No. 12-986

# In The Supreme Court of the United States

ERIC C. WILSON,

*Petitioner,*

v.

W. STEVEN FLAHERTY, Superintendent,
Virginia Department of State Police,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In 2005, petitioner Eric Wilson was released from incarceration and completely discharged from the prison sentence imposed for his 1999 Virginia rape conviction. He was required to register as a sex offender in Virginia; he thereafter moved to Texas, where he is subject to that State's sex offender registration requirements. The question presented is:

> Did Wilson, who had completely served and been discharged from his Virginia sentence nearly five years before he filed any federal or state habeas petition, establish the jurisdictional requirement of custody for purposes of his federal habeas corpus petition, under 28 U.S.C. § 2254, based solely on the requirement that he comply with the state sex offender registration statutes in Texas, where he has chosen to live since his release from incarceration?

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## STATEMENT OF THE CASE[1]

Eric C. Wilson was tried by a jury on June 16-18 and 21, 1999, in the Circuit Court of Norfolk, Virginia, for rape and murder. At Wilson's trial, the Commonwealth presented evidence that Wilson was one of several men responsible for the crimes. (*Governor's Response to Clemency Petitions*, App. F. at 85a).[2]

The jury was advised, by stipulation, that Omar Ballard was the only source of DNA evidence discovered at the crime scene, and inculpatory statements Ballard made were admitted in evidence. (*Respondent's Motion to Amend Opinion,* at 1-3, 9, 12, *Wilson v. Flaherty*, No. 11-6919 (4th Cir. Aug. 21, 2012), ECF No. 31;[3] *see also Governor's Response*,

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[1] The federal habeas petition in the instant case was filed in the district court and was immediately followed by a motion to stay and hold the pleading in abeyance pending exhaustion in state court. The respondent filed an objection to the motion to stay and abey. The federal district court ultimately dismissed the federal habeas petition prior to directing a pleading from the respondent addressing the claims in the petition. Thus, the records from the state criminal case were not forwarded to the federal court. In the petition for a writ of certiorari, the petitioner has cited portions of the habeas petition as factual statements. (Pet. for Cert. at 3 n.1, 5-7).

[2] Documents contained in the Appendix to the Petition for Certiorari in this case shall be cited as (App. ___).

[3] The respondent filed a motion to amend the opinion of the Fourth Circuit Court, with exhibits. The court erroneously noted in its opinion that new evidence discovered following conviction included a DNA match to another individual who confessed and was later convicted of the crimes. That evidence was known and

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App. F. at 85a). Joseph Dick, one of the other defendants, testified against the petitioner at the trial; the petitioner's confession was introduced;[4] and the petitioner testified at his trial, challenging his confession and denying any criminal conduct. (App. F. at 85a; *Williams v. Fahey*, 82 Va. Cir. 178, 183-84, 2011 Va. Cir. LEXIS 159, *12 (Va. Cir. Feb. 2, 2011)).

The jury convicted Wilson of rape and acquitted him of the murder. The jury fixed his sentence at eight-and-one-half years in prison, and by order entered on September 21, 1999, the trial court imposed the jury's sentence.[5]

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presented at Wilson's trial. Wilson's habeas counsel did not take a position on the motion to amend and did not file a response to it. The court denied the motion.

[4] There is no dispute that Wilson confessed his involvement in the rape to the police, but he did not confess to the murder.

[5] Five men were convicted with respect to crimes against the victim: Derek Tice, Danial Williams, Joseph Dick, Eric Wilson, and Omar Ballard. Tice was convicted of both crimes by jury; Wilson was convicted by a jury of rape; Williams, Dick, and Ballard were convicted of rape and murder on their guilty pleas to those crimes. In 2009, Virginia Governor Timothy Kaine issued conditional pardons to Tice, Williams, and Dick, but not to Wilson, because Wilson had been released from confinement. (App. F. at 90a). The pardon included conditions, and the pardoned men remained subject to the supervision of the Parole Board. (App. F. at 80a). The federal district court granted habeas corpus relief to Tice on a claim that his attorney was ineffective in failing to move to suppress a confession Tice made to police as violative of *Miranda,* and the United States Court of Appeals for the Fourth Circuit affirmed that judgment. Tice's charges

(Continued on following page)

Thereafter, Wilson, by counsel, appealed the judgment of the trial court to the Court of Appeals of Virginia. That court, by order entered March 8, 2000, denied the appeal. (*Wilson v. Commonwealth*, No. 2276-99-1). There was no further direct appeal.

During his detention, Wilson did not file a petition for a writ of habeas corpus in state or federal court. Wilson was fully discharged from custody by the Virginia Department of Corrections on September 26, 2005.

Wilson is not on probation or parole. As a result of his conviction, he was required to comply with Virginia's Sex Offender Registry. According to his pleadings, Wilson registered in Virginia, prior to moving to Texas, where he resided on the date he filed his federal habeas corpus petition in the federal district court in Virginia. He has stated that he currently resides in that state, where he is subject to the Texas sex offender registration statutes.

On July 30, 2010, Wilson, by counsel, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division. On that date, Wilson also moved the district court to stay the federal

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were subsequently *nolle prosequi* in the state trial court. The habeas petitions of Dick and Williams are currently pending in the United States District Court for the Eastern District of Virginia. *Williams v. Muse*, No. 3:09-cv-00769; *Dick v. Muse*, No. 3:10-cv-00505. Ballard is serving two life terms.

habeas proceeding and hold it in abeyance pending the exhaustion of a habeas claim in state court. *Wilson v. Flaherty*, No. 3:10-CV-536, 2011 U.S. Dist. LEXIS 66272 (E.D. Va. July 30, 2010), ECF Nos. 1-2. The respondent filed an objection to the motion and supporting brief, and the petitioner filed a reply. *Id.*, ECF Nos. 3-5.

Following the filing of his federal habeas petition and motion to stay and abey the proceedings in the district court, Wilson filed his first state habeas corpus petition in the Circuit Court for the City of Norfolk on September 1, 2010. Many of the allegations in the state habeas petition focused on the federal indictment of former Norfolk Detective Robert Glenn Ford for corruption charges, unrelated to the prosecution of the petitioner or the other defendants.[6] The respondent, by counsel, moved to

[6] In his petition for certiorari, the petitioner has cited to a pleading of the United States Attorney for the Eastern District of Virginia in Ford's criminal corruption case. (Pet. for Cert. at 8 n.4). It should be noted that in this pleading, the prosecutor stated that Ford's crimes involved Ford accepting bribes "from drug defendants awaiting sentencing in exchange for lying to prosecutors and judges by falsely representing that they had assisted him in homicide investigations and therefore deserved reduced sentences" and fraudulently obtaining money from a Crime Line program. Position of the United States Regarding Sentencing, at 1-2, *United States v. Ford,* No. 2:10-CR-83 (E.D. Va. Feb. 14, 2011), ECF No. 84. These activities were completely dissimilar to the allegations of misconduct Wilson made against the detective in his habeas petition.

dismiss the state habeas petition, and both parties filed additional pleadings.

By opinion letter dated February 2, 2011, in which the state habeas court rejected Wilson's habeas petition, along with the separate habeas petitions of defendants Williams and Dick, the state habeas court denied and dismissed Wilson's habeas petition as barred by the state habeas corpus statute of limitations in Va. Code Ann. § 8.01-654(A)(2). The court found it unnecessary to rule on whether Wilson was in custody for purposes of habeas corpus review. *See Williams*, 82 Va. Cir. at 184, 2011 Va. Cir. LEXIS 159 at *12-13.[7] The habeas court entered its final order on February 28, 2011.

Wilson appealed the state habeas court's ruling to the Supreme Court of Virginia. The respondent filed a brief in opposition and assigned cross-error to the state habeas court's failure to dismiss Wilson's habeas corpus petition on the ground Wilson was not

[7] In the portion of the opinion letter addressing Wilson's state habeas petition, the habeas court noted Wilson had asserted, among other allegations, that Detective Ford had coerced a false and involuntary confession. The state habeas court noted Wilson had failed to convince the state criminal trial judge to suppress his confession, failed to convince the jury that the statement was involuntary, and failed to convince the Court of Appeals of Virginia to grant appellate relief on the issue. The state habeas court characterized Wilson's contention that he could not have brought the claim until Ford's corruption indictment as "preposterous." 82 Va. Cir. at 183-84, 2011 Va. Cir. LEXIS 159 at *12.

in custody. Wilson filed a reply brief addressing the assignment of cross-error. By order dated September 19, 2011, the Virginia Supreme Court refused the petition for appeal. (Record No. 110987).

Meanwhile, in a memorandum opinion issued June 20, 2011, the federal district court noted it was treating the respondent's objection to Wilson's motion to stay and abey the proceedings as a motion to dismiss the habeas petition for lack of jurisdiction. (App. B. at 37a). The court dismissed the motion to stay and abey and the habeas corpus petition on the ground the court lacked jurisdiction to entertain the case because Wilson was not in custody. (App. B. at 39a-46a). The court granted a certificate of appealability limited to "the specific issue regarding whether Wilson is considered 'in custody' such that the relief afforded by habeas corpus is available to him." (App. B. at 46a).

Following briefing and oral argument, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court in *Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012). (App. A. at 1a-35a).[8] The petitioner filed a petition for certiorari in this Court on February 8, 2013. The respondent filed a waiver on March 4,

[8] The appeals court denied the respondent's motion to correct errors in the opinion. *Wilson*, No. 11-6919, order (4th Cir. Sept. 5, 2012), ECF No. 34. The court denied the petitioner's request for rehearing or rehearing *en banc*. *Wilson*, No. 11-6919, order (4th Cir. Sept. 11, 2012), ECF No. 35.

2013. Subsequently, this Court requested the respondent to file a responsive brief. On April 3, 2013, the time for filing the brief was extended to May 24, 2013.

## SUMMARY OF ARGUMENT

Because Wilson attacked his state criminal conviction through habeas corpus pursuant to 28 U.S.C. § 2254, he had to establish he was in custody as a result of that conviction. Wilson was not in custody on the conviction he was challenging at the time he filed his petition; therefore, the federal district court lacked jurisdiction to entertain the petition.

While this Court has not addressed the precise issue of whether a requirement to comply with sex offender registration statutes alone constitutes "custody" for purposes of habeas corpus review, every federal circuit that has considered the question has answered in the negative. Federal district courts that have addressed the question, including district courts in Texas, where Wilson now resides, uniformly have ruled that the requirement to comply with sex offender registration statutes does not render one "in custody" for purposes of federal habeas corpus review.

The Fourth Circuit majority correctly determined that Wilson was not in custody for purposes of 28 U.S.C. § 2254. Jurisdiction cannot be conferred on a

court by agreement of the parties or counsel. In habeas corpus cases, collateral consequences arising from a conviction and sentence are insufficient to establish custody for cases brought under 28 U.S.C. § 2254.

This case is a poor vehicle for this Court to address the issues Wilson seeks to raise. Due to the procedural history of the case, the records of the state court proceedings were not forwarded to the federal habeas court. While the record before the federal courts was sufficient to demonstrate Wilson was not in custody under prevailing law, to the extent Wilson argues there should be a "flexible" definition of custody based on a claim of actual innocence, state court records are essential. Moreover, the petitioner, who named the Superintendent of the Virginia Department of State Police as the respondent, resided in Texas, and thus was subject to the Texas registry requirements, at the time he filed his federal habeas corpus petition. The petitioner moved from Virginia to Texas of his own volition.

Although the petitioner contends in his petition for a writ of certiorari that he is actually innocent of the charge for which he was convicted, no court has found Wilson actually innocent. While Wilson contends he has no avenue other than habeas corpus to seek relief from his conviction, that contention is incorrect. Although he is ineligible to file a petition for writ of actual innocence based on biological evidence, pursuant to Va. Code Ann. §§ 19.2-327.2 through 19.2-327.6, he would not be barred from

seeking an actual innocence writ in the Court of Appeals of Virginia, based on non-biological evidence, pursuant to Va. Code Ann. §§ 19.2-327.10 through 19.2-327.14. Wilson has not sought relief under the state actual innocence statute.

## REASONS THE WRIT SHOULD BE DENIED

### I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS OF APPEALS.

This Court noted in *Holland v. Florida*, ___ U.S. ___, ___, 130 S. Ct. 2549, 2565 (2010), "We are '[m]indful that this is a court of final review and not first view.' *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 . . . (2001) (per curiam) (internal quotation marks omitted)." The petitioner, however, asks the Court to be a Court of first view and decide that compliance with requirements of a state sex offender registry constitutes custody for federal habeas corpus, contrary to every federal court of appeals to address the issue. Indeed, Wilson concedes that "the courts of appeals have not disagreed" in ruling on the issue of whether custody may be established based only on a requirement to comply with sex offender registry statutes. (Pet. for Cert. at 27).

The federal habeas corpus statute authorizes courts to grant relief only to "a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the

Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphases added). The custody requirement is jurisdictional. *See Maleng v. Cook*, 490 U.S. 488, 490 (1989).

The courts of appeals in the Fourth, Sixth, Seventh, and Ninth Circuits have all ruled in published opinions that sex offender registration does not constitute such custody. As the Seventh Circuit Court noted, "courts have rejected uniformly" challenges to sex offender registration statutes in habeas corpus, due to lack of custody. *Virsnieks v. Smith*, 521 F.3d 707, 718 (7th Cir. 2008); *see also Leslie v. Randle*, 296 F.3d 518, 521-23 (6th Cir. 2002); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999). This Court recently denied certiorari and rehearing in another such habeas corpus case, originating in the United States District Court of Maryland, and denied by the Fourth Circuit. *See Clair v. Maynard*, 812 F. Supp. 2d 685 (D. Md. 2011), *appeal dismissed*, 476 Fed. Appx. 543 (4th Cir.) (*per curiam*), *cert. denied,* 133 S. Ct. 488, *reh'g denied*, 133 S. Ct. 783 (2012).

Wilson argues that the requirements of the sex offender registration statutes at issue in the cases decided prior to his were less onerous than the requirements he faces in *Texas*, which includes a requirement for in-person reporting. (Pet. for Cert. at 28). The district court in the instant case, however, correctly rejected this argument. (App. B. at 42a-43a). The district court correctly reasoned the requirement of in-person reporting was "not such a significant

restraint on individual liberty that the requirement renders a person 'in custody.'" (App. B. at 42a) (citations omitted).[9]

In recent years, numerous district courts have addressed the issue of whether compliance with sex offender registration statutes constitutes custody for purposes of federal habeas corpus jurisdiction, and uniformly have determined that it does not. *See, e.g., Rodriguez v. Attorney General*, No. 10 Civ. 3868, 2011 U.S. Dist. LEXIS 16911 (S.D.N.Y. Feb. 15, 2011).[10] The magistrate judge in *Rodriguez* included an extensive survey of the federal district courts and concluded:

> [I]t appears that every federal district court that has considered the issue has reached the same conclusion—that the requirements of state sex offender laws, many more severe

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[9] As the Ninth Circuit Court of Appeals has held, "[r]egistration, even if it must be done in person at the police station, does not constitute the type of severe, immediate restraint on physical liberty necessary to render a petitioner in 'custody' for purposes of federal habeas corpus relief." *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999). The district court here noted that the sex offender statutes in Colorado also involved in-person appearance yet, the district court in *Frazier v. Colorado*, No. 08-cv-02427, 2010 U.S. Dist. LEXIS 84957 (D. Colo. July 16, 2010), *appeal dismissed*, 405 Fed. Appx. 276 (10th Cir. 2010), determined Frazier was not in custody for purposes of habeas corpus. (App. B. at 42a).

[10] Rodriguez was required to personally verify his address with law enforcement every 90 days, and be photographed annually.

> than the requirements of the Washington State law at issue in *Williamson* [*v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998)], constitute mere collateral consequences of a conviction and not restraints on a petitioner's liberty sufficient to render a petitioner "in custody" under Section 2254(a).

*Id.* at *21.[11]

In *Frazier v. Colorado*, 2010 U.S. Dist. LEXIS 84957, the district judge stated that "all of the circuit courts to consider the issue have determined that the burdens imposed by a state sex offender registration statute do not meet the custody requirement of the habeas corpus statutes. . . . Federal district court decisions are in accord." *Id.* at *9 (internal citations omitted). In *Williams v. District Attorney of Allegheny County, et al.*, No. 10-353, 2010 U.S. Dist. LEXIS 115505 (W.D. Pa. Oct. 29, 2010), the magistrate judge noted she had not discovered "a single case in which a court found that a habeas petitioner satisfied the § 2254 'in custody' requirement, simply because he was subject to the requirements of a sex offender registration law." *Id.* at *25.

Significantly, federal district courts in Texas, addressing the sex offender registration statutes with which Wilson must now comply, have ruled that

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[11] The district judge adopted the magistrate judge's report and recommendation. *See Rodriguez v. Attorney General*, No. 10 Civ. 3868, 2011 U.S. Dist. LEXIS 99490 (S.D.N.Y. Sept. 2, 2011).

compliance with such statutes does not constitute custody for purposes of habeas corpus petitions under 28 U.S.C. § 2254.[12] In *Guardiola v. Thaler*, No. 4:11-CV-159-Y, 2011 U.S. Dist. LEXIS 54944 (N.D. Tex. Apr. 27, 2011), the magistrate judge recommended the habeas petition be dismissed for lack of jurisdiction. *See id.* at *4. There, the petitioner had completely served his sentence, had been required to comply with sex offender registration statutes, had violated that requirement, and was serving a sentence for that violation. *See id.* at *2-*4.[13] *See also Hurley v. Quarterman*, No. 3:08-CV-968-L, 2008 U.S. Dist. LEXIS 123193 (N.D. Tex. Oct. 29, 2008), at *5 ("[T]he requirements imposed on sex offenders under Texas law are not sufficiently restrictive to constitute a form of custody").[14] This striking unanimity of opinion among

[12] To the extent the Texas sex offender registration statutes, Tex. Code Crim. Proc. 62.001, *et seq.*, are more stringent than Virginia's statutes, nothing in the record suggests Wilson did not move to Texas of his own accord. Indeed, it is noteworthy that after conviction in Virginia, and a requirement that he register as a sex offender in Virginia, Wilson was not prohibited from moving to another State to live.

[13] The district court judge adopted the magistrate judge's finding and conclusions. *See Guardiola v. Thaler*, No. 4:11-CV-159-Y, 2011 U.S. Dist. LEXIS 54947 (N.D. Tex. May 23, 2011).

[14] The district court's opinion, adopting the magistrate's findings and conclusions is found at *Hurley v. Quarterman*, No. 3:08-CV-968-L, 2008 U.S. Dist. LEXIS 94129 (N.D. Tex. Nov. 18, 2008).

the lower courts renders Wilson's case wholly unsuitable for certiorari review.

## II. THE FOURTH CIRCUIT MAJORITY CORRECTLY DETERMINED WILSON WAS NOT IN CUSTODY.

A petitioner who files a habeas petition while incarcerated pursuant to the challenged judgment always meets the "'in custody' requirement." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). However, there is no absolute requirement that a petitioner "be physically confined in order to challenge his sentence on habeas corpus." *Maleng*, 490 U.S. at 491. For example, courts consider a petitioner "in custody" when released to parole or probation. *See Jones v. Cunningham*, 371 U.S. 236, 241-43 (1963) (parole); *United States v. Bryson*, 981 F.2d 720, 726 (4th Cir. 1992) (probation).

One who is released to probation or parole, however, unlike Wilson, actually faces the possibility of *returning* to detention *on the sentence imposed*. *See Jones*, 371 U.S. at 242 (noting a parolee "must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed on him in violation of the United States Constitution"). Upon revocation of a suspended sentence, the defendant is punished in accordance with a previously imposed sentence, not for the conduct prompting the revocation, but for his commission of the original crime. *See United States*

*v. Woodrup*, 86 F.3d 359, 361-62 (4th Cir. 1996); *see also Alsberry v. Commonwealth*, 572 S.E.2d 522, 525 (Va. App. 2002).

There is no portion of Wilson's fully served rape sentence that could now ever be imposed. The Fourth Circuit determined that the sex offender registry requirements were collateral consequences of Wilson's rape conviction and held, "there was no term or condition of [Wilson's] sentence that could subject him to reincarceration or impose any other restraint on his liberty." (App. A. at 9a-10a). The court below observed:

> If we were to find that the requirements of [the sex offender registry] statutes were not in fact collateral consequences, then we would be holding that any convicted sex offender could challenge his conviction "at any time on federal habeas," with the consequence that the in-custody jurisdictional requirement of § 2254 would be read out of the statute. *Maleng*, 490 U.S. at 492. *Maleng* unambiguously rules out such a result.

(App. A. at 10a, footnote omitted).

In his petition for certiorari, Wilson cites to examples of custody which do not involve incarceration in prison, including a sentence of community service and a sentence of alcohol rehabilitation. (Pet. for Cert. at 29-30). The comparison is not well made, however, because in each example the penalty is a

measure imposed to punish the convicted offender. Here, Wilson already has fulfilled his punishment.

Wilson argues that some circuits have found restrictions on movement and mandatory appearance, which are less "onerous" than sex offender registration requirements, constitute custody for federal habeas corpus purposes. (Pet. for Cert. at 29). He relies on *Barry v. Bergen County Probation Department*, 128 F.3d 152 (3d Cir. 1997); *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993); and *Lawrence v. 48th District Court*, 560 F.3d 475 (6th Cir. 2009). (Pet. for Cert. at 29-30). That reliance is misplaced.

In *Barry*, the defendant received a substantial fine as part of the sentence for his crime. Later, when the court determined Barry could not pay the fine, a community service requirement was *substituted* for the monetary penalty. Although Barry had been released from probation supervision, his community service was monitored by community service program officials, who could report noncompliance to the Bergen County Probation Department. *See Barry*, 128 F.3d at 161. While the focus of the court of appeals in *Barry* was the degree of restraint imposed by the community service requirement, rather than the threat of imminent incarceration, it should be noted that the community service was part of Barry's *sentence* for his criminal conviction.

In *Dow*, the defendant was *sentenced* to 14 hours in an alcohol rehabilitation program. He was required

to be physically present for the classes. In its opinion, the Ninth Circuit found that attendance at the rehabilitation program significantly restrained Dow's liberty. *See Dow*, 995 F.2d at 923. The Ninth Circuit subsequently discussed both *Barry* and *Dow* in *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998), a case in which the court concluded that compliance with sex offender registration statutes did *not* constitute custody for purposes of 28 U.S.C. § 2254. In *Williamson*, the Ninth Circuit concluded sex offender registry requirements did not impose significant restraints on liberty, nor did the possibility of future incarceration for noncompliance cause them to constitute custody. The court correctly found that sex offender registry statutes were regulatory, not punitive. *See id.* at 1183-84.

Significantly, the following year, the Ninth Circuit in *Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999), again determined that sex offender registry requirements did not constitute custody for federal habeas corpus. The court of appeals noted that Henry had claimed the California law required in-person registration, though such a requirement was not "spelled out in the statute." *Id.* at 1242. The court held, "Registration, even if it must be done in person at the police station, does not constitute the type of severe, immediate restraint on physical liberty necessary to render a petitioner 'in custody' for purposes of federal habeas corpus relief." *Id.*

In *Lawrence,* which is also distinguishable from the instant case, the defendant was sentenced

for interference with a police officer to a year of non-reporting probation and 500 hours of community service. *See Lawrence*, 560 F.3d at 479, 480-81. He was placed on a personal recognizance bond pending resolution of his appeal. *See id.* at 480. The Sixth Circuit held, "Together, probation and an onerous community service requirement imposes significant restraints on liberty. In addition, should Lawrence have violated the terms of probation or community service, the court could revoke his probation and incarcerate him." *Id.* at 481.

Wilson argues that requiring compliance with the sex offender registry was "an element of the judge's order upon conviction." (Pet. for Cert. at 15). He contends the registry requirement functions as a "continuation of the penalty imposed upon petitioner as punishment for his rape conviction." (Pet. for Cert. at 15-16). This characterization is incorrect. The district court correctly concluded that the "regulatory nature of the statute supports the Court's finding that Wilson is not in custody." (App. B. at 44a). The Fourth Circuit accurately noted, "the registration requirements are not imposed *as a sentence for his rape* but rather as a collateral consequence of his having been convicted of rape." (App. A. at 10a).

Indeed, in *Connecticut Department of Public Safety, et al. v. Doe*, 538 U.S. 1 (2003), this Court explained the rationale for such statutes. The Court found registration laws provide information aimed at protecting communities from sex offenders and helping in the arrest of repeat offenders. *See id.* at 4;

*see also Smith v. Doe*, 538 U.S. 84, 93 (2003) (protecting public from sex offenders is "primary governmental interest of the law."). The statutes are an aid for community safety, and are not punitive in nature.

Virginia's sex offender registry statute is "not penal" in nature, but "remedial." *Kitze v. Commonwealth*, 475 S.E.2d 830, 832-33 (Va. App. 1996).[15] The Virginia General Assembly intended to facilitate law enforcement and protect the public, which are regulatory functions. *See id.* at 832. Indeed, the statute's purpose is stated in the statute itself. *See* Va. Code Ann. § 9.1-900 (noting purpose is to assist law enforcement and others to protect community).[16]

Wilson was released from custody on the rape conviction on September 26, 2005, having fully completed his sentence. He was no longer in custody on the rape conviction at the time he filed his federal habeas petition in the district court and thus the court did not have jurisdiction to consider the habeas

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[15] *Kitze* was decided under predecessor statute Va. Code Ann. § 19.2-298.1.

[16] Wilson argues that the remedial nature of the statutes is immaterial because habeas corpus applies even to consequences that are not punitive or criminal. (Pet. for Cert. at 17 n.7). However, it should be noted he cites to cases filed pursuant to 28 U.S.C. § 2241. Wilson filed his habeas petition pursuant to 28 U.S.C. § 2254, which provides for review of a habeas petition brought by "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).

corpus petition. Wilson never again will be in custody on the rape sentence imposed by the Norfolk Circuit Court in 1999.

"[T]he future threat of incarceration for [sex offender] registrants who fail to comply with the statute is insufficient to satisfy the custody requirement." *Virsnieks*, 521 F.3d at 720; *see also Williamson*, 151 F.3d at 1184 ("potentiality for future incarceration" dependent entirely on whether registrant "chooses to obey" sex offender registration law).

The petitioner cites *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), for the proposition that he is in custody because his rape conviction is a necessary predicate to any future violation of the sex offender statutes and he should not have to commit a "new crime" in order to challenge his rape conviction. (Pet. for Cert. at 18). That conclusion, however, is contrary to habeas corpus principles. *See, generally Maleng*, 490 U.S. at 492-93. A petitioner convicted for violating the provisions of a sex offender registration statute would be in custody for the *new* criminal offense, not the original conviction which caused the petitioner to be required to register.

In *Davis v. Nassau County*, 524 F. Supp. 2d 182 (E.D.N.Y. 2007), the district court rejected an argument of the petitioner, who had moved from New York to Oklahoma, that his conviction for violating Oklahoma's sex offender registry requirements "somehow resurrects his ability to challenge his

underlying [New York] conviction because he is again 'in custody' for habeas purposes. . . ." *Id.* at 189. The court found that Davis' sentence for his original conviction had expired fully at the time he filed his habeas petition and "thus, any collateral consequence of that conviction—including penalties for failure to register—cannot constitute 'custody' for purposes of the underlying conviction." *Id.* The court held:

> Thus, once the conviction has fully expired, the "in custody" requirement cannot be met simply by becoming re-incarcerated for violating some collateral consequence of a conviction, such as failure to register as a sex offender or by possessing a firearm as a convicted felon. When such a re-incarceration occurs as a result of failing to register, the resulting sentence is not a continuation of the sex offense because that sentence has expired, but rather is pursuant to an entirely separate conviction for failure to register.

*Id.* at 190. *See also In Re Douglas*, 132 Cal. Rptr. 3d 582, 591 (Cal. App. 2011) ("The end result of applying *Zichko* is that failure to register as a sex offender, resulting in subsequent arrest and charges, is rewarded with access to expired convictions. Such a result is untenable and contrary to principles described in Supreme Court case law.").

Wilson argues that the restraints imposed on his movement and employment, and the requirement that he provide personal information so the police can

track him are so severe that they amount to custody for purposes of federal habeas corpus. (Pet. for Cert. at 21, 23). The district court properly rejected such arguments, noting that "the regulations 'are more analogous to collateral consequences such as the loss of the right to vote than to severe restraints on freedom of movement such as parole.'" (App. B. at 41a, quoting *Leslie*, 296 F.3d at 523). The Fourth Circuit likewise rejected the argument, finding that restrictions imposed by sex offender registry statutes are "particularized collateral consequences." (App. A. at 13a). The Fourth Circuit, quoting *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987), noted that numerous consequences were "a frequent aftermath of virtually any felony conviction," but rejected making "habeas corpus routinely available to all who suffer harm emanating from a state conviction, regardless of actual custodial status." (App. A. at 14a).

Finally, Wilson argues that, based on his claims of actual innocence, a "flexible" interpretation of custody should be employed.[17] (Pet. for Cert. at 25). However, custody is jurisdictional. It cannot be conferred by a party to an action or waived by a party. *See* App. A. at 14a. Although a habeas petitioner may overcome some procedural rules based on the content of his argument, a petitioner may not overcome a loss of jurisdiction, due to lack of custody, on that basis.

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[17] While the petitioner contends that he is actually innocent of the rape for which he was convicted, no court has made such a determination.

## III. THIS CASE IS A POOR VEHICLE FOR THE COURT TO ADDRESS ISSUES WILSON HAS RAISED.

This case is a poor vehicle to address issues Wilson presents, such as his suggestion that there should be a flexible standard for proof of custody where a habeas petitioner has presented evidence that he is actually innocent of the charge for which he stands convicted.

Pursuant to Rule 5, *Rules Governing Section 2254 Cases in the United States District Courts*, a respondent is required to file an answer to a habeas petition only upon order of the judge. In his answer, the respondent must indicate what transcripts from the criminal proceeding are available and must attach copies of relevant portions of such transcripts to his answer. The judge may direct the respondent to provide other portions of state court records. Also, the respondent must attach to his answer copies of appellate briefs and opinions or orders from the state court direct appeal.

In this case, the petition was dismissed before the respondent was directed to file such a responsive pleading. The respondent had objected to the motion to stay and abey the proceedings because the federal court lacked jurisdiction to entertain the habeas petition due to lack of custody. Thus, state court records from the state criminal proceeding were not forwarded to the federal court.

While these records are not necessary to determine that the petitioner was not in custody for purposes of 28 U.S.C. § 2254 under prevailing law, to the extent Wilson argues that a showing of actual innocence "warrants a flexible interpretation of the 'custody' requirement," (Pet. for Cert. at 25-27), such records are essential.

Furthermore, while the petitioner has argued that habeas corpus involves an equitable remedy, he waited more than ten years after the conclusion of the direct appeal of his rape conviction, and nearly five years after his discharge from his sentence, to first file a habeas corpus petition.[18] He is not positioned to claim the benefits of equity.

Finally, although Wilson initially was required to comply with Virginia's sex offender registration statutes, which registry is implemented and enforced by the respondent, *see* Va. Code Ann. § 9.1-915, due to Wilson's voluntary relocation to Texas, he is subject to that state's sex offender registration laws. When a Virginia registrant no longer resides in Virginia, the provisions of the Virginia registry *do not* apply to him

[18] Wilson erroneously asserts that he timely filed his federal habeas petition. (Pet. for Cert. at 27 n.11). The petition, however, was not timely under 28 U.S.C. § 2244, having been filed many years after the final judgment in the criminal case. Indeed, the state habeas corpus court applied Virginia's state habeas statute of limitations, Va. Code Ann. § 8.01-654(A)(2), to deny Wilson's state habeas petition, filed in 2010.

unless he returns to Virginia for work, school, or an extended visit. *See* Va. Code Ann. § 9.1-905.

Wilson must comply with the Texas sex offender registry, which the respondent does not implement or enforce. If Wilson were to violate the provisions of the Texas sex offender statute, he would be subject to prosecution in Texas, for a Texas crime, separate and distinct from his Virginia rape conviction. Under these circumstances, certiorari review would be inappropriate against the Virginia respondent.

## IV. WILSON IS NOT WITHOUT AN AVENUE TO SEEK RELIEF.

The petitioner contends that if he is unable to attack his conviction in this habeas corpus proceeding, "he will have no avenue to obtain relief." (Pet. for Cert. at 18). This assertion is incorrect.

Virginia has two separate writs of actual innocence. In one, a petition for a writ of actual innocence must be based upon newly discovered biological evidence. *See* Va. Code Ann. §§ 19.2-327.2 through 19.2-327.6. Such a petition is filed in the first instance in the Supreme Court of Virginia. Wilson is not eligible to file such a writ in this case because, as noted above, evidence that Omar Ballard's DNA was the only such evidence recovered by law enforcement was known at the time of trial and indeed, that fact was introduced, via stipulation, at Wilson's jury trial. Motion to Amend Opinion, *Wilson*, No. 11-6919, (4th Cir. Aug. 21, 2012), ECF No. 31-1; (App. F. at 85a).

However, under Va. Code Ann. §§ 19.2-327.10 through 19.2-327.14, a petitioner who has pled not guilty at trial, as Wilson did, may file in the Court of Appeals of Virginia in the first instance, a petition for a writ of actual innocence based on non-biological evidence previously unknown or unavailable to the petitioner or his trial attorney at the time the conviction became final in the circuit court. In a petition for a writ of actual innocence filed under these statutes, a petitioner must establish the date on which the non-biological evidence became available and prove it could not have been discovered within 21 days after the entry of the final order in the criminal case. He must demonstrate that the previously unknown and unavailable evidence is material and, when considered with all other evidence, will prove that no rational fact finder could have found proof of guilt beyond a reasonable doubt.[19]

The actual innocence statutes were first enacted by the Virginia General Assembly in 2004. Since that date, numerous non-biological actual innocence petitions have been filed. *See*, *e.g.*, *Haas v. Commonwealth*, 721 S.E.2d 479 (Va. 2012); *Turner v. Commonwealth*, 717 S.E.2d 111 (Va. 2011); *Carpitcher*

[19] During the 2013 Session of the Virginia General Assembly, the actual innocence statutes were amended to alter the standard of review from "could have found" to "would have found" proof of guilt beyond a reasonable doubt. The legislation will become effective July 1, 2013. *See 2013 Va. Acts, ch. 180*.

*v. Commonwealth*, 641 S.E.2d 486 (Va. 2007);[20] *Haynesworth v. Commonwealth*, 717 S.E.2d 817 (Va. App. 2011) (*en banc*); *Copeland v. Commonwealth*, 664 S.E.2d 528 (Va. App. 2008).

Such an avenue to seek relief is available to Wilson, as he pled not guilty at his criminal trial and would not be barred from filing a petition for a writ of actual innocence. Furthermore, the petitioner is not precluded from seeking clemency from Virginia's governors.

[20] Prior to filing a petition for a writ of actual innocence in state court, Carpitcher had filed a petition for a writ of habeas corpus in federal court in the Western District of Virginia. In granting the respondent's motion to dismiss Carpitcher's habeas petition, the court observed that Carpitcher's claim of actual innocence, *inter alia*, had not been exhausted because he had not filed a state petition for a writ of actual innocence. *See* Memorandum Opinion at 4, *Carpitcher v. Ray*, No. 7:04-cv-00313 (W.D. Va. Jan. 3, 2005), *appeal dismissed*, 166 Fed. Appx. 94 (4th Cir. 2006).

## CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be **DENIED**.

Respectfully submitted,

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