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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Virginia's opposition does not take issue with many of the central points made in the petition. It gives no reason to believe that petitioner is, or might be, guilty. It does not challenge our demonstration that the sex-offender registration regime imposes extraordinary and onerous restrictions on petitioner's liberty that burden his life on a daily basis. And the Commonwealth cannot deny that the question presented by the petition is one of exceptional practical importance, both because it arises with great frequency and because the Fourth Circuit's rule, in the words of the *concurring* judge below, leaves an innocent man subject to "significant legal burdens and disabilities" that "are wholly unjustified by any legitimate governmental interest." Pet. App. 17a.

The little that Virginia does say is not responsive to the petition's arguments. The Commonwealth does not attempt to reconcile the Fourth Circuit's analysis with the decisions of this Court that are addressed in the petition. It ignores our demonstration that courts of appeals have reached inconsistent conclusions about what kinds of in-person appearance requirements constitute custodial restraint. And the Commonwealth has virtually nothing to say about this Court's recognition that a petitioner's actual innocence mandates flexibility in the application of habeas requirements—a principle that the Court very recently reaffirmed in holding that "actual innocence, if proved, serves as a gateway through which a [habeas] petitioner may pass." *McQuiggin* v. *Perkins*, No. 12-126 (U.S. May 28, 2013), slip op. 1. Because the decision below is inconsistent with this Court's decisions and contributes to continuing uncertainty about the broader meaning of the habeas custody re-

quirement—and because it is a "moral imperative" that an innocent man be given an opportunity to challenge lifetime, state-imposed disabilities (Pet. App. 35a (Wynn, J., dissenting))—further review is imperative.

A. The Restrictions On The Availability Of Habeas Applied By The Fourth Circuit Are Inconsistent With This Court's Decisions

The Fourth Circuit resolved three points regarding the meaning of the habeas custody requirement: It held (1) that the requirement of sex-offender registration is simply a "collateral consequence" of conviction that is immaterial once the petitioner's sentence has been served; (2) that the sex-offender registration and related requirements are too trivial to constitute "custody"; and (3) that the actual innocence of a habeas petitioner has no bearing on the custody inquiry. See Pet. 15, 18-19, 25-26. We showed in the petition that these holdings cannot be squared with this Court's decisions. Virginia has virtually nothing to say in response.

1. In arguing that the sex-offender registration requirements cannot trigger habeas review, the Commonwealth first simply repeats the Fourth Circuit's observation that petitioner's sentence for rape has been fully served and that he does not "face[] the possibility of *returning* to detention *on the sentence imposed*." Opp. 14; see *id.* at 15, 19-22. As we showed in the petition (at 15-18), however, this assertion ignores the practical operation of the registration requirements at issue here. Those requirements were triggered by the judge's order upon conviction and will, for the rest of petitioner's life, effectively function as a continuation of his sentence. In such cir-

cumstances, it is not dispositive that petitioner's sentence "has been completed in terms of prison time served" (*Garlotte* v. *Fordice*, 515 U.S. 39, 43 (1995)); because the continuing effects of petitioner's conviction restrain his liberty, his challenge "implicates the core purpose of habeas review." *Id.* at 47. It accordingly did not matter in *Garlotte* that, as in this case, there was "no portion of [the] fully served * * * sentence [that] could ever be imposed" in the future. Opp. 15. Virginia makes no response to this point; it fails even to cite, much less attempt to distinguish, *Garlotte*.

The Commonwealth also repeatedly parrots, without elaboration, the Fourth Circuit's declaration that the sex-offender registration requirements are mere "collateral consequences" of petitioner's conviction. Opp. 15, 18, 22. But we showed in the petition (at 16, 24-25) that the sex-offender requirements are quite different, both in kind and in degree, from the routine consequences of a criminal conviction—"inability to vote, engage in certain businesses, hold public office, or serve as a juror"—described by the Court as "collateral" in *Maleng* v. *Cook*, 490 U.S. 488, 491-492 (1989). Unlike the defendants in *Maleng* and *Carafas* v. *LaVallee*, 391 U.S. 234, 237-238 (1968), petitioner must comply with *affirmative* in-person registration and reporting obligations; he is subject to continuous, intrusive government monitoring to ensure that he complies with those obligations; "the essentially automatic nature of a conviction for failure to register" means that he *always* "is one missed deadline away from returning" to prison (*Recent Cases, Federal Habeas Corpus – Custody Requirement – Fourth Circuit Denies Forum to Sex Offender With Actual Innocence Claim*, 126 HARV. L. REV. 2106, 2111, 2112 (2013)); and he must abide by a long list

of restrictions on where he can live and travel that have a pervasive effect on his daily life. See Pet. 8-10, 21-24. "The requirements of these [sex-offender statutes] are *sui generis*" (Pet. App. 16a (Davis, J., concurring)), and nothing in *Maleng*, or in any other decision of this Court, suggests that such consequences of conviction are immaterial to the habeas inquiry. Here, too, Virginia offers no response at all.[1]

2. We showed in the petition (at 9-12, 21-24), and *amici* Innocence Network (Br. 6-8, 10-16) and The Rutherford Institute (Br. 11-20) demonstrate in detail, that the restraints imposed on petitioner after his release from prison are custodial in nature. Virginia entirely fails to address the substance of this contention, simply asserting, without explanation or analysis, that the sex-offender requirements are insufficiently "severe" to constitute custody. Opp. 22. But that is surely wrong.

As the petition and *amicus* briefs explain, petitioner must, among other things, regularly report *in person* to law enforcement authorities; give those authorities extraordinarily detailed personal information, providing updates when that information changes; in many circumstances report when he travels both within his home State of Texas or to other states; and is subject to significant restrictions on where he can live or visit and, depending on where he does live, on his occupation. Failure to comply with these requirements is a felony that would subject petitioner to immediate arrest and a

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[1] Virginia does assert that the sex offender restrictions are not punitive (Opp. 18-19), but habeas relief never has been limited to punitive restrictions on liberty. See Pet. 20 n.9, 21; see, *e.g.*, *Strait* v. *Laird*, 406 U.S. 341 (1972) (habeas invoked by military reservist).

lengthy prison term. And all this is in addition to the "profound humiliation and community-wide ostracism" that follows from "aggressive public notification of [convicted sex offenders'] crimes." *Smith* v. *Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting). See Innocence Network Br. 11-16; Rutherford Institute Br. 14-19. It would seem obvious, as Justice Black articulated the governing test for a unanimous Court, that such restrictions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963).

3. We explained in the petition that petitioner's actual innocence affects the limits on the availability of habeas relief. Pet. 25-27. Virginia's only response is the conclusory assertion that, "[a]lthough 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." Opp. 22. But this argument misunderstands our position and misstates the governing law. We do not contend that a claim of actual innocence wholly displaces the habeas custody requirement. Instead, our submission is that, given both this Court's practice of "very liberally construe[ing] the 'in custody' requirement for purposes of federal habeas corpus" (*Maleng*, 490 U.S. at 492) and the Court's consistent view that habeas rules must be applied with sensitivity "to the imperative of correcting a fundamentally unjust" result (*Schlup* v. *Delo*, 513 U.S. 298, 320-21 (1995) (citations and internal quotation marks omitted)), the custody requirement must be applied flexibly so as to advance "'the individual interest in justice.'" *McQuiggin*, slip op. 9.

Thus, as Judge Wynn explained below, "[t]he Supreme Court recognized in [*Lackawanna Dist. Att'y* v. *Coss*, 532 U.S. 394 (2001)] that, when a defendant obtain[s] compelling evidence that he is actually innocent of the crime for which he was convicted,' a defendant may proceed on a writ of habeas corpus to collaterally attack a prior conviction for which the defendant had already served the sentence." Pet. App. 26a (quoting 532 U.S. at 404). That is the situation here: Even "the panel agrees that the sexual offender registration requirements do unjustifiably restrain [petitioner]," meaning that this case "combines undisputed deprivations [of petitioner's] liberty, compelling claims of his actual innocence, and an absence of a forum to redress [his] constitutional challenges" (*id.* at 25a, 27a-28a). Even if the sex-offender registration requirements are not regarded as custodial in other circumstances, they are of sufficient severity to trigger the availability of habeas when the petitioner demonstrates his or her actual innocence.

Accordingly, as one commentator very recently suggested in addressing this case, "the Supreme Court should resolve the tension between the custody requirements of § 2254 and the *Coss* actual innocence exception." *Recent Cases*, *supra*, 126 HARV. L. REV. at 2112. The Court repeatedly has emphasized the importance of "providing petitioner[s] a meaningful avenue by which to avoid a manifest injustice." *House* v. *Bell*, 547 U.S. 518, 537 (2006) (citations and internal quotation marks omitted). It reaffirmed that principle just last week in *McQuiggin*, explaining that its decisions in this area "'see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," even in the face of statutory restrictions on the

availability of habeas relief. Slip op. 9 (quoting *Schlup*, 513 U.S. at 324). Of course, such "tenable actual-innocence gateway pleas are rare." *Id.* at 3. But this petition—where two members of the panel below separately characterized petitioner's claims of actual innocence as "compelling" (Pet. App. 17a, 18a)—surely presents one of those rare cases. Petitioner should be given an opportunity in habeas to advance his constitutional claims.[2]

B. The Courts Of Appeals Have Reached Inconsistent Results On The Types Of Restrictions That Qualify As Custodial

Virginia observes, correctly, that there is no conflict in the circuits on the particular question whether sex offender registration requirements constitute custody for habeas purposes. Pet. 9-14. We acknowledged as much in the petition (at 27).[3] But as we also explained (at 27-30), the courts of appeals have reached irreconcilable conclusions on the broader question of what constitutes custody for habeas purposes. On the one hand, several courts have held that mandatory community service or rehabilitation

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[2] When limited to petitioners with a plausible claim of actual innocence, it plainly is not the case that the rule we advance would allow "any convicted sex offender [to] challenge his conviction at any time on federal habeas." Opp. 15 (citations and internal quotation marks omitted). Such a rule would "appl[y] to a severely confined" category of cases. *McQuiggin*, slip op. 10.

[3] As we also noted, however, in all but one of these decisions, and unlike the situation here, the defendant was not subject to an in-person registration requirement. Cf. *Smith* v. *Doe*, 538 U.S. 84, 101-102 (2003). The denial of review in *Clair* v. *Maryland*, 133 S. Ct. 488 (2012) (see Opp. 10), a pro se challenge to a one-paragraph, unpublished decision, sheds no light on whether certiorari should be granted here.

classes are custodial; on the other, some of these same (and other) courts have held that a sex-offender registration regime is not custodial—although it is manifest that being subject to sex offender registration requirements is considerably more onerous and a much greater practical restriction on liberty than is a short stint in a classroom. These divergent outcomes reflect confusion about what it is, exactly, that makes a restriction custodial in nature.

The Commonwealth offers no response. All it has to say about the community-service and rehabilitation-class decisions is that "in each example the penalty is a measure imposed to punish the convicted offender." Opp. 15-16; see *id.* at 16-18. But that observation misses the point. We did not offer these decisions to establish that an expired conviction may be challenged in habeas; we cited them to show uncertainty about the characteristics that make a restriction custodial in nature. Virginia does not deny the existence of this confusion—or, indeed, say anything about the point.

C. Virginia's Remaining Arguments Do Not Militate Against Review

Virginia also offers a hodge-podge of arguments in support of the contention that this case is a "poor vehicle to address" the issue presented in the petition. This submission is insubstantial. The court of appeals decided several propositions as a matter of law: that habeas is unavailable once the defendant's formal sentence has expired; that sex-offender registration requirements are not custodial; and that petitioner's claim of actual innocence is immaterial to whether he is in custody. Those holdings can be addressed without any consideration of the "vehicle" concerns raised by the Commonwealth, as they in

fact were by the Fourth Circuit. If this Court grants review and reverses, Virginia would be able to raise its points below if it continues to resist petitioner's claim.

In any event, the Commonwealth's arguments are incorrect on their own terms. *First*, its principal contention is that "state court records from the state criminal proceeding were not forwarded to the federal court" and that such records are "essential" to evaluation of petitioner's claim of actual innocence. Opp. 23-24. In fact, as we have noted, two judges on the panel had no difficulty concluding on the existing record that petitioner's claim of actual innocence is "compelling." To the extent the state records are thought relevant, they could be obtained on remand from this Court (or, indeed, as public records could be provided to this Court to assist its decision on the merits).

Second, Virginia likewise is incorrect in contending that petitioner's claim is untimely. Opp. 24 & n.18. The decision below made no suggestion that petitioner had been dilatory or that his habeas claim was untimely, and in fact alluded to "exculpatory new evidence." Pet. App. 4a. And even if the claim of untimeliness otherwise could have had merit, it cannot be squared with the Court's recent decision in *McQuiggin*, given petitioner's substantial claim of actual innocence.

Third, habeas relief is not made unavailable by petitioner's move from Virginia to Texas, as the Commonwealth appears to contend. Opp. 24-25. Virginia did not raise this point below and it is best regarded as a challenge to personal jurisdiction or venue that has been waived. See *Kanai* v. *McHugh*, 638 F.3d 251, 256-58 (4th Cir.) (applying 28 U.S.C.

§ 2241), cert. denied, 132 S. Ct. 381 (2011). And the argument is incorrect on the merits. Although the proper habeas defendant is the petitioner's "immediate custodian" and in the "district of confinement" when the challenge is to physical confinement (see *Rumsfeld* v. *Padilla*, 542 U.S. 426, 438, 447 (2004)), in other cases it is not necessary that the petitioner currently be located within the court's territorial jurisdiction. See *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 (1973); *Robinson* v. *Atkinson*, 2004 WL 1798129, at *3-*5 (S.D.N.Y. 2004). Here, the court of appeals was well aware of petitioner's residence in Texas and did not view it as material; it observed that petitioner "was and continues to be subject to similar registration requirements" in Virginia and Texas. Pet. App. 6a-7a. In fact, petitioner's Virginia conviction subjects him to the sex-offender registration regime of *all fifty States*. In such circumstances, bringing the habeas challenge in the state of conviction serves the purpose of avoiding forum shopping. See *Padilla*, 542 U.S. at 447.

Finally, the Commonwealth suggests that petitioner seek relief from his conviction by pursuing a writ of "actual innocence based on non-biological evidence previously unknown or unavailable to the petitioner." Opp. 26; see *id.* at 25-27. This contention, too, offers no reason to deny the petition. The dubious value of this procedure is suggested by Virginia's failure to propose it below as a possible remedy; such a procedure offers no opportunity to raise constitutional challenges and, because hedged about with strict procedural limitations, is very rarely successful. The Fourth Circuit majority instead suggested that petitioner seek to clear his name through a writ of coram nobis. But that writ "has been restricted by statute in Virginia and is not available for 'newly-

discovered evidence or newly-arising facts.'" *Recent Cases*, *supra*, 126 HARV. L. REV. at 2107 n.30; see Pet. App. 26a-27a n.4 (Wynn, J., dissenting). Virginia has abandoned it as a possibility before this Court.[4]

* * *

This Court has granted review with some frequency to determine whether the actual innocence of a petitioner loosens particular restrictions on the availability of habeas relief. See *McQuiggin*, slip op. 7-9 (citing cases). It should do so here as well, so that it can both address that issue and settle the broader question whether sex-offender registration regimes are custodial in nature. These are recurring questions of fundamental importance. And they arise here in a context that calls out for further review: although petitioner's claim of actual innocence is compelling, he faces the prospect of spending the rest of his life subject to painful burdens that "significantly confine and restrain his freedom." *Jones*, 371 U.S. at 243. Allowing the decision below to stand would be a true "miscarriage of justice." *McQuiggin*, slip op. 8.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[4] The concurring judge below suggested the possibility of a remedy under 42 U.S.C. § 1983, but it also is questionable whether such an action is available. See *Recent Cases*, *supra*, 126 HARV. L. REV. at 2108 n.33.

Respectfully submitted.

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