

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

SIR GIORGIO SANFORD CLARDY,
Petitioner,

v.

STATE OF OREGON and ELLEN
ROSENBLUM,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether Petitioner Clardy was ‘in custody’ under 28 U.S.C. §§ 2241 and 2254 when he filed his petition for habeas corpus after expiration of the sentences on the challenged convictions, where:

- a. He was constructively denied his 6th and 14th Amendment right to counsel due to conflicts with his trial counsel; and
- b. he filed his habeas petition as speedily as he could consistent with his obligation to exhaust.

2. Whether this Court should overrule *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) and hold that statutory disabilities that continue after service of Clardy’s sentence establish the “in custody” requirement under §§ 2241 and 2254.

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1. Opinions Below.

Petitioner Clardy filed a habeas corpus petition pursuant to 28 U.S.C. §2254 challenging convictions in two Oregon criminal cases. App. at 64 and 74. In its answer and response, Respondents State of Oregon and Ellen Rosenblum moved to dismiss the petition on the grounds that Clardy's sentences had expired and so he was not "in custody" for purposes of 28 U.S.C. §§2241(c) and 2254(a). App. at 58 and 61. Clardy filed a memorandum in support of his petition, but Magistrate Youlee You issued Findings and Recommendations which recommended granting the motion to dismiss. App. at 34 and 39. Clardy filed objections (App. at 21), but the District Court adopted the Findings and Recommendations, and entered a judgment dismissing Clardy's petition with prejudice and declining to issue a certificate of appealability on June 30, 2017. Order and Judgment, App. at 19 and 18; *Clardy v. State*, 2017 U.S. Dist. Lexis 104418 (D. Or. 2017).

Clardy filed a notice of appeal on July 17, 2017, and a motion for a certificate of appealability with the Ninth Circuit on August 10, 2017. App at 16 and 2. On September 22, 2017 the Ninth Circuit denied petitioner Clardy's motion for a certificate of appealability and dismissed his appeal. App. at 1.

2. Jurisdictional Statement.

The Ninth Circuit Court of Appeals entered an order denying petitioner Clardy's motion for a certificate of appealability and dismissed his appeal on

September 22, 2017. Jurisdiction is invoked under 28 U.S.C. 1254(1).

3. Constitutional and Statutory Provisions.

Clardy's habeas petition asserts that he was denied the effective assistance of counsel, in violation of the 6th Amendment and the 14th Amendments to the United States Constitution, which provide:

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel, for his defence.

U.S. Const., 6th Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of life, liberty, or property, without due process of law;....

U.S. Const., 14th Amendment.

The statutory requirement that a habeas petitioner be “in custody” appears in 28 U.S.C. §§ 2241(c)(3) and 2254(a):

- (c) The writ of habeas corpus shall not extend to a prisoner unless –
...
 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §§ 2241(c)(3).

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254(a).

The standard for issuing a certificate of appealability for habeas appeals appears in 28 U.S.C. §2253(c):

- (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. §2253(c)

4. Statement of the Case.

Before the jury arrived, the trial court held a lengthy colloquy (RT1 at 3 – 83)¹ with counsel and Clardy covering four topics: (1) Clardy’s motion for new

¹ . The transcripts in Clardy’s 2006 drug case trial, and his PCR attacking that conviction will be referred to as follows:

RT1 – 2006 drug case, trial day 1 (6/20/06) in *State v. Clardy*, Mult. ## 060231064 and 060231073 (filed as Petitioner’s Ex. B, CR 48)

RT2 – 2006 drug case, trial day 2 (6/21/06) in *State v. Clardy*, Mult. ## 060231064 and 060231073 (filed as Petitioner’s Ex. B, CR 48)

RT3 – Post Conviction trial in *Clardy v. Oregon*, Marion Co. case #09C18169 filed as Petitioner’s Ex. E, CR 48)

counsel; (2) Clardy's motion to disqualify judges; (3) Steen's motion to find Clardy unable to aid and assist; and (4) shackling. The trial transcript begins before the case is called with Clardy discussing racial slurs his lawyer Steen had uttered. RT1 at 1:5-6. The court expressed concern about proceeding safely, and Clardy objected to proceeding "because he [his lawyer Steen] doesn't do his job." *Id.* at 3:22. Clardy explained that Steen had not talked to him once about his case (*id.* at 4:20 – 22), and that there were motions he wanted filed but that Steen hadn't done them. *Id.* at 6:24. Clardy then re-asserted his motion for new counsel, reading from a letter he had written which the court ultimately filed on June 22, 2006. RT1 at 8:21 at 11:10. He argued that Steen had a conflict of interest, had called him a "dumb ass nigger"; and said "Niggers don't know the law", "You're a fucking dope dealer, not a lawyer", and "Why are you trying to be a smart ass". RT1 at 10:11 – 10:17. Clardy told the court that there was an irreconcilable conflict, and that he was concerned he wouldn't get a fair trial. RT1 at 10:24 – 11:10. The court told him that "You don't get to hand pick your lawyer. You can't threaten them ... and file Bar complaints, and then say because you have a Bar complaint --." The court then denied Clardy's substitution motion. RT1 at 12:21 – 14:5.

A later portion of the colloquy concerning Clardy's motions to disqualify Judges Janice R. Wilson (who heard motions in the case) and Merri Souther Wyatt

(who presided over the trial) shows Steen actively working against Clardy's wishes and interests. The division surfaced during a discussion of an aid and assist evaluation which Steen had requested (RT1 at 22:20 – 22:24), with Steen saying "And, Mr. Clardy, you will be interested to know that just filing a frivolous bar complaint against me is not grounds to have me withdrawn." RT1 at 23:9 – 23:11. The court then sent Clardy out and continued with just counsel. RT1 at 38:12. Steen argued against Clardy's interests, saying that his "conduct over the last three months has been threatening throughout", that he believed Clardy was trying to manipulate the system, and that he did not feel comfortable sitting next to Clardy. RT1 at 43:3 – 43:15. Steen asked the court to find Clardy unable to aid and assist pursuant to ORS 161.360 and ORS 161.365. *Id.* at 43:17 – 43:22.

With Clardy absent, the Court asked "What about the motion to disqualify? Isn't he entitled to one?" RT1 at 46:23 – 48:25. The Court suggested that Steen could file a motion, saying 'my client feels he can't have a fair trial.' Steen argued against Clardy's interests again, saying "He's just like an attorney if he's going *pro se*. He has to have a good faith basis, and I say 'No.'" RT1 at 48:20 – 48:22. Apparently feeling that Steen had gone too far, Deputy District Attorney Baptista warned "We're still on, just so you know, the record. Okay." RT1 at 48:24 – 48:25.

The state argued for a trial *in absentia* pursuant to *State v. Harris*, 291 Or. 179, 630 P.2d 332 (1981). RT1 at 50:6. After Steen said that he felt he wouldn't be able to concentrate out of concern that he would be clobbered, the court suggested having deputies sitting between him and Clardy, and Steen assented to that arrangement. RT1 at 52:2 – 52:10. At that point, the state urged the court to take up the issue of arm shackles, and expressed concerns about finding a way to conceal them from the jury. RT1 at 53:5 – 53:22. Steen argued against Clardy's interests once more, saying it was moot whether the jury saw the shackles "in this case with the deputies sitting there and two other deputies sitting there" (RT1 at 53:23 – 54:2), and saying "No, but they know that he's in custody." *Id.* at 54:5 – 54:6.

The conflict between Clardy and his trial lawyer led to the ineffective assistance of counsel claims raised in his petition:

a. Counsel failed to present exculpatory evidence.

This claim appears in the habeas petition (CR 2) at p. 2, ¶ E.7(1), and was raised in Clardy's post-conviction petition at p.4, ¶12(1). Clardy asked Steen to collect and present store surveillance video to show that he was not involved in the deliveries and he failed to do so. RT3 at 33:19 – 37:10.

b. Counsel failed to locate, interview and call favorable witnesses.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(2), and was

raised in Clardy's post-conviction petition at p. 5, ¶12(2). On the second day of trial, Clardy asked Steen to call Houston and Officer Dale to testify. Steen did not have them under subpoena, and did not call them. RT2 at 208:16 – 209:17. Based on jail conversations, Clardy expected that Houston would have testified that Clardy did not deliver drugs, and that spotting Officer Dale would have testified that he didn't see the transaction. RT3 at 35:2 – 37:8. There is no dispute that Steen failed to place these witnesses under subpoena.

c. Counsel failed to keep Clardy reasonably informed about the status of his case.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(3), and was raised in Clardy's post-conviction petition at p. 5, ¶12(3). Clardy testified at his post-conviction trial that Steen was on his case for four months and the only time Clardy saw him was during court appearances, and then an hour the day before trial. Clardy attempted to call Steen multiple times, and multiple messages went unreturned. RT3 at 37:15 – 38:22. It affected the case at the very least by aggravating the relationship between Clardy and Steen. RT3 at 38:23 – 39:4.

d. Counsel failed to file any motions on Clardy's behalf, including those Clardy specifically requested.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(4), and was raised in Clardy's post-conviction petition at p. 5, ¶12(4). Clardy testified at his post-conviction trial that Steen did not pursue a motion for release on speedy trial

grounds, and failed to file a motion to suppress. RT3 at 39:7 – 39:21; and 40:10 – 40:20.

e. Counsel failed to maintain attorney-client confidentiality when he discussed their conflicts over the telephone with two Multnomah County Sheriff's sergeants.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(5), and was raised in Clardy's post-conviction petition at p. 5, ¶12(5). Clardy testified at his post-conviction trial that Steen shared confidential attorney client communications with sheriff's officers. RT3 at 40:22 – 41:9.

f. Counsel failed to adequately argue that Clardy did not hand the informant any drugs.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(6), and was raised in Clardy's post-conviction petition at p. 5, ¶12(7). Clardy testified at his post-conviction trial that his lawyer failed to adequately challenge the informant's testimony about Clardy handing over drugs, in particular by failing to call spotting Officer Dale.

g. Counsel failed to adequately challenge the testimony of the informant and the police procedures used to make a controlled buy.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(7), and was raised in Clardy's post-conviction petition at p. 5, ¶12(6). Clardy testified at his post-conviction trial that his lawyer didn't effectively explore the amount of money

that the informant made or the extent of the informant's drug dependence. RT3 at 41:14 - 42:19.

h. Counsel failed to request the proper jury instructions regarding witness testimony (UCrJI 1016, 1024).

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(8), and was raised in Clardy's post-conviction petition at p. 5, ¶12(8). While it appears that the state requested and the court gave the listed instructions, Clardy testified at his post-conviction trial that his concern here is with not being adequately prepared to testify. RT3 at 43:17 - 44:8.

i. Counsel failed to obtain an independent drug test on the alleged drugs despite Clardy's repeated requests.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(9), and was raised in Clardy's post-conviction petition at p. 5, ¶12(9). Steen's failure to test the drugs, even though specifically requested to do so, not only shows the complete breakdown in the lawyer client relationship, it allowed the state to get its case to the jury without being put to the proof.

j. Counsel failed to challenge the eyewitness identification of Clardy.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(10), and was raised in Clardy's post-conviction petition at p. 5, ¶12(10). By this claim, Clardy foreshadowed the Oregon Supreme Court decision in *State v. Lawson*, 352 Or. 724,

291 P.3d 673 (2012), holding that the trial court has a duty to determine the reliability of eyewitness evidence when challenged by the defense. Consistent with his complete disregard for Clardy's other requests, Steen did not challenge the police and informant testimony identifying him.

k. Counsel failed to ensure that he was available to Clardy during trial for advice and to answer questions by asking to have a sheriff's deputy sit between counsel and Clardy.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(11), and was raised in Clardy's post-conviction petition at p. 5, ¶12(11). In one of several instances where Steen argued against Clardy's interests, he told the trial court that Clardy's "conduct over the last three months has been threatening throughout", that Steen believed Clardy was trying to manipulate the system, and that he did not feel comfortable sitting next to Clardy. RT1 at 43:3 – 43:15. After Steen said that he felt he wouldn't be able to concentrate out of concern that he would be clobbered, the court suggested having deputies sit between him and Clardy. Steen then assented to that arrangement over Clardy's objection. RT1 at 52:2 – 52:10. Ultimately, Clardy sat through trial separated from his counsel by a deputy sitting between them at counsel table.

l. Counsel failed to prepare Clardy to testify at trial.

This claim appears in the habeas petition (CR 2) at p. 3, ¶E.7(12), and was

raised in Clardy's post-conviction petition at p. 5, ¶12(12). Clardy testified during his post-conviction trial that he never had a chance to fully discuss with Steen whether he should testify. RT3 at 46:15 – 47:14.

5. Reasons for Granting the Writ.

The Court should grant Clardy's petition for a writ of certiorari and reverse the Ninth Circuit's order denying a certificate of appealability because Clardy was in custody for three reasons:

- (a). Clardy was constructively denied his 6th and 14th Amendment right to counsel due to the conflict he had with trial counsel;
- (b). Clardy fits within an exception to the *Maleng* 'in custody' rule announced in *Lackawanna County District Atty. v. Coss*, 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) because he filed his habeas petition as speedily as he could; and
- (c). *Maleng* was wrongly decided: this Court should overrule it and find that Clardy was "in custody" when he filed his petition due to the identifiable, statutory disabilities he suffers as a consequence of the convictions.

(a). Clardy Was Constructively Denied His 6th and 14th Amendment Right to Counsel Due to The Conflict He Had With Trial Counsel.

(i). The *Lackawanna County v. Coss* Avenues For Challenging Convictions With Fully Expired Sentences.

Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) held that a §2254 petitioner who challenges a conviction on which the sentence is fully expired is not "in custody" for purposes of 28 U.S.C. §§2241(c) and 2254(a) as to

the fully expired prior sentence, but may be in custody on a current sentence if the challenged fully expired sentence was used to enhance the current sentence. *Id.* at 493. *Maleng* left open the question of the extent to which such a §2254 petitioner can challenge the fully expired sentence. *Id.* at 494 (“[w]e express no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack on the 1978 sentence which it was used to enhance.”)

The Court addressed that question in *Lackawanna County District Atty. v. Coss*, 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001), holding that such a challenge is limited to cases where the petitioner can show either (a) a *Gideon*² error; or (b) that the instant §2254 action is the first and only forum in which the petitioner could raise the error. *Id.* at 404 – 06; *see also Daniels v. United States*, 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) (same rule for §2255 motions) and *Christensen v. Kroger*, 472 Fed. Appx. 562, 2012 U.S. App. Lexis 6003 (2012) (finding no jurisdiction).

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² *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) (6th and 14th amendment guarantee the criminally accused the right to counsel).

(ii). Clardy Fits Within the Lackawanna County Avenue for Gideon Attacks On Fully Expired Sentences Because The Conflict of Interest Between Clardy and His Lawyer In the 2006 Drug Cases, and the Trial Court's Denial of Clardy's Motion To Substitute Counsel, Amounted to a Denial of the Right To Counsel.

The Sixth Amendment right to counsel contemplates counsel free from conflict. *Holloway v. Arkansas*, 435 U.S. 475, 99 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (reversal automatic where court denied motion for appointment of substitute counsel filed by lawyer the court had appointed to represent three co-defendants alleging conflicting interests). Where irreconcilable differences create an actual conflict of interest, the petitioner need only demonstrate that some effect on counsel's handling of particular aspects of the trial was likely, and prejudice is presumed. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998); *Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994) (lawyer's racial epithets against client, if proven, would establish irreconcilable differences in lawyer-client relationship). More recently, in *United States v. Velasquez*, 855 F.3d 1021 (9th Cir. 2017), the Ninth Circuit recognized that denial of a criminal defendant's motion for new counsel without an adequate hearing amounted to a constructive denial of the right to counsel. The court wrote:

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel." *Daniels v.*

Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 779 (9th Cir. 2001)). “A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete denial of counsel.” *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998); see also *Perry v. Leeke*, 488 U.S. 272, 280 (1989) (“‘[A]ctual or constructive denial of the assistance of counsel altogether’ is not subject to . . . prejudice analysis.” (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984))).

Velasquez, 855 F.3d at 1033 – 34.

Such a breakdown occurred here. Clardy’s lawyer failed to meet with him on a regular basis, refused to take his calls, abused him when they did meet, belittled him and advocated against his interests when in court, and failed to perform fundamental functions of a defense lawyer. In these circumstances, Clardy didn’t have a lawyer – he had a second prosecutor. The situation was the functional equivalent of no lawyer at all, and so the Court should find that Clardy fits within *Lackawanna County*’s jurisdictional exception for *Gideon* errors.

(b). Clardy Fits Within A Second *Lackawanna v. Coss* Exception Because He Filed His Petition As Speedily As He Could.

In *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013), Dubrin entered a plea to making threats in violation of California Penal Code §422 in 2000. The day before entering his plea, California voters adopted a proposition designating additional crimes as strikes, so during the plea colloquy Dubrin discussed whether his §422 conviction would count as a strike. Dubrin’s lawyer, the prosecutor and

the judge all agreed that the plea to a violation of §422 would not count as a strike. Dubrin later learned that the §422 conviction would count as a strike, so he filed state habeas petitions in 2004 and 2005, all of which were denied. In 2008, a jury convicted Dubrin of several felonies and he was given a 25 year mandatory minimum three strikes sentence, with the 2000 conviction counting as a strike. In 2010 Dubrin filed a federal habeas petition challenging the constitutional validity of his 2000 conviction.

Relying on a suggestion from a three judge plurality in *Lackawanna County* that federal review of an expired sentence might be warranted when the petitioner cannot be “faulted for failing to obtain timely review of a constitutional claim” (*Lackawanna County*, 532 U.S. at 405), the Ninth Circuit rejected the state’s argument that Dubrin was not in custody and held that

when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under §2254 on the grounds that the prior conviction was unconstitutionally obtained.

Dubrin, 720 F.3d at 1099.

Here, Clardy acted as speedily as he could. He even filed his federal habeas petition before the appellate judgment denying his post-conviction petition became final. He couldn’t file any earlier without being accused of failing to exhaust his state court remedies. The lack of any indication in *Maleng*, *Daniels* and

Lackawanna County that the petitioners acted diligently to prosecute their claims make the Court's concern about respect for the finality of judgments, and avoiding an end run around statutes of limitation, rational. Promoting that interest here where Clardy can't be faulted for filing when he did would be irrational. The same is true of the ease of administration rationale, which rested in part on concerns that older transcripts will become unavailable (*Daniels*, 532 U.S. at 378) – here, the complete record of Clardy's 2006 drug convictions is available. Perversely, the *Maleng / Daniels / Lackawanna County* rule will serve to make unconstitutional shorter state court sentences unreviewable under 28 USC 2254. For these reasons, the Court here should find that Clardy is in custody pursuant to *Dubrin*.

(c). *Maleng* Was Wrongly Decided: This Court Should Find That Clardy Was “In Custody” When He Filed His Petition Due To The Identifiable, Statutory Disabilities His Convictions Impose.

Clardy urges the Court to find that his 2006 drug convictions continue to impose identifiable statutory collateral consequences that warrant a finding that he is “in custody” even though the sentences on the 2006 drug cases have expired. In this regard, Clardy urges the court to find that *Maleng* is not well reasoned to the extent that it holds that a person is not “in custody” in regard to a conviction once the sentence on that conviction has expired.

The statutory collateral consequences Oregon imposes on felons include loss of the right to hold public and political party offices, the right to hold a position of private trust, to act as a juror, or to exercise the right to vote (ORS 137.281(3)); and prohibition on the possession of a firearm (ORS 166.250(1)(c)(C), 18 U.S.C. §924(g)). A felony conviction may also be considered in determining the fitness of a person to receive or hold a professional license (ORS 670.280).

A long line of cases holds that extraordinary writs are available to persons suffering restraints on liberty not shared by the public generally. *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1962) (finding a person on parole is in custody, the Court wrote “[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.” *Id.* at 240.) In *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed.2d 248 (1954) the Court took into account that “civil rights may be affected” when deciding to find jurisdiction over a petition for a writ of *coram nobis* challenging an uncounseled conviction on which the sentence had expired (“[a]lthough the term has been served, the results of the conviction may persist.... civil rights may be affected.” *Id.* at 513.) *Carafas v. Lavalley*, 391 U.S. 234, 88 S.Ct. 1556, 20

L.Ed.2d 554 (1968) recognized the significance of statutory disabilities flowing from an expired sentence:

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*, 329 U.S. 211, 222 (1946). On account of these "collateral consequences," the case is not moot. *Ginsberg v. New York*, 390 U.S. 629, 633-634, n. 2 (1968); *Fiswick v. United States*, *supra*, at 222, n. 10; *United States v. Morgan*, 346 U.S. 502, 512-513 (1954).

Carafas, 391 U.S. at 237-38 (footnotes omitted). *See also*, *Hensley v. Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (finding the petitioner to be in custody when released on his own recognizance); *Sibron v. New York*, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968) (finding a direct appeal from the highest state court not mooted by the expiration of Sibron's sentence because there was no way for him to bring the case to the Supreme Court before expiration of his sentence, and because New York law exposed Sibron to impeachment if he later testified - "a clear legal disability deliberately and specifically imposed by the legislature." *Id.* at 56 n16.); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 540 (1985) (even though sentence ended some collateral consequences remain, including possibility conviction would be used to impeach. *Id.* at 391 n4).

Clardy recognizes that this Court draws a distinction between what constitutes being “in custody” for purposes of the habeas statutes, and the collateral consequences that may keep a case concerning a criminal conviction from becoming moot for purposes of Article III, section 2’s case or controversy clause. In *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), this Court found that a habeas petitioner challenging a parole revocation met the statutory “in custody” requirement because he filed his petition while still in custody, but the court dismissed the case as moot. It surveyed a line of cases leading to a presumption that collateral consequences keep challenges to criminal convictions from becoming moot (*id.* at 10-11), but the Court refused to extend that same presumption to Spencer’s parole revocation. *Id.* at 14. The Court should overrule *Maleng* and should find that statutorily defined collateral consequences of a conviction render a person “in custody” for purposes of the habeas statutes.

6. Conclusion.

This Court should reverse the Ninth Circuit’s order denying Clardy’s motion for a certificate of appealability on the grounds that Clardy has established that he was “in custody” for purposes of 28 U.S.C. §2241(c) and 2254(a) when he filed his petition. First, because the relationship between Clardy and his trial counsel had so completely broken down, the trial court’s denial of his motion for new counsel constructively denied Clardy his right to counsel under the 6th and 14th

Amendments and so fits within the *Lackawanna* exception to *Maleng*'s custody rule for *Gideon* errors. Second, Clardy filed his habeas petition as speedily as he could and so he should be considered "in custody" pursuant to *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013). Finally, the Court should overrule *Maleng* and should hold that a person suffering identifiable statutory collateral consequences is "in custody" for purposes of the habeas statutes.

DATE: December 21, 2017

JAMES F. HALLEY, P.C.

/s/ James F. Halley

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