreme Court has interpreted as "an authorization to adjust the scope of the Writ in accordance with equitable and prudential consideration. DANFORTH v. MINNESOTA 552 U.S. 264, 278 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)". The LACKAWANNA Court exercised that authority by restricting the scope of the Writ when strong prudential consideration justified doing so. "But when those considerations are absent, or AT BEST PRESENT ONLY in GREATLY WEAKENED FORM" [for

Example in Mr. Costelons case]. Therefore, quoting DUBRIN supra, "we do not think it would serve the interest of law and justice to deprive a state or a [Federal prisoner] of what "may effectively be the first and only forum available for review of the prior conviction." LACKAWANNA supra, at 406; see also LONCHAR v. THOMAS, 517 U.S. 314, 324, 116 S. Ct. 1293, 132 L. Ed. 2d 440 (1996).

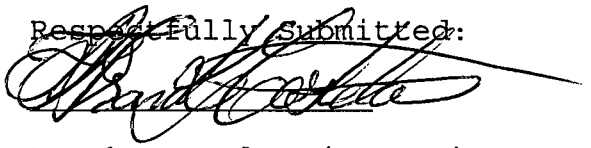
In sum, there are conflict amongst the federal Court of Appeals as pointed out above, to include conflicts between the LACKAWANNA decision of this Supreme Court decision and various Courts of Appeals. As well as conflict among different panels of a single court of appeals being the Tenth Circuit.

WHEREFORE, based on the above compelling questions and arguments regarding the fact, that for the passed 17 years LACKAWANNA has stood as the LAW OF THE LAND, inasmuch as an un-surmountable Mt. Everest, NOT due to its' high bar, but mostly due to its' MISAPPLIED holdings, more importantly the standards of review misconstrued by several lower courts form all circuits regarding the "in custody" requirement of a § 2254 in light of LACKAWANNA Exception. Thus, ONLY one Appeals Court from the Honorable Ninth Circuit granting the SOLE LACKAWANNA case across the nation.

CONCLUSION

For The foregoing reasons, Mr. Costelon respectfully prays that this Petition for Writ of Certiorari should be Granted, and/or Vacated and Remanded.

Respectfully Submitted:



Frank Costelon (PRO SE)

Reg. No. 79711-280

U.S. Penitentiary

P.O. Box 1000

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PROOF OF SERVICE

I, Frank Costelon, hereby certify that on this 27th day of JUNE, 2018, as required by the Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRITE OF CERTIORARI on each part to the above proceedings or that party's counsel and on every other person required to be served, by hand-delivering a true and correct copy of the foregoing, to the U.S. Penitentiary Prison Mailroom Staff, as provided by the (MAILBOX RULE) pursuant to HOUSTON v. LACK, 487 U.S. 266 (1988), to be U.S. Mailed by the method indicated to all counsel of record listed below, including to this Honorable U.S. Supreme Court Clerk:

(U.S. FIRST CLASS MAIL)