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 OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Network and its members[2] are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

In particular, the Network and its members have advocated on behalf of hundreds of individuals who were able to demonstrate their actual innocence years after wrongful convictions. Many of those wrongful convictions were based on the same factors

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[1] Pursuant to Supreme Court Rule 37.2, the parties have both been informed of *amicus curiae*'s intent to file this brief at least ten days prior to filing. The letters of consent from both parties accompany this filing. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

[2] The member entities are listed in the Appendix.

that contributed to the Petitioner's wrongful conviction in this case: false confessions and police misconduct. In these cases, it is important to the Network that habeas corpus is broadly available to all such individuals who can establish their innocence, including those who are subject to the perpetual restraints imposed by sex offender statutes.

SUMMARY OF ARGUMENT

Since 1989, 1,074 convicted defendants have been exonerated based on evidence of their actual innocence. Many of these exonerees have used the writ of habeas corpus to establish their actual innocence. This Court has recognized the importance of keeping the writ available to petitioners who have compelling claims of actual innocence by allowing them to pursue applications for the writ that would otherwise be barred. *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

This case presents a similar situation in which the requirements for habeas relief should be construed flexibly for those who can demonstrate a compelling claim of actual innocence. Although supposedly "free," Petitioner Wilson faces a lifetime of government compulsion and restraint on liberty through the application of federal and state sex offender statutes. The expansion of the system of sex offender statutes in recent years is similar to the adoption of the parole system fifty or sixty years ago. This Court recognized in *Jones v. Cunningham,* 371 U.S. 236 (1963), that habeas corpus should be available to those who, while not actually imprisoned, are subject to the extended form of custody imposed by the parole system. Similarly, habeas relief should be available to those who remain subject to the lifetime of government compulsions and restraints imposed under the sex offender statutes.

But to decide this case in Wilson's favor, this Court need not go that far. Rather, all this Court need decide is that a petitioner with a compelling claim of actual innocence who is subject to the compulsion restraints imposed under the sex offender statutes may seek habeas relief to challenge his conviction.

ARGUMENT

I. HABEAS CORPUS RELIEF SHOULD BE GRANTED BECAUSE THE PETITIONER'S LIBERTY INTERESTS ARE RESTRAINED BY STATUTORY SEX OFFENDER RESTRICTIONS

A. *Historically, Habeas Corpus Has Been Flexibly Construed in Favor of Petitioners with Claims of Actual Innocence*

The Court has long recognized the basic principle that the guilty should be punished and the innocent set free. See *Herrera v. Collins*, 506 U.S. 390, 398 (1993) ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *United States v. Nobles*, 422 U.S. 225, 230 (1975) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'") (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). The great writ of habeas corpus, deemed "the most celebrated writ in the English Law," see 3 WILLIAM BLACKSTONE, COMMENTARIES 129, "'has been for centuries esteemed the best and only sufficient defence of personal freedom.'" *Lonchar v. Thomas*, 517 U.S.

314, 324 (1996) (quoting *Ex parte Yerger*, 75 U.S. 85, 95 (1868)).

The "most compelling" cases for habeas review involve constitutional claims of innocence. *Murray v. Carrier*, 477 U.S. 478, 501 n.8 (1986). In this case, Wilson has raised a compelling claim of his actual innocence such that his conviction should be overturned. Another member of the "Norfolk Four" relying on similar evidence has already succeeded in using the great writ to overturn his own conviction.

Sadly, Wilson is just one of a substantial number of innocent people who have been wrongfully convicted of crimes. According to the National Registry of Exonerations,[3] there have already been 1,074 exonerations in the United States since 1989. Many of these wrongful convictions were based on the same factors present in Wilson's case: official misconduct and false confession. According to a study of 873 individual exonerations from January 1989 through February 2012, official misconduct was a contributing factor in 42% of total cases (18% of 203 sexual assault cases), while false confessions were a factor in 15% of total cases (8% of 203 sexual assault cases).[4]

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[3] The National Registry of Exonerations is a database maintained by the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Mar. 12, 2013).

[4] NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989 – 2012: REPORT BY THE NAT'L REGISTRY OF

Yet so far, Wilson's efforts to clear his name have been frustrated by the lower courts' refusal to recognize that the restraints under which he is obligated to live constitute a form of perpetual custody. As a registered sex offender, Wilson continues to be subject to a byzantine series of requirements that restrict his liberty. Because of the federal Sex Offender Registration and Notification Act, 18 U.S.C. § 16911, *et seq.*, and the interlocking network of state laws, these restraints apply to all sex offenders living and travelling anywhere throughout the country. As a result of his wrongful conviction, wherever Wilson lives or travels throughout the United States for the rest of his life—even for as short a period as two days—he will be required to register with local law enforcement officials and to provide them with personal information, and will be excluded from areas that are otherwise open to the public. As of 2007, twenty-seven states and hundreds of municipalities enacted residency restrictions that prohibit sex offenders from living near schools, parks, playgrounds, and day care centers. U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, SEX OFFENDER RESIDENCY RESTRICTIONS: HOW MAPPING CAN INFORM POLICY 1 (2008). In many locations, the combined restrictions create "overlapping exclusion zones" that have substantially limited where registered sex offenders can live. *Id.*

EXONERATIONS 40 (2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited Mar. 5, 2013) [hereinafter Exonerations Report 2012].

In addition to the limits on his residence and movements, the sex offender statute of Wilson's home state of Texas requires registrants to regularly appear in person to police authorities, and to provide police with a series of personal identifying information. Tex. Code Crim. Proc. Ann. arts. 62.051, 62.061. Further, the Texas statute authorizes law enforcement authorities to ask for "any other information…" they choose on the registration forms, and makes it a crime to not provide answers. *Id.* at 62.051 & 62.102. On a national basis, these statutes purposefully compel affected individuals to maintain contact with government officials, cede their privacy and reputational interests, constrain their contacts with fellow citizens, and constrict where they may live or travel. In reality, Petitioner faces a lifetime of custody. Habeas corpus should be available to those innocent persons, like Wilson, who are required to live their lives under such compulsion and restraints, as well as the constant shame of being branded as sex offenders in public fora, ranging from the Internet to posters on telephone poles.

This Court has long recognized that custody for habeas corpus purposes extends beyond prison walls. The key question is whether the requirements imposed by the government significantly restrict individual liberty. *Jones,* 371 U.S. 236. In *Jones*, the Court further explained:

> It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain

> petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Id. at 242–43. While sex offender statutes may be justified by rational government purposes, it must be recognized that these statutes impose both compulsory obligations and restraints on individuals, and that breach of those obligations or restraints may lead to imprisonment.

Although the Fourth Circuit majority has characterized sex offender restrictions and registration requirements as "collateral consequences" resulting from confinement, these characterizations are mistaken. There can be no doubt that these restrictions actually restrain personal liberty. Free men do not have to announce where they intend to move, report to the government changes in their physical health, provide DNA samples at the request of the government, tell the government what screen names they use online, or announce their presence to the local government

authority when they spend more than forty-eight consecutive hours three times a month in a location away from home. *See* Tex. Code Crim. Proc. Ann. arts. 62.051, 62.055, 62.059 & 62.061. These restrictions are very different in kind from the much more ordinary types of collateral consequences that are faced by individuals convicted of other crimes, such as losing the right to vote. Garrett Ordower, *Gone, But Not Forgotten? Habeas Corpus for Necessary Predicate Offenses*, 76 U. CHI. L. REV. 1837, 1844 (2009) [hereinafter Ordower]. Rather, these restraints apply continuously each day of an individual's life, limiting where he may go and subjecting him to constant monitoring.

Regardless of whether these restraints are reasonable or justified given the underlying offenses involved, the individuals subject to these restrictions experience restraints on their liberty. Thus, an individual who is suffering these restraints by virtue of a wrongful conviction should be able to use habeas corpus to challenge that conviction.

The context of the *Jones* case provides an important historical parallel to the Petitioner's case. When *Jones* was decided in 1963, the nationwide expansion of indeterminate probation and parole schemes was relatively new. Ordower, *supra*, at 18, 42–43. These schemes were developed for a noble purpose—to help to facilitate the rehabilitation of former prisoners. The *Jones* Court understood that the new parole and probation mechanisms represented a fundamental shift in governments' response to crime, *see Jones*, 371 U.S. at 242–43, but

nonetheless considered these programs forms of custody. The growth of nationwide sex offender registrations and restrictions is very similar. Governments have created a post-prison custodial scheme where former convicts' actions are monitored and controlled. Moreover, in both probation and sex offender registration schemes, failure to comply with the requirements results in a return to prison.[5] *See* Tex. Code Crim. Proc. Ann. art. 62.102. Although different mechanisms are used for re-imprisonment, in both cases individuals live in fear that a "single deviation, however slight, might be enough to result in [their] being returned to prison." *Jones*, 371 U.S. at 242.

This fear of an inadvertent deviation is even more justified for sex offenders than parolees: while a parolee must answer to a single parole officer, a sex offender is subject to a multitude of federal, state and local requirements, which may differ from each other. As an example, the Texas sex offender statute that applies to Wilson requires he provide

- his address;
- a detailed description of his physical characteristics including date of birth, sex, race, height, weight, eye color, hair color, and shoe size;
- his social security number;

[5] Under Va. Code Ann. § 9.1-903(A) (West 2010), the effects of the sex offender scheme begins at sentencing. When a person is convicted of a sex offense requiring registration, the convicted offender must register with the Department of State police.

- his driver's license number;
- any alias used;
- a recent color photograph;
- information on the crime he was convicted of;
- employment information;
- information on where he attends school;
- any online identifiers;
- information on any license he holds; and
- "any other information required by the department."

Tex. Code Crim. Proc. Ann. art. 62.051(c). Moreover, the registration requirements vary from state to state and among local jurisdictions. Therefore, sex offenders like Wilson face myriad individual reporting requirements wherever they go—each with separate requirements limiting residence, travel and contact with others.

B. *As a Result of Sex Offender Registries, Registered Sex Offenders Are Subject to an Onslaught of Burdensome Restrictions That Confine Every Aspect of Their Daily Lives*

Those obligated to register as sex offenders remain captive to myriad restrictions—both statutorily inscribed and implied—which govern the substance and minutiae of their daily lives. Unstated restrictions run the gamut from stigmatization, ostracism, and loss of housing to job loss and physical assault. *See* HUMAN RIGHTS

WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 78–79 (2007) [hereinafter Human Rights Watch].[6] Registered sex offenders like Wilson are outcast from society and often compelled to live a life of isolation and confinement.[7] From their perspective, it is a form of continuous punishment and custody, even though they may not actually be behind bars.

The statutes impose residency burdens so severe that registered sex offenders must resort to "living on the streets, in the woods, under bridges, in abandoned houses, and in sewer pipes" because there is simply no place else to live. Tabriz Combs, Unwillingly Revealed: Registered Sex Offenders' Attitudes Toward the Sex Offender Registry (Apr. 15, 2011) (unpublished B.A. thesis, Wesleyan University) [hereinafter Combs] at 89, available at http://wesscholar.wesleyan.edu/etd_hon_theses/632

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[6] A Justice Department study examining the impact of Wisconsin's sex registration statute found that 83% of offenders said that notification results in "exclusion from residence"; 77% reported "threats and harassment"; 67% reported "emotional harm to family members"; 67% reported being "ostracized by neighbors/acquaintances"; 57% reported "loss of employment"; and 3% reported "vigilante attack." U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN 10 (2000).

[7] The very justification for many sex offender registration statutes—albeit unstated—is to humiliate sex offenders. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 339 (2001). Tellingly, during the introduction of the federal sex offender statute, Congressmen routinely referred to sex offenders as "monsters," "beasts," and "predators." *Id.* (citations omitted).

(last visited Mar. 5, 2013); *see also* Human Rights Watch, *supra*, at 100 (quoting Georgia State House Majority Leader Jerry Keen as admitting that his "intent personally is to make it so onerous on those that are convicted of these offenses . . . [that] they will want to move to another state"). The frequency of such homelessness among registered sex offenders is increasing. According to the California Sex Offender Management Board, "the number of sex offenders registering as transient has increased from 2,050 in June 2007 to 3,267 by August 2008 – an increase of 60%." CAL. SEX OFFENDER MGMT. BD., HOMELESSNESS AMONG REGISTERED SEX OFFENDERS IN CALIFORNIA: THE NUMBERS, THE RISKS AND THE RESPONSE 1 (2008), available at http://www.cdcr.ca.gov/Parole/Sex_Offender_Facts/docs_SOMB/Housing_2008_Rev.pdf (last visited Mar. 12, 2013). These unfortunate circumstances are complicated by state registration statutes that require offenders to register a specific place of residence—a requirement that, in some situations, has led to an individual's return to jail for failure to register. *See* Human Rights Watch, *supra*, at 103.[8]

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[8] One individual, William K., tells a compelling story illustrating these circumstances:

> I was homeless—I went to two homeless shelters—told them the truth—I was a registered sex offender—I could not stay. No one helps sex offenders I was told. The 3rd shelter I went to—I did not tell them. I was allowed to stay, November 2002 I was to register again—my birthday. If I told them I lived at a shelter—I would be thrown out—if I stayed on the streets I would not have a [sic] address to give—violation. So I registered

Not only are registered sex offenders confined by governmental restrictions on where they may live, but they are also restricted by being part of a controlled and stigmatized group. This public stigmatization, or "branding," can make registered sex offenders "avoid intergroup contact to escape exposure to prejudice and discrimination from the majority group" and "isolate themselves due to the possibility of contact with prejudice and discrimination through involuntary exposure due to being listed on the registry." Combs, *supra*, at 49. The resulting need for sex offenders to isolate themselves from society is even greater in states where active community notification is practiced. This practice of "branding—which can last for a lifetime—has the entirely foreseeable result of making it very difficult (if not entirely impossible) for former offenders and their families to live peaceful, safe, stable, and productive lives." Human Rights Watch, *supra*, at 80–81. Far from living a "normal" existence, sex offenders have been murdered by vigilantes, *id.* at 89–90, and often commit anxiety-induced suicide. *Id.* at 41, 78–79.

The position of a registered sex offender in communities nationwide is therefore akin to that of a biblical leper, shunned from society and forced by

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> under my old address—the empty house, which was too close to a school. Someone called the police—told them I did not live at that address anymore—! I was locked up, March 2003. I was given a 10-year sentence for failure to register as a sex offender.

Human Rights Watch, *supra*, at 103.

both legal practicalities and the disgust of others to live "apart." *See* Combs, *supra*, at 51 (noting that "[r]esearchers have even deemed the registry and community notification to be equivalent to the use of the 'scarlet letter'"). As Justice Souter aptly stated,

> Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts . . . Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.

Smith v. Doe, 538 U.S. 84, 109 (2003) (Souter, J., concurring in judgment).

Thus, registered sex offenders have compared their lives to being "shackled all over again." Combs, *supra*, at 98; *see also* Human Rights Watch, *supra*, at 88 (quoting H.M, a registered sex offender, stating that community notification "is a far worse punishment than jail ever was"). Understandably, the feeling of confinement is exacerbated when the individual subject to the consequences of being on a registry is, in fact, innocent. Indeed, one such individual—even after being released on parole 14 years after a 1987 crime that DNA evidence excluded him from committing—still called registering as a sex offender "the most horrific thing I ever had to do in my life." Shawndra Jones, *Setting Their Record Straight: Granting Wrongly*

Branded Individuals Relief From Sex Offender Registration, 41 COLUM. J. L. & SOC. PROBS. 479, 480 (2008); *see also* Ramonica R. Jones, *East Texas Man Cleared in 24-Year-Old Rape Case*, KTRE, Apr. 19, 2007, available at www.ktre.com/story/6397470/east-texas-man-cleared-in-24-year-old-rape-case?clienttype=printable (last visited Mar. 12, 2013) (noting James Giles, wrongfully convicted of rape, saying that "he feels like more of a prisoner now than he did when he was locked up"). Without the availability of habeas corpus, those convicted sex offenders who, like Wilson, may be able to establish their actual innocence, will nonetheless remain subject to confining restrictions that will dictate every aspect of their daily lives.

II. PERSONS WITH COMPELLING EVIDENCE OF ACTUAL INNOCENCE WHO WERE WRONGFULLY CONVICTED OF A SEX OFFENSE SHOULD NOT PERPETUALLY ENDURE BURDENSOME RESTRAINTS ON THEIR LIBERTY

Wilson is part of a small but critical class of innocent persons who were wrongfully convicted of a sex offense, but must endure burdensome infringements on their liberty as a direct consequence of that wrongful conviction—all despite compelling evidence of innocence. In Wilson's case, official misconduct and coercion of a false confession resulted in his wrongful conviction, amidst an investigation and prosecution rife with glaring constitutional infirmities. Should the Fourth Circuit's decision stand, innocent persons such as Wilson will have no recourse but to accept a scheme of substantial ongoing restrictions that impede numerous aspects of daily life.

As noted above, 1,074 exonerations have occurred in the United States since 1989. These confirmed 1,074 wrongful convictions resulted from one or more of the following contributing factors: mistaken witness identification, perjury or false accusation, false or misleading forensic evidence, inadequate legal defense, and the two primary contributing factors to Wilson's wrongful conviction—official misconduct and false confession. Official misconduct was a contributing factor in 42% of 873 cases (18% of 203 sexual assault cases), while false confessions were a factor in 15% of those cases (8% of 203 sexual assault cases).[9] An exhaustive study examining the first 250 wrongfully convicted people to be exonerated by DNA testing[10] concluded that forty of the first 250 DNA exoneration cases (16%) involved a false confession.[11]

The alarmingly high number of false confessions given by innocent persons who are convicted and later exonerated demands attention to the key role false confessions play in the wrongful conviction and unjust post-conviction suffering of Wilson and others like him. As this Court has stated, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [C]onfessions have

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[9] Exonerations Report 2012, *supra*.

[10] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) [hereinafter Garrett].

[11] *Id.* at 18.

profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 139–40 (1968)).

Unsurprisingly, "[t]he primary reason that innocent defendants confess is that they are coerced into doing so—frightened, tricked, exhausted or all three."[12] Often, a suspect will comply with police pressure and will confess primarily to "b[e] allowed to go home, brin[g] a lengthy interrogation to an end, or avoi[d] physical injury."[13]

Particularly disturbing is that innocent people may not take advantage of the rights that the Constitution grants to suspects interrogated by the police. Research indicates that people who are falsely accused believe that truth will prevail and that their innocence be apparent and, therefore, waive their right to silence and to a lawyer.[14]

Another distressing phenomenon is the multiplying effect of false confessions, where one individual false confession can draw additional innocent people into an investigation.[15] A 2004

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[12] Exonerations Report 2012, *supra*, at 57.

[13] Garrett, *supra*, at 18.

[14] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 22-23 (2010) [hereinafter Kassin].

[15] Garrett, *supra*, at 26.

study,[16] twice referenced by this Court,[17] analyzed 125 cases of proven false confession in the United States between 1971 and 2002, finding that in 30% of the cases, multiple false confessions were obtained for the same crime, "wherein one false confession was used to prompt the others. In total, 81% of false confessors in this sample whose cases went to trial were wrongfully convicted."[18]

Wilson's circumstances illustrate these statistics all too well. Wilson only provided a false confession after being tricked, exhausted, and intimidated. During the interrogation, Wilson "repeatedly denied that he was in any way involved in the crime"[19] and even voluntarily submitted to a polygraph examination.[20] After the test, the interrogator lied to Wilson and asserted that Wilson had failed the polygraph test.[21] When Wilson maintained his innocence, the interrogator "became very angry and aggressive."[22] The interrogator

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[16] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) [hereinafter Drizin & Leo].

[17] *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011); *Corley v. United States*, 556 U.S. 303, 321 (2009).

[18] Kassin, *supra*, at 5 (citing Drizin & Leo).

[19] Ct. App. J.A. 10. The citation is taken from the Petitioner's federal habeas petition, which was reproduced in the Joint Appendix filed in the Fourth Circuit. The Joint Appendix will hereinafter be cited as Ct. App. J.A.

[20] *Id.*

[21] *Id.*

[22] *Id.*

employed various physical intimidation tactics, and even "repeatedly poked [Wilson] in the chest, forehead, and eye."[23] Finally, "exhausted and intimidated," Wilson falsely confessed to a crime he did not commit.[24] In his own words: "[I]f they had told me that I killed J.F.K., I would have told them I handed Oswald the gun."[25]

However, Wilson's confession did not match the evidence at the crime scene, nor did it match the other false confessions that the interrogator had extracted from Wilson's co-defendants.[26] Nevertheless, Wilson and his innocent co-defendants were ultimately convicted. His three co-defendants have each pursued habeas corpus relief and, as noted above, one of them has already obtained relief overturning his conviction.

The Center on Wrongful Convictions and the Innocence Project (members of the Innocence Network) have assisted in the exoneration of many individuals whose convictions have been based on false confessions.

In a Chicago case with similar facts, Terrill Swift was convicted after giving a false confession, and received a thirty year sentence for a rape and murder he did not commit. Swift was seventeen at

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[23] *Id.*

[24] *Id.*

[25] Transcript of Proceedings at 552:15-17, Commonwealth of Va. v. Wilson (1999).

[26] Ct. App. J.A. 11.

the time he and four others confessed. The defendants' statements were inconsistent with one another, no physical evidence linked any of the confessors to the crime, and pre-trial DNA testing of semen from the crime scene excluded Swift and his co-defendants. Notwithstanding, Swift was convicted in a bench trial and served fifteen years and another year on parole. Later, a motion was granted to conduct a more sophisticated DNA test which matched the semen to another man the police had originally interviewed. The convictions of Swift and three co-defendants were vacated. Profile of Terrill Swift, Center on Wrongful Convictions, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilswifttSummary.html (last visited Mar. 7, 2013).

In another case, fourteen year old Robert Taylor falsely confessed to the gang rape and murder of a fourteen year old girl. Outside the presence of parents or counsel, Taylor signed a statement implicating him and four other teenagers in the rape-murder. Two of the other defendants also confessed, but their confessions conflicted with one another over basic facts. Furthermore, DNA testing of sperm recovered from the crime scene identified a lone male DNA profile—a profile that did not match any of the defendants. Nevertheless, based upon the confession and testimony from two of the defendants who were offered plea deals, Taylor was convicted and sentenced to eighty years. Post-conviction DNA testing matched the sperm to another man, who at the time of the crime lived in the victim's neighborhood. Taylor's conviction was vacated and

he was released after having served more than nineteen years for a crime he did not commit. Profile of Robert Taylor, Center on Wrongful Convictions, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/iltaylorrSummary.html (last visited Mar. 7, 2013).

Similarly, Eddie James Lowery served a sentence of over nine years and later proved his innocence while living under the restrictions of the sex offender registries. Lowery was involved in a traffic accident in the neighborhood of an elderly Kansas woman who had been raped. Lowery was interrogated all day without food, and was supplied non-public details of the crime by investigators. At the end of the lengthy interrogation, Lowery falsely confessed; the confession was the centerpiece of his trial. He was convicted and sentenced to eleven years in prison. After being released on parole, Lowery paid for DNA testing that excluded him as the contributor of the DNA collected from the victim. His conviction was subsequently vacated. Profile of Eddie James Lowery, Innocence Project, http://www.innocenceproject.org/Content/Eddie_James_Lowery.php (last visited Mar. 8, 2013).

Despite Wilson's wrongful conviction, he will have no recourse from the substantial burdens thrust upon him unless this Court extends him habeas relief. Because of his compelling showing of actual innocence, Wilson's situation merits a more flexible application of habeas corpus to correct a grave miscarriage of justice.

III. HABEAS CORPUS SHOULD BE AVAILABLE TO PETITIONERS WITH SUBSTANTIAL CLAIMS OF ACTUAL INNOCENCE WHOM ARE SUBJECT TO SEX OFFENDER STATUTES

A. *The Court Should Allow Wilson's Habeas Petition to Proceed Because the Writ is Flexible and Favors Petitioners with Compelling Claims of Actual Innocence*

As the Court held in *Murray*, 477 U.S. at 501 n.8, "a constitutional claim that may establish innocence is clearly the most compelling case for habeas review." To provide petitioners with such compelling innocence claims with access to obtain relief, this Court has flexibly construed the habeas requirements in favor of petitioners asserting innocence claims. *See Daniels v. United States*, 532 U.S. 374, 383 (2001) (acknowledging habeas relief may be available in "rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own"); *Lackawanna Cnty. Dist. Attorney v. Coss*, 532 U.S. 394, 405 (2001) (suggesting certain instances in which a habeas petitioner could challenge an expired conviction because "it is not always the case, however, that a defendant can be faulted for failing to obtain timely review of a constitutional claim."). Most notably, this Court has recognized an actual innocence exception that provides a "gateway" for an otherwise defaulted petitioner to pursue habeas relief. *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (citing *Herrera*, 506 U.S. at 404). By recognizing this actual innocence exception, the Court has allowed federal courts to reach the merits of habeas

petitions, even if the petitioner could not show cause for default and prejudice from the claimed error. *See House v. Bell,* 547 U.S. 518, 536 (2006).

The Fourth Circuit, however, construed the habeas statute narrowly to deny Wilson such relief—despite the lack of any such procedural defaults in his case—only because the obvious restraints on Wilson's liberty do not meet the Fourth Circuit's overly formalistic definition of custody. *Wilson v. Flaherty*, 689 F.3d 332, 333 (4th Cir. 2012). Yet the writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones*, 371 U.S. at 243. As this Court recently reiterated, "'fundamental fairness is the central concern of the writ of habeas corpus.'" *See Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (quoting *Strickland v. Wash.*, 466 U.S. 668, 697 (1984)).

Given the express purpose of habeas corpus and the considerable flexibility provided to habeas petitioners bringing constitutional claims of innocence, this Court should similarly allow Wilson's claims for habeas relief to be heard.

B. *The Virginia and Texas Sex Offender Statutes Place Restraints On Liberty that Warrant Habeas Relief*

As discussed, there is no question that the Virginia and Texas sex offender statutes place severe restrictions on Wilson's liberty that are not

shared by the public at large. While the Fourth Circuit majority minimized the impact of these restrictions by characterizing them as a "collateral consequence of his having been convicted of rape," the majority never stated that such restraints do not exist. *See Wilson*, 689 F.3d at 337. Thus, the Fourth Circuit majority agreed that Wilson's liberty has been and continues to be restrained, but regrettably did not find the restraints "sufficiently substantial" to warrant habeas relief. *Id.* at 333.

As Judge Wynn indicated in his dissent, now is not the time to "blindly adher[e] to formalist procedural concerns" and to narrowly interpret the term custody to deny Wilson a forum for redress. *Wilson*, 689 F.3d at 348. As in *Schlup,* Wilson's case is extraordinary because without this Court's intervention, his liberty will *forever* be restrained despite compelling evidence of his innocence. Because Wilson may have no other forum to defend his liberty interests, he is deserving of relief and his petition should be heard on the merits.

Where a petitioner such as Wilson can raise a substantial claim of actual innocence, probative evidence of grave constitutional error at trial, and new evidence, he should have access to the habeas writ to challenge a conviction that imposes any restraints on his liberty, especially severe liberty restraints such as those in Wilson's case. When confronted with claims of innocence, this Court has flexibly applied the requirements for habeas relief and should continue to do, particularly when a petitioner's liberty is restrained such that he cannot

"do those things which in this country free men are entitled to do." *Jones*, 371 U.S. at 243.

C. *Deciding in Petitioner's Favor Will Have a Limited Impact*

In ruling in Wilson's favor, the Court need not decide whether a petitioner, who is unable to raise a substantial claim of innocence but who has fully served his sentence and remains subject to state sex offender restrictions, can seek habeas relief. Rather, the Court need only address the very narrow set of circumstances of Wilson's case in which a petitioner seeking habeas relief presents a substantial claim of actual innocence, raises a compelling claim of new evidence or unconstitutional error at trial, has been released from prison, and remains subject to liberty restrictions under state sex offender statutes.

Moreover, the Court need not be concerned that such a ruling will open the floodgates to other similar claims. This Court has previously noted that "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare."[27] *Schlup*, 513 U.S. at 321. There are major evidentiary hurdles that petitioners must overcome to bring a successful claim of innocence:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable

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[27] Additionally, most convicted sex offenders who are no longer incarcerated, on parole, or probation are beyond the end of their direct appeals and cannot pursue habeas relief pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996's one-year limitation period. 28 U.S.C. 2244(d).

> evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324.

The burden on the petitioner to make an effective claim of innocence is extraordinary. A recent study examined over 2,750 federal habeas petitions brought by state prisoners and found that only one petitioner made a successful *Schlup* claim. *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 15, 17, 48–49 (2007), available at http://law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639 (last visited Mar. 12, 2013). If a petitioner, such as Wilson, can meet these exacting standards, then his petition should be heard. Most importantly, the only tangible impact of a ruling in Wilson's favor would be to allow an actually innocent petitioner to be free of substantial, unending, and unwarranted restrictions on his personal liberty.

CONCLUSION

For the foregoing reasons, and those presented by petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review

Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.