

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

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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

SIRGIORGIO SANFORD CLARDY,

Petitioner-Appellant,

v.

STATE OF OREGON and ELLEN
ROSENBLUM,

Respondents-Appellees.

No. 17-35594

D.C. No. 2:15-cv-00412-YY
District of Oregon,
Pendleton

ORDER

Before: CHRISTEN and OWENS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

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UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

SIRGIORGIO CLARDY,

Petitioner,

vs.

STATE OF OREGON, et al.,

Respondents.

USCA 17-35594

APPELLANT SIRGIORGIO SANFORD
 CLARDY'S MOTION FOR A
 CERTIFICATE OF APPEALABILITY

Comes now petitioner/appellant Sirgiorgio Sanford Clardy, by and through counsel James F. Halley, and moves for a certificate of appealability pursuant to FRAP 22 and 28 U.S.C. §2253(c). The state moved to dismiss Clardy's §2254 petition under *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) on the grounds that Clardy's challenged 2006 drug convictions expired before he filed his federal habeas petition, and so he was not "in custody" as required by 28 U.S.C. §2241(c) and 2254(a). State's Response to Petition for Writ of Habeas Corpus, CR 26. In an order entered on July 6, 2017, the District Court granted that motion and dismissed Clardy's habeas petition. CR 83.

This Court should issue a certificate of appealability because Clardy makes more than a substantial showing that he was "in custody" for purposes of 28 U.S.C. §2241(c)

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 MOTION FOR A CERTIFICATE OF APPEALABILITY

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and 2254(a) for the following reasons:

1. Clardy was constructively denied his 6th and 14th Amendment right to counsel in the underlying prosecution due to conflicts with his trial counsel;

2. 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) and recognized in *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013) because he filed his habeas petition as speedily as he could; and

3. *Maleng*, *Lackawanna County*, and *Daniels v. United States*, 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) were wrongly decided: the Supreme Court should ultimately find that Clardy is “in custody” as to his challenged 2006 drug convictions due to the identifiable, statutory disabilities he suffers as a consequence of the convictions.

II. ARGUMENT

1. Mr. Clardy Fits Within The *Gideon* Error Exception to *Maleng v. Cook* As Announced in *Lackawanna County District Atty. v. Coss*, 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001).

A. 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*,

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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*¹ 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).

Here, Clardy fits within the *Gideon* error exception recognized in *Lackawanna County* due to the conflict of interest that existed between him and his counsel.

B. 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*, USCA 9th Cir. Docket no. 14-10311, 2017 U.S. App. LEXIS 7674 (9th Cir. May 1, 2017), the Ninth Circuit recognized that denial of a criminal defendant's motion for new counsel

¹ *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).

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))).

Such a breakdown occurred here. Before the jury arrived, the trial court held a lengthy colloquy (RT1 at 3 – 83)² with counsel and Clardy covering four topics: (1) Clardy’s motion for new 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

² . The transcripts in Clardy’s 2006 drug case trial, 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)

– 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 Clardy 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 (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 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 the sheriff's deputies. 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 (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.

I. 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.

In these circumstances, Clardy did not have an advocate – he had another adversary. 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.

2. Clardy Fits Within A Second *Lackawanna v. Coss* Exception Recognized In *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013) 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*.

3. *Maleng, Lackawanna County, and Daniels* Were Wrongly Decided: This Court Should Find That Clardy Is “In Custody” As To His Challenged 2006 Drug Convictions Due To The Identifiable, Statutory Disabilities The Convictions Will 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, Daniels, and Lackawanna County* are not well reasoned to the extent that they hold 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. Lavallee*, 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 the Supreme 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), the Supreme 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. Although Clardy recognizes that this court may not overrule *Maleng, Daniels, and Lackawanna County*, he wishes to preserve an argument that the Supreme Court should do so. This court should find that statutorily defined collateral consequences of a conviction render a person “in custody” for purposes of the habeas statutes.

III. CONCLUSION.

Clardy has made more than a substantial showing that he was “in custody” for purposes of 28 U.S.C. §2241(c) and 2254(a) when he filed his 2254 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’s right to counsel under the 6th and 14th Amendments. 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 Supreme Court should overrule *Maleng, Daniels and Lackawanna County* and should hold that a person suffering identifiable statutory collateral consequences is “in custody” for purposes of the habeas statutes.

Once the court has found Clardy to be in custody, it should grant his habeas petition for the reasons set forth in the memorandum filed in support of his petition. CR 47 and 48.

Date: August 10, 2017

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/s James F. Halley

James F. Halley, OSB 911757

Attorney for Petitioner Sirgiorgio Clardy

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on (date) , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on (date) , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature

Print Name: Sir Giorgio Sanford Clardy
Sid # 15778879
Oregon State Penitentiary
2605 State Street, NE
Salem OR 97310

FILED 17 JUL '17 10:46 USDC-ORP

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,
Petitioner,
vs.
STATE OF OREGON, et al.,
Respondents.

File Number 2:15-cv-00412-YY

NOTICE OF APPEAL

Notice is hereby given that Sir Giorgio Sanford Clardy,
in the above named case, hereby appeal to the United States Court of Appeals for the Ninth
Circuit from the [final Judgment] [from an Order {describe it: _____}] entered
in this action on the 6th day of June, 2017.

Dated this 13th day of July, 20 17.

Respectfully Submitted,

Sir Giorgio Sanford Clardy
(Signature)
Print Name: Sir Giorgio Sanford Clardy
Sid # 15778879
Oregon State Penitentiary
2605 State Street, NE
Salem OR 97310

CERTIFICATE OF SERVICE

CASE NAME: Clardy v. State of Oregon, et al

CASE NUMBER: (if known) USDC No. 2:15-CV-00412-YY

COMES NOW, Sir Giorgio Sanford Clardy, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at the Oregon State Penitentiary

That on the 13th day of July, 20 17, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

"Notice of Appeal"

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Clerk of the Court
1000 S.W. Third Avenue, suite 740
Portland OR 97204

James F. Hallay - Atty At Law
735 S.W. First Avenue, Second Floor
Portland Oregon 97204-3326

James M. Aaron - Asst Atty General
1162 Court Street, NE
Salem OR 97310

Sir Giorgio Sanford Clardy
(Signature)

Print Name Sir Giorgio Sanford Clardy
S.I.D. No.: 15770079
2605 State Street NE
Salem OR 97310

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

SIR GIORGIO SANFORD CLARDY,

2:15-cv-00412-YY

Petitioner,

JUDGMENT

v.

STATE OF OREGON, et al.,

Respondents.

Based on the Court's Order issued June 30, 2017, the Court **DISMISSES** this matter **with prejudice** and **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 30th day of June, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

2:15-cv-00412-YY

Petitioner,

ORDER

v.

STATE OF OREGON, et al.,

Respondents.

BROWN, Judge.

Magistrate Judge Youlee Yim You issued Findings and Recommendation (#53) on November 14, 2016, in which she recommends the Court deny Petitioner Sir Georgio Sanford Clardy's Petition (#2) for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, enter a judgment dismissing this matter with prejudice, and decline to issue a certificate of appealability. On May 23, 2017, Petitioner, through counsel, filed timely Objections to the Findings and Recommendation. On June 1, 2017, Petitioner also filed *pro se* Objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*).

This Court has carefully considered Petitioner's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court **ADOPTS** Magistrate Judge You's Findings and Recommendation (#53) and, therefore, **DENIES** the Petition (#2) for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, **DISMISSES** this matter **with prejudice**, and **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 30th day of June, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIRGIORGIO CLARDY,

Petitioner,

vs.

STATE OF OREGON, et al.,

Respondents.

No. 2:15-cv-00412-BR

PETITIONER SIRGIORGIO CLARDY'S
OBJECTIONS TO FINDINGS AND
RECOMMENDATIONS

I. INTRODUCTION.

Comes now petitioner Sirgiorgio Sanford Clardy, by and through counsel James F. Halley, and objects to the Findings and Recommendations (CR 53). The State moved to dismiss Clardy's petition on jurisdictional grounds pursuant to *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), asserting that the sentences in Clardy's challenged 2006 drug convictions expired before he filed his federal habeas petition, and so he was not "in custody" as required by 28 U.S.C. §2241(c) and 2254(a). State's Response to Petition for Writ of Habeas Corpus, CR 26. The Findings and Recommendations agreed, and recommended that the Court dismiss the petition. The Court should deny the State's motion and reject the findings and recommendations for three reasons:

1. Clardy was constructively denied his 6th and 14th Amendment right to counsel due to the conflict between him and his trial counsel;

2. 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) and recognized in *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013) because he filed his habeas petition as speedily as he could; and

3. *Maleng*, *Lackawanna County*, and *Daniels* were wrongly decided: the Supreme Court should ultimately find that Clardy is “in custody” as to his challenged 2006 drug convictions due to the identifiable, statutory disabilities he suffers as a consequence of the convictions.

Once the court has found Clardy to be in custody, it should grant his habeas petition for the reasons set forth in the memorandum filed in support of his petition. CR 47 and 48.

II. ARGUMENT

1. Mr. Clardy Fits Within The *Gideon* Error Exception to *Maleng v. Cook* As Announced in *Lackawanna County District Atty. v. Coss*, 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001).

A. 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*¹ 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).

Here, Clardy fits within the *Gideon* error exception recognized in *Lackawanna County* due to the conflict of interest that existed between him and his counsel.

B. 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*, USCA 9th Cir. Docket no. 14-10311, 2017 U.S. App. LEXIS 7674 (9th Cir. May 1, 2017), the Ninth Circuit recognized that denial of a criminal defendant's motion for new counsel

¹ *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).

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))).

Such a breakdown occurred here. Before the jury arrived, the trial court held a lengthy colloquy (RT1 at 3 – 83)² with counsel and Clardy covering four topics: (1) Clardy’s motion for new 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

² . The transcripts in Clardy’s 2006 drug case trial, 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)

– 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 Clardy was concerned he wouldn't get a fair trial. RT1 at 10:24 – 11:10. The court told Clardy 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 (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 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 (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.

I. 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.

In these circumstances, Clardy did not have an advocate – he had another adversary. 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.

2. Clardy Fits Within A Second *Lackawanna v. Coss* Exception Recognized In *Dubrin v. California*, 720 F.3d 1095 (9th Cir. 2013) 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*.

3. *Maleng, Lackawanna County, and Daniels* Were Wrongly Decided: This Court Should Find That Clardy Is “In Custody” As To His Challenged 2006 Drug Convictions Due To The Identifiable, Statutory Disabilities The Convictions Will 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, Daniels, and Lackawanna County* are not well reasoned to the extent that they hold 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. Lavallee*, 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 the Supreme 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), the Supreme 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. Although Clardy recognizes that this court may not overrule *Maleng, Daniels, and Lackawanna County*, he wishes to preserve an argument that the Supreme Court should do so, and should find that statutorily defined collateral consequences of a conviction render a person "in custody" for purposes of the habeas statutes.

III. CONCLUSION.

This Court should find that Clardy is "in custody" for purposes of 28 U.S.C. §2241(c) and 2254(a) for three reasons. 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. 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 Supreme Court should overrule *Maleng, Daniels and Lackawanna County* and should hold that a person suffering identifiable statutory collateral consequences is "in custody" for purposes of the habeas statutes.

Once the court has found Clardy to be in custody, it should grant his habeas petition for the reasons set forth in the memorandum filed in support of his petition. CR 47 and 48.

Date: May 23, 2017

JAMES F. HALLEY, PC

/s James F. Halley

James F. Halley, OSB 911757

Attorney for Petitioner Sirgiorgio Clardy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,
Petitioner,

Case No. 2:15-cv-00412-YY

FINDINGS AND RECOMMENDATION

v.

STATE OF OREGON, et al.,
Respondents.

YOU, Magistrate Judge.

On April 3, 2015, petitioner filed this 28 U.S.C. § 2254 habeas corpus case challenging four August 2006 drug convictions from Multnomah County. Respondent asks the court to dismiss the Petition on the basis that petitioner was not in custody pursuant to those convictions at the time he filed this action.

DISCUSSION

Federal habeas corpus law permits prisoners to challenge the validity of convictions under which they are "in custody."

Garlotte v. Fordice, 515 U.S. 39, 43-44 (1995); *Feldman v. Perrill*, 902 F.2d 1445, 1446 (9th Cir. 1990); *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994). The habeas corpus remedy is an extraordinary one which is not intended to be used "for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Once a habeas petitioner's sentence has expired, "some concrete and continuing injury other than the now-ended incarceration or parole--some 'collateral consequence' of the conviction--must exist if the suit is to be maintained." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). The custody requirement must be satisfied at the time the petition is filed. *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989); *Feldman*, 902 F.2d at 1448.

Respondent asserts that the sentences for the convictions at issue in this case expired completely on March 13, 2010. He argues that where petitioner did not file this case until April 3, 2015, he was not in custody pursuant to those convictions such that habeas relief is unavailable to him. Petitioner does not disagree with this characterization, but claims that he should be excused from the custody requirement due to excessive judicial delay in Oregon's state courts. The entirety of his argument on this point reads:

The state moves to dismiss the petition on the grounds that Clardy's sentence expired after he had filed his petition, relying on *Maleng v. Cook*, 490 U.S. 488, 489-90 (1989). Clardy urges the court to deny that motion on the grounds that an unreasonable delay occurred in his appeal and post conviction processes for which he should not be penalized.

Memo in Support (#47), p. 12.

Although excessive appellate delay may excuse a habeas petitioner from exhausting his state court remedies, *Coe v. Thurmond*, 922 F.2d 528, 530 (9th Cir. 1990), petitioner provides no authority for the proposition that state-court appellate delay excuses the custody requirement. Even assuming the custody requirement could be excused in this manner, it is not possible from the limited record before the court to conclude that petitioner was not the cause of at least some of the delay he claims to have experienced. The court can only ascertain that: (1) petitioner was convicted in August 2006, and his direct appeal became final 29 months later when the Oregon Supreme Court denied review on January 13, 2009; and (2) petitioner filed for post-conviction relief on July 29, 2009, a process that ended when the Oregon Supreme Court again denied review on February 5, 2015. *State v. Clardy*, 345 Or. 618 (2009); *Clardy v. State*, 356 Or. 689 (2015).

From this procedural history, there is no indication that petitioner experienced any unreasonable delay during his direct review. His post-conviction trial and subsequent appeals did take more than five years to complete but such a delay, even if excessive, was not the cause of his inability to meet the custody requirement where petitioner left custody only eight months into his post-conviction proceedings. Accordingly, any delay he may have experienced in his post-conviction proceedings is not germane to the custody issue. The Petition for Writ of Habeas Corpus should therefore be dismissed.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#2) should be dismissed, and a judgment should be entered dismissing this case with prejudice. The court should decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 14th day of November, 2016.

/s/Youlee Yim You_____
Youlee Yim You
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIRGIORGIO CLARDY,

Petitioner,

vs.

STATE OF OREGON, et. al.,

Respondents.

No. 2:15-cv-00412-ST

MEMORANDUM IN SUPPORT OF
HABEAS PETITION

Comes now petitioner Sirgiorgio Sanford Clardy, by and through counsel James F. Halley, and submits the following memorandum of points and authorities supporting his petition for a writ of habeas corpus.

I. INTRODUCTION.

The state prosecuted Clardy in regard to two undercover drug buys, one on December 9, 2005 and the other on December 16, 2005. The first gave rise to *State v. Clardy*, Multnomah County Circuit Court no. 060231074, charging Mr. Clardy with delivery of cocaine (DCS2) for consideration, and possession of cocaine (PCS2). The second event gave rise to *State v. Clardy and Houston*, Multnomah County Circuit Court no. 060231064, charging Mr. Clardy with DCS2 and PCS2.

Before a joint trial on the two indictments, Clardy moved for substitution of

counsel on the grounds that his relationship with Jason Steen had broken down. The court denied that motion. The dysfunction carried through to trial, so much so that Steen asked the court to shackle Clardy during the trial. The jury convicted Clardy on all charges, and the court imposed the following sentences, all concurrent with each other:

#060231064: Ct. 2, DCS2 – 24 mos. formal probation.

Ct. 3, PCS2 – 18 mos. formal probation.

#060231074: Ct. 1, DCS2 – 18 mos. prison, 24 mos. post-prison supervision.

Ct. 2, PCS – 18 mos. formal probation.

On October 22, 2007 the court revoked the probations in both cases, imposing 6 months concurrent on each count in case #060231064 with 1 year of post-prison supervision, and 6 months consecutive in case #060231074, with two years of post-prison supervision. Supervision terminated on March 13, 2010.

Clardy pursued a direct appeal, arguing that the trial court erred when it tried Clardy before a jury in shackles, and that the trial court erred when it denied Clardy's motion for substitution of counsel. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Clardy*, 221 Or.App. 383 (2008), rev. denied 345 Or. 618 (2009).

Clardy then filed a petition for post-conviction relief on July 29, 2009 that raised the 12 allegations of ineffective assistance of counsel raised in his habeas petition. *Clardy v. State*, Marion County Circuit Court #09C18169. The PCR trial court denied relief and Clardy appealed. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Clardy v State*, 267 Ore. App. 423 (2014), rev. denied 356 Or. 689 (2015). Exs. * - *.

This memo will first outline the facts of the prosecution, and then address the issues raised in the habeas petition.

II. FACTS.

A. Motions For Substitution Of Counsel.

The state indicted Mr. Clardy in both cases on February 16, 2006, and at an arraignment on February 17, 2006 the court appointed “PDC/Walker” to represent him. On March 31, 2006 the court ordered that counsel Kvernland be relieved and on April 6, 2006 Jason Steen filed a notice of appearance with the court. Steen filed a discovery request and speedy trial demand on April 7, and on April 25, 2006 the state filed an unopposed motion to join the two cases. On May 16, 2006 the state moved for an unopposed continuance and the court set a trial date for June 5, 2006. Clardy moved for release from custody on May 18, and the court ordered that he be released to the Pretrial Services Program (PSP) if it accepted him and if Clardy’s probation officer approved. The probation officer objected to release, so PSP recommended against release.

On May 22, 2006 Clardy moved *pro se* for substitution of counsel. In his *pro se* supporting affidavit, he wrote that the attorney-client relationship had broken down. He complained that he had told Steen about motions he wanted filed and Steen wouldn’t file them; when Clardy talked about things he had learned in the law library, Steen laughed at him; that Steen never returned Clardy’s telephone calls, and that Steen never wanted to hear what Clardy had to say. On June 1, 2006 the court heard and denied Clardy’s motion for new counsel, and granted a defense request to set-over the trial from June 5 to June 13, 2006. On June 12 the court granted the state’s second unopposed motion to continue the trial, setting it for June 20, 2016.

Before the jury arrived, the court held a lengthy colloquy (RT1¹ at 3 – 83) with counsel and Clardy covering four topics: (1) Clardy’s motion for new counsel; (2)

¹ . The following abbreviations will be used to identify the transcripts:

RT1 – Trial day 1 (6/20/06) in *State v. Clardy*, Multnomah Co. case ## 060231064 and 060231073

RT2 - Trial day 2 (6/21/06) in *State v. Clardy*, Multnomah Co. case ## 060231064 and 060231073

RT3 – Post Conviction trial (*) in *Clardy v. State*, *.

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 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 Clardy was concerned he wouldn't get a fair trial. RT1 at 10:24 – 11:10. The court told Clardy 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. When Judge Souther-Wyatt denied Clardy's motion for new counsel, he moved to disqualify her, saying he believed she was "biased and prejudice[d] against me and my case because of my conduct." 13:24 – 14:5.

The discussion then turned to a mental health evaluation Steen had done. RT1 at 16:1. Regarding a statement in that evaluation that Clardy could hurt his lawyer, Clardy told the court "I said I don't know." RT1 at 20:21 – 21:4. He said that he was fine with his first lawyer, Walker, who withdrew due to a conflict (RT1 at 21:13 – 21:22), and the court then asked to hear from the lawyers. Steen asked for an aid and assist

evaluation (RT1 at 22:20 – 22:24), and the division between Steen and Clardy surfaced during that discussion, 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. 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, 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.

B. Shackling.

The issue of shackling first appears at RT1 at 2:21 when Clardy said “I'm in a courtroom with cuffs on”, and the court remarking “So we're here for a jury trial, but we need to make sure we can proceed safely.” RT1 at 3:11 – 3:12. After an initial discussion about Clardy's motion for substitute counsel, he complained “When I'm in a courtroom of law, I can't be in handcuffs, shackled.” RT1 at 14:12 – 14:13. The issue of shackling then revolved around the division between Clardy and Steen. The court told Clardy “if you behave yourself, you don't have to have them, but you're threatening people.” RT1 at 18:23 – 18:23. Clardy denied having threatened Steen: “I have not threatened him once. I said I'm not having him. That's not a threat.” RT1 at 19:3 – 19:4.

The court asked Clardy about a statement attributed to him in a psychological evaluation done at Steen's request to the effect that he “could hurt your lawyer”, and Clardy clarified “I said I don't know.” RT1 at 21:1 – 21:4. Steen later argued against Clardy's interests again, 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.

The state argued for a trial in absentia pursuant to *State v. Harris*, 291 Or. 179 (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.

Clardy then returned to the courtroom (RT1 at 55:10), and complained again “They can’t see me with handcuffs on”, and the court told him “Yes, they will.” RT1 at 57:10 – 57:11. The court remarked “You’re young ... and you’re fast ... and you’ve had a psychological, ... and you’ve been threatening....” (RT1 57:13 – 57:19), and gave Clardy the choice of attending trial shackled or being removed. RT1 58:4 – 58:7. After further discussions without incident, the court observed that it was “obvious to this court now from watching your performance that you can turn it on or off at will. So I know you can behave yourself.” RT1 at 79:8 – 79:10. Clardy told the court “I will shut it up when they come.” RT1 at 80:8. The trial proceeded with Clardy wearing shackles on his legs, a belly chain and handcuffs, and with a deputy sitting between him and his lawyer. RT1 at 14:12 – 14:13; 43:13 and 57.

C. State’s Witnesses Regarding December 9, 2005 Undercover Purchase.

Officer Sims testified that on December 9, 2005, he was with Mr. Cliff. He said

that Officer Trainer also worked as an informant handler that day. He confirmed that Mr. Cliff did not have any currency, drugs, or drug paraphernalia on his person. Officer Sims said, "I dropped [Mr. Cliff] off at 16th and Emerson and I told him to go north on 16th until he got into the parking lot of the market on Killingsworth." He observed Mr. Cliff walking northbound on 16th. One of the spotters, Officer Quackenbush, took over the observations after he saw Clardy on Killingsworth. (RT1 at 123-124).

Officer Sims testified that Mr. Cliff returned to the same location where he had been dropped off "probably 30 seconds" after Officer Sims was made aware that the hit signal had been made. Sims testified he did not observe the transaction himself. Officer Sims stated, "[Mr. Cliff] gave me an off white chunky substance that appeared to be crack cocaine based on my training and experience." (RT1 at 125). Sims put the substance in manila envelope, numbered it, and then put it in an evidence bag which was later secured in the Northeast property room. The substance was later tested by the state crime lab. (RT1 at 125-126).

On cross-examination, Officer Sims testified that on the December 9 case, Officer Quackenbush and Officer Dale worked as spotters. Sims testified that Officer Quackenbush was present for Clardy's trial, but Officer Dale was not. Relative to whether or not Officer Dale would testify or had written a report, Officer Sims stated, "Well, usually, whoever sees the transaction is the one that writes the reports." Further, Officer Sims could not testify to what Officer Dale saw. He testified Officer Dale did not write a report on the first case. (RT1 at 136-137). Upon re-direct examination, Officer Sims testified that the other officer would write a report if there was something conflicting or something unusual. (RT1 at 136).

PPB Officer James Quackenbush was the next to testify about the December 9 undercover purchase. He confirmed that it was dark outside at 7:28 p.m. He testified that he was sitting in an undercover vehicle at the corner of N.E. 16th Avenue and Killingsworth Street. (RT1 at 146). Officer Quackenbush testified that when he first saw Mr. Cliff, he observed that he was ". . . walking northbound on 16th Avenue towards the

market, towards Killingsworth.” Quackenbush also saw an individual hanging around the parking lot whom they identified later as Clardy. (RT1 at 147). Quackenbush testified that the first thing that happened was an older African American gentleman approached Mr. Cliff. Officer Quackenbush said he observed them walking to the northwest corner of the market where “. . . there were a lot of obstructions in the windows and there are old window sills sort of out on the front.” (RT1 at 148). Officer Quackenbush testified Mr. Clardy put a small object on the window sill. Quackenbush testified he could not identify exactly what it was. (RT1 at 149). He testified that the informant left, “. . . heading south the same way he had come on 16th Avenue and placed a stocking cap on his head, which was the indication . . . that a deal had been made.” Quackenbush was not able to determine if the informant handed anything to Clardy. Officer Quackenbush notified Officers Russell and Chapin that a deal had been made and that Clardy was walking toward a telephone booth. (RT1 at 149).

The State next called Officer Travis Chapin of the City of Portland. He testified that on December 9, 2005, he was working a “buy and slide” mission with Officer Sims. He was working as a uniform stop car and his role was to identify the person who had just sold drugs to the informant. (RT1 at 162). On this date, other police officers informed him that a hit had been made and that the person who had sold the drugs to the informant was wearing a black hoodie, a sweatshirt, and underneath that he wore a red t-shirt and blue jeans. Officer Chapin testified that he saw a person exactly matching the description leaning inside a car. (RT1 at 163-164). He testified that as he drove by, Clardy and the person in the car looked up at them. He testified he knew Clardy by sight and was able to confirm his identify. (RT1 at 164).

The State next called Anthony Cliff as a witness. Cliff testified that he contacted Officer Brian Sims about working for him as an informant. He wanted to remove a felony drug charge from his record because he wanted to be a fireman. He testified that he had to make three ‘reliability’ buys, and then three or four undercover buys. (RT1 at s 179-180). He testified that he got paid \$20 for each buy and normally worked Friday

and Saturday nights as a dancer normally making \$200 as a minimum and sometimes \$400 or \$500 in a four-hour shift. (RT1 at s 183-184).

Mr. Cliff testified that on December 9, 2005, he was with Officer Sims. He was dropped off at 17th and NE Killingsworth at a convenience store. (RT1 at 184). He confirmed he was searched that night and did not have any drugs or money on his person. Mr. Cliff testified that the police officers gave him \$20.00. He said that his instructions were “. . . to go to the convenience store where the drug dealers were hanging out and try to buy a \$20.00 rock of crack cocaine.” (RT1 at 186). Mr. Cliff further testified that at the convenience store, a middle aged black man took him to a younger black male wearing a dark colored hoodie pull over. Cliff testified that when he approached the middle aged man, he asked if he could get a “dub” which means a \$20.00 rock. He testified that the middle aged man brought him to the younger man. (RT1 at s 186-187). The younger man walked to the southwest corner of the market and Mr. Cliff saw him “fish out the rock” from his boxers (which were underneath his jeans) “. . . and then he set it on the little window ledge behind him.” Cliff testified that he gave the man \$20.00. (RT1 at 189). Mr. Cliff took the rock, walked back to where the officers were in the van, and gave them the hit sign. (RT1 at 189). Mr. Cliff testified that he recognized the person he had purchased drugs from on December 9, 2005, and pointed to Clardy in the courtroom. (RT2 at 226).

D. State's Witnesses Regarding December 16, 2005 Undercover Purchase.

Officer Sims testified that on December 16, 2005, he was working on the same mission. He testified that Officer Russell was an informant handler with him that night and Mr. Cliff was again the CRI. Sims testified on that date they worked at the same location, 16th and Killingsworth. He testified it was 6:48 p.m. and dark outside. (RT1 at s 127-128). He gave Mr. Cliff \$20.00 as compensation. Officer Sims did not observe the drug transaction. When Mr. Cliff returned, he handed Officer Sims an off white chunky substance that appeared to be crack cocaine. (RT1 at 130). Sims placed the substance

in an evidence bag and secured it in property room. The substance was later sent to the state crime lab. Sims' testimony reflected that the test identified the substance as cocaine. (RT1 at 131).

Officer Quackenbush said that on December 16, 2005, he was still working with Officer Sims on the "buy and slide" mission. Officer Quackenbush was working as an undercover spotter on that date. He was parked on 16th Avenue, on the north side of Killingsworth. He confirmed that the lighting was "still the same." (RT1 at 150). Officer Quackenbush testified that a person named ". . . Dwayne Houston was standing on the southwest side of the intersection, on the west side of Killingsworth south." Officer Quackenbush saw Mr. Cliff make contact with Mr. Houston. (RT1 at 151). He testified that Mr. Houston walked away from Mr. Cliff and then Mr. Houston went to the extreme end of the corner. Clardy met Mr. Houston at this particular corner. Quackenbush stated, "[Clardy] reached with his left hand and appeared to reach for the buttock area of his pants, inside of his pants, and remove something with his left hand and that to - whatever the object was to Mr. Houston in his left hand." (RT1 at 151, lines 20-23). Officer Quackenbush testified, "From my training and experience, street level drug dealers will commonly hide illegal narcotics in their anal cavities in attempt to avoid detection by law enforcement. . . ." He agreed that Petitioner's movement was consistent with that type of behavior. (RT1 at 152). Officer Quackenbush testified that Mr. Houston walked back to Mr. Cliff who was ". . . standing about 10 feet south of that location." He testified that Mr. Cliff then walked ". . . southbound again on 16th, placing the stocking cap on his head, which, again, was the hit sign." Mr. Houston had not made contact with anyone else between the time he met with Clardy and the informant, Mr. Cliff. (RT1 at 152).

During cross-examination, Officer Quackenbush testified he was initially 40 or 50 feet away from Mr. Houston when he spotted him. Quackenbush testified that Mr. Houston walked toward him to the corner, right across the street from where

Quackenbush was sitting. He estimated he was about 20 to 30 feet away. He testified that Mr. Houston walked toward him from where the CRI was positioned, which was also toward Clardy. He then gave something to Clardy. (RT1 at s 155-156). Upon re-direct examination, Officer Quackenbush testified that when Clardy pulled something from his boxer shorts, the men were standing directly beneath a street light. (RT1 at 159).

Officer Chapin further testified that on December 16, 2005, he was again working a “buy and slide” mission, this time as a spotter in civilian clothes. He observed Clardy walk northbound on the east side of 16th Avenue, approaching Killingsworth. Officer Chapin said he saw Dwayne Houston standing on the west side of the sidewalk. He saw the informant walk across the street to Mr. Houston. He watched a brief encounter and then he observed Mr. Houston walk to Killingsworth and make a brief contact with Mr. Clardy. Mr. Houston then returned for brief contact with the informant. Officer Chapin testified that he saw the informant give the hit sign. (RT1 at 166-67).

Mr. Cliff testified that on December 16, 2005, he was working as an informant again with the same officers in the same location. (RT2 at 221). Mr. Cliff testified that he got to the corner of 17th and Killingsworth and a gentleman named Dwayne contacted him. (RT2 at 221). Cliff testified that he asked Dwayne if he could get a “dub”, and that Dwayne then went over to Clardy, got it, and came back. (RT2 at 223). Mr. Cliff testified that he did not actually see Dwayne interact with Clardy. He testified that he saw Dwayne walk up to Clardy, but he did not see the exchange because Dwayne asked him to look for cops. Cliff testified Dwayne was gone from him a few seconds, and then gave him a \$20.00 rock in exchange for the money. (RT2 at 225).

During cross-examination, Mr. Cliff testified he made about 18 buys in December 2005. (RT2 at 228). He testified that he did not actually see Dwayne get anything from Clardy, and that he (Cliff) was about 20 feet from them. (RT2 at 230). The State then rested.

D. The Defense Called No Witnesses and Presented No Evidence.

At the beginning of the second day of trial, before the state finished its case, Clardy informed the trial court that he wanted to call Duane Houston and PPB Officer Dale, the co-defendant and spotter for the December 16, 2005 sale. RT2 at 208-209. After the state rested, Steen rested without calling any witnesses or presenting on any evidence. RT2 at 237.

III. THE STATE'S MOTION TO DISMISS.

The state moves to dismiss the petition on the grounds that Clardy's sentence expired after he had filed his petition, relying on *Maleng v. Cook*, 490 U.S. 488, 489-90 (1989). Clardy urges the court to deny that motion on the grounds that an unreasonable delay occurred in his appeal and post conviction processes for which he should not be penalized.

IV. ARGUMENT.

Clardy's habeas petition alleges 12 instance of ineffective assistance of counsel by his trial lawyer, and two instances of trial court error. Rather than address them in the order in which they appear in the petition, this memo will first address the two trial court errors, and will then address the ineffective assistance issues.

B. Shackling.

(1) Two Step Analysis: Compelling Need, and Balancing of Interests to Consider Less Restrictive Alternatives.

No person should be tried while bound and gagged except as a "last resort." *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The sight of shackles may have a significant effect on the jury's feelings about the defendant, their use is "something of an affront to the very dignity and decorum of judicial proceedings",

and they may greatly reduce one of “the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel.” *Id.*; see also *Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989), *cert. denied* 498 U.S. 832, 112 L.Ed.2d 67, 111 S.Ct. 95 (1990); and *Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985).

In the Ninth Circuit, the Due Process clauses of the 5th and 14th Amendments require a trial court to engage in a two-step analysis before ordering that a defendant be shackled. First, the court must be persuaded by compelling circumstances that some measure is needed to maintain security in the courtroom. Second, the court must consider less restrictive alternatives and the effect of restraints on the defendant before imposing physical restraints. *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995), citing *Spain v. Rushen*; *Jones v. Mayer*, 899 F.2d 883, 885 (9th Cir. 1990), and *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993). While the trial court need not state all the reasons on the record, or hold a hearing, “the basis for the decision should be apparent from the record.” *Duckett v. Godinez*, 67 F.3d at 749 n7.

(2). There Was No Compelling Need For Shackling Here.

The cases finding a “compelling need” rest on disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities. *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995). For example, in *Stewart v. Corbin*, 850 F.2d 492, 498 (9th Cir. 1988), *cert. denied*, 490 U.S. 1016, 104 L. Ed. 2d 175, 109 S. Ct. 1737 (1989) shackling did not violate due process because the defendant had two prior escapes while handcuffed, was on trial for a violent robbery, assaulted a deputy in court, and threatened a judge in the case. The trial court did not abuse its discretion in shackling a murder defendant in *Jones v. Meyer*, 899 F.2d 883 (9th Cir. 1990) because he threatened the prosecutor, his own attorney and the bailiff; he had a prior murder conviction; and he was involved in a jail altercation during jury selection. See also *King v. Rowland*, 977 F.2d 1354 (9th Cir. 1992) (shackling appropriate where the defendant

attacked his lawyer and a police officer in court); *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (shackling approved in multi-defendant drug case where US Marshal assessed the threat as high, witnesses were threatened and intimidated during pretrial proceedings, and several defendants conspired to kill a government witness and the case agent); *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir. 1994) (no abuse of discretion to shackle murder defendant in light of assault on counsel and his assistant before trial, and violence during trial); and *Morgan v Bunnell*, 24 F.3d 49 (9th Cir. 1994) (defendant planned to escape; witnesses died before, during and after a trial he had in Michigan; and he had a violent history).

There was no such compelling need here. Clardy disputed ever having been threatening toward his counsel. He was upset about the way Steen had treated him, was upset that no motions had been filed, and upset that no effort had been made to bring Houston or Dale to court. The depth of the lawyer-client divide can be seen in the several instances where Steen argues against Clardy's interests – arguments that went far enough to prompt the prosecutor to warn Steen that they were still on the record. See, e.g., RT1 at 23:9 – 23:11 (accusing Clardy of a frivolous bar complaint), RT1 at 43:3 – 43:15 (expressing belief that Clardy was trying to manipulate the system); RT1 at 48:26 – 25 (rebuffing the court's suggestion that he pursue a motion to disqualify and prompting prosecutor's record warning); and RT1 at 53:5 – 54:6 (arguing against efforts to conceal shackles from the jury). Perhaps more to the point, Clardy was on trial for two non-violent drug offenses, he had no history of violence or escape, and he showed that he could cooperate with counsel.

In the second step of the analysis (considering less restrictive alternatives to binding), the court must begin by "assess[ing] the extent of the limitations that would be present if shackles were applied." *Spain v. Rushin*, 883 F.2d at 721. These limitations include the following: (1) shackles may reverse the presumption of innocence by

causing jury prejudice; (2) shackles may impair the defendant's mental faculties; (3) shackles may impede communication between the defendant and his counsel; (4) shackles may detract from the decorum of the judicial proceeding; (5) shackles may cause pain to the defendant. After considering these factors, the trial judge "must weigh the benefits and [these] burdens of shackling against other possible alternatives." *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990). If the court finds that security concerns warrant intervention, there are three constitutionally permissible approaches: (1) bind, gag or otherwise restrain the defendant in court; (2) cite the defendant for civil or criminal contempt; or (3) remove the defendant from the courtroom until the defendant promises to conduct himself properly. *Illinois v. Allen*, 397 U.S. 337, 343-44, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Binding the defendant is a "last resort".

Here, the trial court struck the wrong balance. It had observed that Clardy could behave civilly (RT1 at 79:8 – 79:10), and it had promised that it would remove the shackles if he behaved himself (RT1 at 18:23 – 18:23). He promised to remain quiet when the jury was present (RT1 at 80:8), and was civil throughout the testimony, yet the trial proceeded with him shackled and sandwiched between two guards at counsel table.

B. DENIAL OF MOTION FOR SUBSTITUTE COUNSEL.

The Sixth Amendment right to counsel contemplates counsel free from conflict. *Holloway v. Arkansas*, 435 U.S. 475 (1978). 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).

Here, the record shows that the relationship between Steen and Clardy had completely broken down. Steen called Clardy racially offensive names, and actively worked against his interests during the pretrial colloquy regarding shackling. The trial court did not hold a hearing on Clardy's allegations, and its refusal to grant substitute counsel denied Clardy his right to the effective assistance of counsel under the 6th and 14th Amendments, and the Oregon appellate court's affirmance was contrary to clearly established federal law.

C. CLARDY'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In addition to the two trial court errors discussed above, Clardy's petition asserts 12 claims of ineffective assistance of counsel. Those claims have been exhausted through his state post-conviction petition and post-conviction appeal. The arguments regarding those claims is as follows.

1. 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. RT3 at 33:19 – 37:10.

2. 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 officer Dale and Houston 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.

3. 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. Attempts to call 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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 (Ex. * at *), Clardy's testified at his post-conviction trial that his concern here is with not being adequately prepared to testify. RT3 at 43:17 - 44:8.

9. 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).

10. 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 (2012), holding that the trial court has a duty to determine the reliability of eyewitness evidence when challenged by the defense. Clardy's trial lawyer did not challenge the police and informant testimony identifying him.

11. 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). This issue is subsumed within the argument regarding shackling.

12. 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.

V. CONCLUSION

For the foregoing reasons, Clardy urges the court to grant his petition.

Date: August 5, 2016

JAMES F. HALLEY, PC

/s James F. Halley

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Petitioner,

v.

STATE OF OREGON, et al,

Respondent.

Case No. 2:15-cv-00412-ST

ANSWER

Respondent answers the Petition for Writ of Habeas Corpus and responds to this Court's Order, dated April 13, 2015, to show cause why the relief prayed for should not be granted and to state the true cause of petitioner's detention and whether remedies available to petitioner in the courts of the State of Oregon have been exhausted, as follows:

I.

Petitioner is in the custody of the Oregon Department of Corrections pursuant to judgments not named in the instant petition in Multnomah County Circuit Court Case Nos. 120833617, 120632917, and 120733213. (Ex. 101). Instead, petitioner attacks judgments

dated August 9, 2006 from Multnomah County Circuit Court Case Nos. C060231064 and C060231074, after convictions for two counts of Delivery of a Controlled Substance – Schedule II and two counts of Possession of a Controlled Substance – Schedule II. (Ex. 104; Ex. 105; Ex. 106). After a jury convicted petitioner of the above-listed crimes, the court imposed 18 months in prison for one count of Delivery of a Controlled Substance, 24 months of probation for the other, and 18 months of probation for each count of Possession of a Controlled Substance. (*Id.*). All of the sentences expired by 2010. (Ex. 102; Ex. 103).

II.

1. Petitioner directly appealed his convictions, but the Court of Appeals affirmed without opinion, *State v. Clardy*, A133373 (Control) and A133374, 221 Or. App. 383, 190 P.3d 495 (2008). Petitioner sought review from the Oregon Supreme Court and was, ultimately, denied review, 345 Or. 618, 201 P.3d 909 (2009).

2. Petitioner filed a First Amended Petition for Post-Conviction Relief in *Clardy v. State*, Marion County Circuit Court Case No. 09C18169, but the court denied relief. Petitioner appealed, and the Oregon Court of Appeals affirmed without opinion, *Clardy v. State*, 267 Or. App. 423, 341 P.3d 252 (2014), and the Oregon Supreme Court denied review, 356 Or. 689, 344 P.3d 1111 (2014).

III.

Petitioner has no remaining state remedies on the issues he raises in this habeas corpus proceeding. He has, however, procedurally defaulted on certain issues by his failure to timely pursue to completion all his available remedies, and habeas review of those issues should be denied.

IV.

Because petitioner was not in custody on the challenged convictions at the time petitioner filed his petition, this Court should dismiss all of the claims in the petition.

DATED October 13, 2015.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Petitioner,

v.

STATE OF OREGON, et al,

Respondent.

Case No. 2:15-cv-00412-ST

RESPONSE TO PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner brings this action under 28 U.S.C. § 2254 to attack his August 2006 convictions for two counts each of manufacture or delivery of a Schedule II controlled substance and possession of a Schedule II controlled substance. The Court should dismiss the petition on the grounds that petitioner is not “in custody” for purposes of 28 U.S.C. § 2254 on the convictions he attacks in this case.

1. The “In Custody” Requirement

A basic requirement to proceed under 28 U.S.C. § 2254 is that the state prisoner be “in custody” on the conviction or sanction he challenges. That a petitioner is currently in prison on a

subsequent conviction does not satisfy that requirement. For instance, the petitioner in *Maleng v. Cook* sought to challenge a 1958 conviction that had fully expired on the ground that it had been used to enhance the sentence on a subsequent conviction. 490 U.S. 488, 489-90 (1989) (*per curiam*). Citing *Carafas v. LaVallee*, 391 U.S. 324 (1968), the Court held:

The question presented by this case is whether a habeas petitioner remains “in custody” under conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. We hold that he does not. 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.
...

In this case, of course, the possibility of a sentence upon a subsequent conviction being enhanced because of the prior conviction actually materialized, but we do not think that requires any different conclusion. When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore “in custody.”

Maleng, 490 U.S. at 492-93. That holding controls this case. The convictions petitioner attacks in this proceeding are complete. Even if the convictions were used to enhance his subsequent convictions, the reasoning in *Maleng* would preclude a finding that petitioner remains “in custody” on the convictions under attack for purposes of § 2254 jurisdiction.

2. Analysis in this Case

In this proceeding, petitioner attacks the judgments that were imposed in August 2006 in two cases that were consolidated for trial, Multnomah County Circuit Court Case Nos. 060231064 and 060231074. The court sentenced petitioner to 18 months in prison, three terms of probation, and 24 months of post-prison supervision. (Ex. 104; Ex. 105; Ex. 106). Petitioner was released from prison on August 10, 2007 and then began serving his terms of probation and post-prison supervision. (Ex. 102, ODOC Admission and Release History). That supervision terminated on all sentences from the two judgments on March 13, 2010. (Ex. 102; Ex. 103, ODOC Offender Public Information screen shot).

In 2013, petitioner was convicted of numerous crimes in three different cases, Multnomah County Circuit Court Case Nos. 120833617, 120632917, and 120733213, and

sentenced to a considerable term of imprisonment. (Ex. 101, Judgments/Facesheet (indicating projected release date of October 18, 2101)). Thus, petitioner was imprisoned on April 3, 2015, when the petition was deemed filed (Docket #25), but was no longer “in custody” regarding the convictions under attack, even assuming that those convictions had some effect on the sentence imposed in the 2013 convictions. *See Maleng*, 490 U.S. 488.

3. Conclusion

For the above stated reasons, the petition should be dismissed. In the event that this court finds that petitioner is in custody, then the respondent would request additional time to address the merits of the petition.

DATED October 13, 2015.

Respectfully submitted,

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FILED 12 MAR '15 11:15 USDC ORP

1

UNITED STATES DISTRICT COURT

2

DISTRICT OF OREGON

3

SIR GIORGIO SANFORD CLARDY,

Civil Case No. 2:15-cv-00412-ST

4

Petitioner,

5

-v-

PETITION FOR WRIT OF HABEAS

6

STATE OF OREGON, ELLEN ROSEBLUM

CORPUS PURSUANT TO 28 U.S.C. § 2254

7

Attorney General of Oregon,

8

Respondent(s).

9

I. CONVICTION UNDER ATTACK

10A.

Name and location of court which entered the judgment of conviction under attack:

11

Multnomah County Courthouse, 1021 S.W. Fourth Avenue, Portland OR, 97204.

12B.

Criminal docket or case number: 06-02-31064

13C.

Date of Judgment of conviction: August 9, 2006

14D.

Length of sentence: Count 2 - 24 months supervised Probation / Count 3 - 18 months supervised Probation

15E.

Nature of offenses involved: Count 2 - Delivery of a Controlled Substance schedule II

16

(FB) and Count 3 - Possession of Controlled substance schedule II (FC).

17F.

What was your Plea?: Not Guilty

18G.

If you Pleaded not guilty, what kind of trial did you have?: Jury Trial

19H.

Did you testify at trial?: No

20

II. EXHAUSTION OF STATE REMEDIES

21

DIRECT APPEAL

22A.

Did you directly appeal from the Judgment of conviction?: Yes

23B.

If you did appeal, answer the following:

24

1. Name of Court: Oregon Court of Appeals

1 2. Docket or Case Number: ~~A18~~ A133373

2 3. Result: Affirmed Without Opinion

3 4. Date of result and citation: State v. Clardy, 221 Or App 383, 190 P3d 495 (2008)

4 5. Grounds raised: (1) First Assignment of Error the trial court erred by ordering defendant
5 to be visibly restrained in front of his jury (2) Second Assignment of Error the trial court
6 abused its discretion in denying defendant's request for new counsel (3) Supplemental Argument
7 to Counsel's First Assignment of Error and (4) Defendant was Denied the Right to Counsel.

8 C. Did you seek further review of the decision on appeal by a higher state court?: Yes

9 1. Name of Court: Oregon Supreme Court

10 2. Docket or Case Number: ~~A133373~~ SO56640

11 3. Result: Denied

12 4. Date of result and citation: Unknown

13 5. Grounds raised: (1) Defendant was Entitled to Substitute Counsel and (2) Defendant should
14 Not Have Been Shackled and Guarded Before the Jury.

15 D. Did you file a Petition for certiorari in the United States Supreme Court? No

16 POST - CONVICTION RELIEF

17 E. Did you file a Petition for state Post-conviction relief?: Yes

18 1. Name of Court: Marion County Circuit Court

19 2. Docket or Case Number: 09C18169

20 3. Nature of Proceeding: State Post-conviction relief

21 4. Did you receive an evidentiary hearing?: Yes

22 5. Result: Denied

23 6. Date of result and citation: Unknown

24 7. Grounds of raised: (1) Trial counsel failed to Present exculpatory evidence to the Jury.

1 (2) Trial counsel failed to locate, interview and call favorable witnesses to testify
2 on Petitioner's behalf at trial.

3 (3) Trial counsel failed to keep Petitioner reasonably informed about the status of his
4 case. Trial counsel did not meet with Petitioner to discuss the case. Trial counsel did not
5 not discuss the Police report or the Presentence Investigation Report with Petitioner. Petitioner
6 saw trial counsel only four times from the date counsel was appointed until sentencing and
7 those ~~times~~ ^{times} were only at court appearances. Trial counsel called Petitioner only two times. Trial
8 counsel did not respond to Petitioner's telephone messages advising that there was information
9 missing from the Police reports. Trial counsel obtained a psychiatric evaluation report which
10 was also used against Petitioner's defense.

11 (4) Trial counsel failed to file any motions on behalf of Petitioner, including those spec-
12 ifically requested by Petitioner.

13 (5) Trial counsel failed to maintain the client-attorney confidentiality when he disc-
14 cussed their conflicts over the telephone with two sergeants of the Multnomah County Det-
15 ention Center.

16 (6) Trial counsel failed to adequately argue that Petitioner did not hand the informant
17 any drugs.

18 (7) Trial counsel failed to adequately challenge the testimony of the Police informant
19 and the Police Procedures utilized to make the controlled by

20 (8) Trial counsel failed to request the proper jury instruction regarding witness test-
21 imony (UcrJI, 1016, 1024).

22 (9) Trial counsel failed to obtain an independent drug test on the alleged drugs desp-
23 ite repeated requests by Petitioner.

24 (10) Trial counsel failed to challenge the alleged eyewitness identification of Petitioner

1 as the seller of the pill.

2 (11) Trial counsel failed to ensure that during trial he was available to Petitioner for
3 advice and answering questions. A Police officer sat between trial counsel and Petitioner at the def-
4 ense table throughout the trial.

5 (12) Trial counsel failed to prepare Petitioner to testify at trial. Trial counsel further
6 failed to discuss with Petitioner his right to testify at trial.

7 (13) The trial court erred by abusing its discretion when it denied Petitioner's numerous
8 requests for new counsel. Petitioner believed there were conflicts with trial counsel which affected
9 trial counsel's performance and created a legitimate complaint requiring appointment of new counsel.

10 (14) The trial court erred when it ordered Petitioner to be visibly restrained in the pre-
11 sence of the jury. Petitioner's being shackled at trial in the presence of the jury was prejudi-
12 cial and caused bias against Petitioner. Petitioner was confused and embarrassed by this.

13 F. Did you appeal the result of your state Post-conviction relief? Yes

14 1. Name of court: Oregon Court of Appeal

15 2. Docket or case Number: A154694

16 3. Result: Affirmed Without Opinion

17 4. Date of result and citation: Unknown

18 5. Grounds raised: (1) Trial counsel failed to present exculpatory evidence to the jury.

19 (2) Trial counsel failed to locate, interview and call favorable witnesses to testify on Petitioner's
20 behalf at trial.

21 (3) Trial counsel failed to keep Petitioner reasonably informed about the status of his case. Trial
22 counsel did not meet with Petitioner to discuss the case. Trial counsel did not discuss the Police rep-
23 ort or the Presentence Investigation Report with Petitioner. Petitioner saw trial counsel only for briefs
24 from the date counsel was appointed until sentencing and those briefs were only at court appearances.

Page 4 of 10: Petition of Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254

1 Trial Counsel called Petitioner only two times. Trial counsel did not respond to Petitioner's telephone
2 messages advising him that there was information missing from the Police reports. Trial counsel
3 obtained a Psychiatric evaluation report but failed to provide Petitioner with a copy of the Psy-
4 chiatric evaluation report which was also used against Petitioner's defense.

5 (4) Trial Counsel failed to file any motions on behalf of Petitioner; including those spec-
6 ially requested by Petitioner.

7 (5) Trial Counsel failed to maintain the client-attorney confidentiality when he discussed their
8 conflicts over the telephone with two sergeants of the Multnomah County Detention Center.

9 (6) Trial Counsel failed to adequately challenge the testimony of the Police informant and the
10 Police Procedures utilized to make the controlled buy.

11 (7) Trial Counsel failed to adequately argue that Petitioner did not hand the informant any
12 drugs.

13 (8) Trial Counsel failed to request the proper jury instruction regarding witness testimony.
14 (Verdict 1016 and 1024).

15 (9) Trial Counsel failed to obtain an independent drug test on the alleged drugs despite
16 repeated request by Petitioner.

17 (10) Trial Counsel failed to challenge the alleged eyewitness identification of Petitioner as
18 the seller of the pill.

19 (11) Trial Counsel failed to ensure that during trial he was available to Petitioner for
20 advise and answering questions. A Police officer sat between trial counsel and Petitioner at the defense
21 table throughout the trial.

22 (12) Trial Counsel failed to prepare Petitioner to testify at trial. Trial counsel further failed
23 to discuss with Petitioner his right to testify at trial.

24 (13) Post-conviction ^{Relief} Trial Counsel failed to raised speed trial argument in Petition, memor-

Indemnity declaration, response and denial's Post-conviction Relief trial

2 (14) The trial court erred by abusing its discretion when it denied Petitioner's numerous
3 request for new counsel. Petitioner believed there were conflicts with trial counsel which affected
4 trial counsel's Performance and created a legitimate complaint requiring appointment of new counsel.

5 (15) The trial court erred when it ordered Petitioner to be restrained in the Presence of the
6 jury. Petitioner's being shackled at trial in the Presence of the jury was Prejudicial and caused
7 bias against Petitioner. Petitioner was confused and embarrassed by this

8 G. Did you seek further review of the decision on appeal by a higher state court?: Yes

9 1. Name of Court: Oregon Supreme Court

10 2. Docket or case Number: ~~Unknown~~ ~~201506094~~ SO62819

11 3. Result: Denied

12 4. Date of result and citation: Unknown

13 5. Grounds raised: Petitioner raised all same grounds asserted in his opening brief filed
14 with the Oregon Court of appeal against denial of Post-conviction relief.

15 III. GROUNDS FOR RELIEF

16 A. ARGUMENTS CONCERNING FIRST GROUNDS FOR RELIEF: "TRIAL COURT ERROR"

17 (1) The trial court erred by abusing its discretion when it denied Petitioner's num-
18 erous request for new counsel. Petitioner believed there were conflicts with trial counsel which
19 affected trial counsel's Performance and created a legitimate complaint requiring appointment of
20 new counsel.

21 (2) The trial court erred when it ordered Petitioner to be visibly restrained in the Pre-
22 sence of the jury. Petitioner being shackled at trial in the Presence of the jury was Prejudicial
23 and caused bias against Petitioner. Petitioner was confused and embarrassed by this.

24 B. ARGUMENTS CONCERNING SECOND GROUNDS FOR RELIEF: "INEFFECTIVE

1 ASSISTANCE OF TRIAL COUNSEL"

2 (1) Trial counsel failed to Present exculpatory evidence to the Jury.

3 (2) Trial counsel failed to locate, interview and call favorable witness to testify on Petitioner's
4 behalf at trial.

5 (3) Trial counsel failed to keep Petitioner reasonably informed about the status of his
6 case. Trial Counsel did not meet with Petitioner to discuss the case. Trial counsel did not discuss
7 the Police report or the Presentence Investigation Report with Petitioner. Petitioner saw trial counsel
8 only four times from the date counsel was appointed until sentencing and those times were only at
9 court appearances. Trial Counsel called Petitioner only two times. Trial counsel did not respond to
10 Petitioner's telephone messages advising that there was information missing from the Police reports.
11 Trial counsel failed to challenge the underrepresentation of Persons of color on the Jury. There was
12 a black Person in the Jury Pool but that Person was dismissed and not allowed to serve on the
13 Jury. Trial counsel obtained a Psychiatric evaluation report but failed to Provide Petitioner with a
14 copy of the Psychiatric evaluation report which was also used against Petitioner's defense.

15 (4) Trial Counsel failed to file any and all motions on behalf of Petitioner, including those
16 specifically requested by Petitioner.

17 (5) Trial Counsel failed to maintain the client-attorney confidentiality when he discussed
18 their conflicts over the telephone with two sergeants of the Multnomah County ^{Petition} ~~Detention~~ Center.

19 (6) Trial counsel failed to adequately challenge the testimony of the Police informant
20 and the Police Procedures utilized to make the controlled buy.

21 (7) Trial counsel failed to adequately argue that Petitioner did not have the informant
22 and drugs.

23 (8) Trial counsel failed to request the proper Jury instruction regarding witness testimony
24 (Ocr. II 1016 and 1034).

1 (9) Trial counsel failed to obtain an independent drug test on the alleged drugs despite
2 repeated requests by Petitioner.

3 (10) Trial counsel failed to challenge the alleged eyewitness identification of Petitioner
4 as the seller of the pill.

5 (11) Trial counsel failed to ensure that during trial he was available to Petitioner for advice
6 and answering questions. A Police officer sat between trial counsel and Petitioner at the defense table
7 throughout the trial.

8 (12) Trial counsel failed to prepare Petitioner to testify at trial. Trial counsel further
9 failed to discuss with Petitioner his right to testify at trial.

10 (13) Post-Conviction Relief trial counsel failed to raise speedy trial argument in Petition,
11 memorandum, declaration, response and during Post-Conviction Relief trial.

12 **IV. OTHER INFORMATION**

13 A. Have all grounds for relief that you have raised in this been Presented to the highest
14 state court having jurisdiction?: Yes

15 B. Do you have any Petition or appeal now Pending (filed and not decided yet) in any court,
16 state or federal, for the judgment you are challenging here?: No

17 C. Give the name and address, if known, of each attorney who represented you in the fol-
18 lowing stages of the judgment attacked herein:

19 1. At Preliminary hearing: Jason A. Steen, OSB #993675, 741 S.W. Lincoln Street,
20 Portland, Oregon 97201.

21 2. At arraignment and Plea: Jason A. Steen, OSB #993675, 741 S.W. Lincoln Street,
22 Portland, Oregon 97201.

23 3. At trial: Jason A. Steen, OSB #993675, 741 S.W. Lincoln Street, Portland, Oregon 97201.

24 4. At sentencing: Jason A. Steen, OSB #993675, 741 S.W. Lincoln Street, Portland,

1 Oregon 97201.

2 S. On Appeal: David O. Ferry, OSB # 974573, Office of Public Defense Services, 1320 Capital
3 Street NE, Suite 200, Salem, Oregon 97301.

4 G. In any Post-conviction Proceeding: Richard L. Cowen, OSB # 771467, PO Box 965,
5 5530 Center Street NE, Suite 700, Salem, Oregon 97308-0965.

6 7. On appeal from any adverse ruling in a Post-conviction Proceeding: James N. Warner,
7 OSB # 891320, 521 S.W. Clay Street, Suite 205, Portland OR 97132

8 D. Is this the first Federal Petition for writ of habeas corpus challenging this conviction?: Yes

9 E. Do you have any future sentence to serve after you complete the sentence imposed
10 by the judgment under attack?: No

11 F. TIMELINESS OF PETITION: IF your judgment of conviction became final over one

12 year ago, you must explain why the one-year ago, you must explain why the one-year

13 statute of limitations as contained in 28 U.S.C. § 2244 (d) does not bar your Petition: Petitioner

14 filed his notice of appeal timely on September 11, 2006 from the judgments entered in Multnomah County

15 Circuit Court on August 11, 2006. Briefs were filed and the Court of appeal affirmed without opi-

16 nion on June 27, 2008. A Petition for Review was filed and the Oregon Supreme Court but denied

17 review on January 13, 2009. Petitioner filed the instant Post-Conviction Relief case on July

18 24, 2009, in Marion County Circuit Court, but was denied relief by Judge Linda L. Bertrman

19 which was filed on June 24, 2013. Petitioner filed his timely notice of appeal on July 15, 2013,

20 briefs were filed and the Court of Appeal affirmed without opinion on November 26, 2014.

21 A Petition for Review was filed on December 2, 2014 and the Oregon Supreme Court denied the Petition

22 for review on February 5, 2015. Based on the above-listed reasons since Petitioner was exhausting

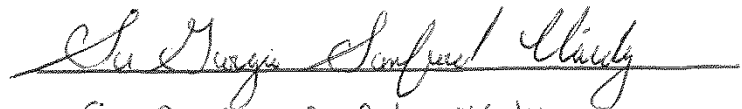
23 his state judicial remedies timely not exceeding a year without exhausting Petitioner's federal judi-

24 cial remedies ~~are subjected to the~~ ^{are subjected to the} equitable tolling doctrine.

V. CONCLUSION

WHEREFORE, Petitioner Prays that the court will grant such relief to which he may be entitled in this federal Petition for writ of habeas corpus Pursuant to 28 U.S.C. § 2254 by a Person in a state custody conviction.

DATED this 4th day of March, 2015



Sir Giorgio Sanford Clardy

Sid No. 15770879

Snake River Correctional Institution

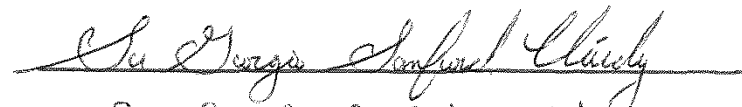
777 Stanton Blvd

Ontario OR 97914

VI. DECLARATION UNDER PENALTY OF PERJURY

I declare under Penalty of Perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 4th day of March, 2015



Sir Giorgio Sanford Clardy

Sid No. 15770879

Snake River Correctional Institution

777 Stanton Blvd

Ontario OR 97914

State of Oregon vs. Sirgeorgio Sanford Clardy III, Cd . 060231064

FILED

ER-3

AUG - 9 2006

Circuit Court
Multnomah County, Oregon

In the Circuit Court of the State of Oregon for Multnomah County

State of Oregon,
Plaintiff,

vs.

Sirgeorgio Sanford Clardy III,
Defendant.

Case No.: 060231064

JUDGMENT

Case File Date: 02/16/2006
District Attorney File #: 2072582-2B

DEFENDANT

True Name: Sirgeorgio Sanford Clardy III
Date of Birth: 05/06/87
Fingerprint Control No (FPN): 65624535
AKA: 682809 Cpms

Sex: Male

ENTERED

AUG 11 2006

IN REGISTER BY PL

HEARING

Proceeding Date: 08/07/2006

Judge: MERRI SOUTHER WYATT

Court Reporter: FTR

Defendant appeared in person and was in custody. The court determined that the defendant was indigent for purposes of court-appointed counsel, and the court appointed counsel for the defendant. The defendant was represented by **Attorney(s) Jason Alan Steen, OSB Number 99367.**

Plaintiff appeared by and through Mary Beth Baptista, OSB Number 01196.

COUNT(S)

It is adjudged that the defendant has been convicted on the following count(s):

Count 2: Manu/Del Cntrld Sub-SC 2

Count number 2, Manu/Del Cntrld Sub-SC 2, ORS 4758401B, a Class B Felony, committed on or about **12/16/2005.**

Conviction is based upon a **Jury Verdict of guilty on 06/20/2006.**

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 2 is 4 and the Criminal History Classification (CHC) is C.

This sentence is pursuant to the following special factors:

- This is a presumptive sentence.

State of Oregon vs. Sirgeorgio Sanford Clardy III, Ca . 060231064

ER - 4

Probation

Defendant is sentenced to Supervised Probation for a period of 24 month(s) and shall be subject to the following conditions of probation:

Defendant is subject to all general conditions of probation (ORS 137.540).

Furthermore, defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)):

Defendant shall:

- Be assigned to Judge Eric J. Bergstrom (OSB #90205) for judicial supervision of probation.
- Participate in a drug evaluation, and enter and successfully complete any course of treatment, including after and follow-up care, determined to be necessary and as designated by the evaluator or the probation officer.
- Not enter any drug free zone for one year.
- Refrain from knowingly associating with persons who illegally use or possess controlled substances.
- Not use or possess inhalants or intoxicants unless prescribed by a licensed physician.
- Submit blood or buccal sample and thumbprint pursuant to ORS 137.076.
- Conditions concurrent with C0602-31074.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Unitary Assessment	\$107.00			\$107.00
Total	\$107.00			\$107.00

Count 3: Poss Controlled Sub 2

Count number 3, Poss Controlled Sub 2, ORS 4758403B, a Class C Felony, committed on or about 12/16/2005.

Conviction is based upon a Jury Verdict of guilty on 06/20/2006.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 3 is 4 and the Criminal History Classification (CHC) is C.

This sentence is pursuant to the following special factors:

- This is a presumptive sentence.

Probation

Defendant is sentenced to Supervised Probation for a period of 18 month(s) and shall be subject to the following conditions of probation:

Defendant is subject to all general conditions of probation (ORS 137.540).

Furthermore, defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)):

Defendant shall:

- Be assigned to Judge Eric J. Bergstrom for judicial supervision of probation.
- Submit blood or buccal sample and thumbprint pursuant to ORS 137.076.
- Conditions concurrent with C0602-31074.

Monetary Terms

State of Oregon vs. Sirgeorgio Sanford Clardy III, Ca .060231064

ER-5

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Unitary Assessment	\$107.00			\$107.00
Total	\$107.00			\$107.00

MONEY AWARD

Judgment Creditor: State of Oregon

Judgment Debtor: Sirgeorgio Sanford Clardy III

Defendant is ordered to pay the following monetary totals, including restitution or compensatory fine amounts stated above, which are listed in the Money Award portion of this document:

Type	Actual Owed
Unitary Assessment	\$214.00
Total	\$214.00

The court may increase the total amount owed by adding collection fees and other assessments. These fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

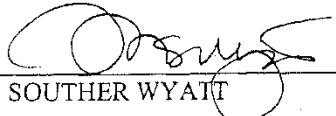
Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be made as follows:

Payable to:

Multnomah County Circuit Court
P.O. Box 114
Portland, OR 97207

Dated the 9 day of August, 2006

Signed:


 MERRI SOUTHER WYATT

State of Oregon vs. Sirgeorgio Sanford Clardy III, Ct 060231074

FILED

AUG - 9 2006

Circuit Court
Multnomah County, Oregon

In the Circuit Court of the State of Oregon for Multnomah County

State of Oregon,
Plaintiff,

vs.

Sirgeorgio Sanford Clardy III,
Defendant.

Case No. 060231074

JUDGMENT

Case File Date: 02/16/2006
District Attorney File #: 2072570-1B

DEFENDANT

True Name: Sirgeorgio Sanford Clardy III
Date of Birth: 05/06/87
Fingerprint Control No (FPN): 65624535
AKA: Sirgeorgio Sanford Clardy III, 682809 CpmS

Sex: Male

HEARING

Proceeding Date: 08/07/2006

Judge: MERRI SOUTHER WYATT

Court Reporter: FTR

Defendant appeared in person and was in custody. The court determined that the defendant was indigent for purposes of court-appointed counsel, and the court appointed counsel for the defendant. The defendant was represented by Attorney(s) Jason Alan Steen, OSB Number 99367.

Plaintiff appeared by and through Mary Beth Baptista, OSB Number 01196.

COUNT(S)

It is adjudged that the defendant has been convicted on the following count(s):

Count 1: Manu/Del Cntrl'd Sub-SC 2

Count number 1, Manu/Del Cntrl'd Sub-SC 2, ORS 4758401B, a Class B Felony, committed on or about 12/09/2005.

Conviction is based upon a Jury Verdict of guilty on 06/20/2006.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 1 is 6 and the Criminal History Classification (CHC) is C.

This sentence is pursuant to the following special factors:

- This is a presumptive sentence.

* State of Oregon vs. Sirgeorgia Sanford Clardy III, Ca 060231074

Incarceration

Defendant is sentenced to the custody of Oregon Department of Corrections for a period of 18 month(s). Defendant is remanded to the custody of the Multnomah County Sheriff for transportation to the Oregon Department of Corrections for service of this sentence.

Defendant may receive credit for time served. Defendant may be considered, either by the executing or releasing authority or by the supervisory authority, for any form of temporary leave, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release as specified in ORS 137.750 - 137.752, and defendant shall pay any required per diem fees.

Defendant is recommended for the following program(s) and/or treatment(s) while incarcerated:

- Summit Program
- Turning Point Program
- Work on education, criminal thinking, mental health and substance abuse in custody.

Post-Prison Supervision

The term of Post-Prison Supervision is 24 month(s). If defendant violates any of the conditions of post-prison supervision, the defendant shall be subject to sanctions including the possibility of additional imprisonment in accordance with the rules of the State Sentencing Guidelines Board.

Statutory Provisions

Defendant is ordered to submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Unitary Assessment	\$107.00			\$107.00
Total	\$107.00			\$107.00

Count 2: Poss Controlled Sub 2

Count number 2, Poss Controlled Sub 2, ORS 4758403B, a Class C Felony, committed on or about 12/09/2005.

Conviction is based upon a Jury Verdict of guilty on 06/22/2006.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 2 is 1 and the Criminal History Classification (CHC) is C.

This sentence is pursuant to the following special factors:

- This is a presumptive sentence.

Probation

Defendant is sentenced to Supervised Probation for a period of 18 month(s) and shall be subject to the following conditions of probation:

Defendant is subject to all general conditions of probation (ORS 137.540).

State of Oregon vs. Sirgeorgio Sanford Clardy III, Ca 060231074

Furthermore, defendant is subject to the following Special Conditions of Probation (ORS 137.540(2)):
Defendant shall:

- Be assigned to Judge Eric J. Bergstrom (OSB #90205) for judicial supervision of probation.
- Submit blood or buccal sample and thumbprint pursuant to ORS 137.076.
- Conditions concurrent with Count 1.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Unitary Assessment	\$107.00			\$107.00
Total	\$107.00			\$107.00

MONEY AWARD

Judgment Creditor: State of Oregon

Judgment Debtor: Sirgeorgio Sanford Clardy III

Defendant is ordered to pay the following monetary totals, including restitution or compensatory fine amounts stated above, which are listed in the Money Award portion of this document:

Type	Actual Owed
Unitary Assessment	\$214.00
Total	\$214.00

The court may increase the total amount owed by adding collection fees and other assessments. These fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

- State of Oregon vs. Sirgeorgio Sanford Clardy III, Ca 060231074

Payment Schedule

Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be made as follows:

The payment schedule for all financial obligations is to be established by the court or appropriate supervising authority.

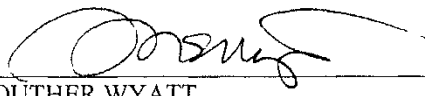
Unless otherwise directed by the court, all financial obligations must be paid 30 days prior to completion of Post-Prison Supervision.

Payable to:

**Multnomah County Circuit Court
P.O. Box 114
Portland, OR 97207**

Dated the 9 day of August, 2016

Signed:


MERRI SOUTHER WYATT