No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal court must entertain an application for a writ of habeas corpus on behalf of a person who is "in custody pursuant to the judgment of a State court" if the person is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The question presented is whether an actually innocent person is "in custody" within the meaning of 28 U.S.C. § 2254 if that person has been released from prison but remains subject for the rest of his life to sex offender registration and reporting requirements that limit where he can live and visit, and compel his regular appearance at particular places.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Wilson respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-35a) is reported at 689 F.3d 332. The decision of the district court (App., *infra*, 36a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2012, and a timely petition for rehearing was denied on September 11, 2012 (App., *infra*, 47a). On December 3, 2012, the Chief Justice extended the time for filing a petition for a writ of certiorari until February 8, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(a) provides:

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

STATEMENT

Petitioner was one of four sailors in the U.S. Navy—popularly known as the "Norfolk Four"—who were charged in Virginia state court for rape and murder. He was convicted of rape and imprisoned for over seven years. Upon his release, and as a direct consequence of his rape conviction, state law sub-

jected petitioner to an extensive set of onerous sex offender registration requirements that obligate him regularly to provide detailed personal information to the government, limit where he may live and travel, and significantly affect his family and occupational status. Petitioner will be subject to these burdens for the rest of his life.

There is, however, no serious doubt that petitioner is innocent of the crime; his conviction was the product of what one of the judges below termed "gross police misconduct" that came to light years later. App., *infra*, 18a. Petitioner therefore commenced this habeas action to set aside his conviction. Habeas relief is available when the habeas petitioner is "in custody" pursuant to the challenged judgment, and petitioner contended that the sex offender registration requirements to which he is subject constitute "custody" in that sense. A divided panel of the Fourth Circuit rejected this argument, holding that petitioner's conviction has "expired" and that the lifetime sex offender requirements to which he is subject, while "triggered" by his conviction, are simply "a collateral consequence of his having been convicted of rape." *Id.* at 10a. The majority added that these requirements are in any event insufficiently burdensome to qualify as "custody." Because the majority also found it immaterial to the habeas inquiry that petitioner is most likely innocent, it ordered the habeas petition dismissed.

That holding is wrong: It is inconsistent with both this Court's recognition that a person is "in custody" when subject to restrictions that "significantly restrain [the] 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))—which surely describes the restrictions imposed upon

petitioner here—and with the Court's suggestion that special flexibility is required in the application of habeas requirements when a petitioner advances a plausible claim of actual innocence. And this Court's intervention is urgently needed to correct a manifest and deeply disturbing miscarriage of justice. Even the concurring judge below recognized that petitioner is suffering under "legal burdens and disabilities" that "are wholly unjustified by any legitimate government interest," making him "morally and legally" entitled "to a judicial forum to contest the accuracy of his claims." App., *infra*, 17a. The dissenter below thought it a "moral imperative" that petitioner obtain relief. *Id.* at 35a. Further review by this Court is warranted.

A. The crime and wrongful convictions of the Norfolk Four

1. On July 8, 1997, William Bosko, a U.S. Navy sailor, found his wife, Michelle Bosko, lying dead in their apartment. *Tice* v. *Johnson*, 647 F.3d 87, 89 (4th Cir. 2011).[1] Michelle Bosko had been raped, strangled, and stabbed several times in the chest with a steak knife. *Ibid.*

Detective Robert Glenn Ford of the Norfolk Police Department led the investigation into Michelle Bosko's murder. Ford initially focused the investigation on Danial Williams, a Navy sailor who lived

[1] The description in text of the crime and investigation of the Norfolk Four is drawn from the Fourth Circuit's decision in *Tice* v. *Johnson*, 647 F.3d 87 (4th Cir. 2011), which addressed habeas proceedings involving another one of the Norfolk Four, and from petitioner's federal habeas petition, which was reproduced in the Joint Appendix filed in the Fourth Circuit. We cite the latter as "Ct. App. J.A."

near the Boskos. Ct. App. J.A. 6. Following an all-night interrogation session, and after Ford lied to Williams about his having failed a polygraph exam, Williams confessed that he had raped and murdered Michelle Bosko. *Id.* at 6-7. Because Williams said he acted alone and the crime-scene evidence suggested a lone assailant, the crime was considered solved despite significant inconsistencies between Williams' account and the actual crime scene. *Id.* at 7.

Several months later, however, DNA testing conclusively eliminated Williams as the source of male DNA found at the scene. Ct. App. J.A. 7. This new evidence led Ford, not to reconsider Williams' guilt, but to look for an accomplice to Williams. *Ibid.* Because Ford had previously been demoted for securing multiple false confessions (and implicated in the alteration of evidence against another defendant), he could not admit to having coerced a false confession in the Bosko case. *Id.* at 7, 33-34.

Ford accordingly focused on Joseph Dick, another Navy sailor. Ct. App. J.A. 7-8. In January 1998, following hours of coercive and abusive interrogation, Dick falsely told Ford that he and Williams had raped and murdered Michelle Bosko. *Id.* at 8. Dick did not implicate petitioner, and the details of Dick's confession matched neither Williams' confession nor the known details of the crime scene. *Id.* at 8-9. Within months, DNA results conclusively eliminated Dick as the source of the crime-scene DNA. *Id.* at 9.

Ford responded by turning his attention to petitioner, then also a young sailor, on the basis of false information from a prison informant about someone named "Eric," even though petitioner had no criminal record and no history of violence or other misbehavior. Ct. App. J.A. 9-10. On April 8, 1998, Ford in-

terrogated petitioner after early shipboard watch, for which he had awoken at 3 a.m. Ct. App. J.A. 10. As he had with Williams and Dick, Ford questioned petitioner angrily and forcefully, falsely telling petitioner that he had failed a polygraph examination and that police had evidence proving his guilt. *Ibid.* Following many hours of grueling interrogation, petitioner falsely confessed to raping Michelle Bosko. *Id.* at 10-11. Petitioner also falsely recounted being with Williams and Dick when they attacked Michelle Bosko. *Ibid.*

Petitioner's false confession matched neither the crime-scene evidence nor details of the two other confessions. Ct. App. J.A. 11. Two months later, DNA results conclusively excluded petitioner as the source of the crime-scene DNA, just as the results had previously excluded Williams and Dick. *Id.* at 12.

With three confessions now refuted by DNA evidence, Ford continued to expand the circle of suspects in search of someone to match the assailant's DNA. See *Tice* v. *Johnson*, 647 F.3d 87, 93 (4th Cir. 2011) (chronicling the "grim repetition" of this investigatory process). This effort led to the false confession of Derek Tice, the last of the Norfolk Four. Ct. App. J.A. 14. Tice in turn falsely implicated three more men. But these men, who had airtight alibis, refused to confess. *Id.* at 12-20. DNA tests excluded each as the source of the crime-scene DNA, including Tice. *Id.* at 13-19.

2. The investigation took a dramatic turn in early 1999 when Omar Ballard wrote a menacing letter to an acquaintance bragging about the murder of Michelle Bosko. The letter was turned over to the police. *Id.* at 20. Ballard already was in prison for two other assaults, one of which took place just ten days

after the murder of Michelle Bosko and involved the rape and strangulation of a 14-year-old girl about one mile from Michelle Bosko's home. App., *infra*, 83a; Ct. App. J.A. 20; *Tice*, 647 F.3d at 89.

Testing matched Ballard's DNA to the samples found at the Bosko crime scene. Ct. App. J.A. 20. Confronted with this evidence, Ballard promptly confessed and provided a detailed description of the crime that—unlike the confessions of the Norfolk Four—was completely consistent with the known evidence. *Ibid.* Ballard also repeatedly told the police that he had acted alone. *Id.* at 20-22. He soon pleaded guilty and was sentenced to life in prison for the rape and murder of Michelle Bosko. *Tice*, 647 F.3d at 89.[2]

Nevertheless, the State of Virginia maintained its charges against petitioner, whose trial began in June 1999. Ct. App. J.A. 24. The State relied principally on petitioner's confession, but also secured Dick's agreement to testify against petitioner (notwithstanding Dick's initially having confessed to acting only with Williams). *Ibid.*[3] Petitioner testified in his own defense; Ballard refused to testify when called as a defense witness. *Ibid.*

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[2] When he confessed, Ballard insisted that he had acted alone and called the Norfolk Four "stupid" for talking to the police. Ct. App. J.A. 21-22. Months later, after accepting a plea and cooperation deal that spared him the death penalty, Ballard changed his story to claim that petitioner and others were involved in the Bosko murder. *Id.* at 22.

[3] Dick was unusually susceptible to authority figures (Ct. App. J.A. at 7-8, 35-36), and, in response to pressure from Ford and his own attorney, had changed his story multiple times, at first to implicate only himself and Williams and then to implicate petitioner as well as Tice. *Id.* at 11-13; see also *Tice*, 647 F.3d at 91-92 (describing Dick's evolving and inconsistent stories).

The jury acquitted petitioner of murder but convicted him of rape. Ct. App. J.A. 24. He was sentenced to eight-and-a-half years' imprisonment. *Ibid.* The other members of the Norfolk Four—Williams, Dick, and Tice—were convicted of or pleaded guilty to the rape and murder of Michelle Bosko and sentenced to life imprisonment, despite the lack of any forensic evidence linking them to the crimes. *Id.* at 22-26.

B. Postconviction evidence of petitioner's actual innocence

In 2004, pro bono counsel took on the cases of the Norfolk Four, seeking postconviction relief and clemency from the Governor of Virginia. New counsel enlisted the assistance of multiple national experts in the fields of DNA analysis, forensic pathology, crime-scene analysis, and false confessions. This additional analysis pointed to one conclusion: Omar Ballard acted alone in the rape and murder of Michelle Bosko. Ct. App. J.A. 27-36. The jury that convicted petitioner had heard little of this overwhelming evidence of petitioner's innocence. *Id.* at 36-37 (cataloging evidence not heard by the trial jury).

In August 2009, the Governor of Virginia granted conditional pardons to Williams, Dick, and Tice, allowing them to be conditionally released from prison. But the Governor denied relief to petitioner because he had already served his full sentence and been released. App., *infra*, 80a-90a.

In October 2010, Detective Ford was convicted by a federal jury on three felony counts of extortion and making willfully false statements to the FBI. Although that conduct was not related to the Michelle Bosko murder investigation, the trial evidence against Ford showed "a pervasive pattern of asto-

nishing corruption dating back to the 1990s."[4] Ford was sentenced to a term of 150 months' imprisonment. See *United States* v. *Ford*, 2011 WL 4005506 (E.D. Va. 2011).

C. Petitioner's release from prison subject to sex offender registration and reporting requirements

Petitioner was released in 2005 after serving more than seven years in a Virginia prison and returned to his home state of Texas. Immediately upon release, petitioner's rape conviction made him subject to sex offender registration and notification requirements in Virginia and Texas—indeed, in all fifty States.[5] Petitioner accordingly was obligated to register as a sex offender with Virginia authorities, and he subsequently registered in person with a sheriff's department in Texas. Ct. App. J.A. 89. Texas law makes noncompliance with its sex offender registration and reporting requirements a felony, and petitioner will remain subject to these requirements for the rest of his life. Tex. Crim. Proc. Code Ann. arts. 62.101(a)(1), 62.102.

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[4] Position of the United States Regarding Sentencing at 2, *United States* v. *Ford*, No. 2:10-cr-83 (E.D. Va. Feb. 14, 2011) (describing how Ford "conspir[ed] with an informant to solicit and receive bribes from drug dealers," "used his informants to fraudulently obtain money" from a crime-tip reward program, and "committed perjury" at his trial).

[5] All fifty States have enacted extensive registration and notification systems for convicted sex offenders. See *Smith* v. *Doe*, 538 U.S. 84, 90 (2003). At the federal level, the Sex Offender Registration and Notification Act, 120 Stat. 590, 42 U.S.C. § 16901 *et seq*. (2006 ed. and Supp. III), sets minimum national standards for gathering, updating, and publicizing information about sex offenders. See *Reynolds* v. *United States*, 132 S. Ct. 975, 978-979 (2012).

Petitioner is subject to the following sex offender registration and reporting requirements under Texas law:

- He must report annually and in person to local law enforcement authorities to re-register. Tex. Crim. Proc. Code Ann. art. 62.058(a).
- He must notify law enforcement authorities about changes in online contact information, name, physical health, educational status, and employment. Tex. Crim. Proc. Code Ann. arts. 62.0551(a), 62.057(b).
- If he changes his address, he must report in person to law enforcement authorities in the localities that are responsible for both his previous residence and his new residence. Tex. Crim. Proc. Code Ann. art. 62.055(a).
- He must specially apply in person for a driver's license and/or a personal identification card and is subject to annual in-person renewal requirements (rather than being allowed to renew by mail every six years). Tex. Crim. Proc. Code Ann. art. 62.060; Tex. Transp. Code. Ann. §§ 521.103, 521.272.

Beyond those registration requirements, petitioner's status as a violent sex offender burdens his right to travel in several significant ways:

- Whenever he travels to another part of Texas for at least three forty-eight-hour periods per month, petitioner must notify local authorities. Tex. Crim. Proc. Code Ann. art. 62.059.
- If he seeks to travel to certain other states for even a short stay, he must notify local authorities in the new state as well. See, *e.g.*, Ariz.

Rev. Stat. Ann. § 13-3821(A); Fla. Stat. Ann. § 943.0435; 730 Ill. Comp. Stat. Ann. 150/3-(a)(1); Nev. Rev. Stat. Ann. § 179D.460.

Petitioner faces not only the foregoing statutory restrictions but also numerous other consequences that affect his occupational and family status. For example, his status as a violent sex offender has prevented him from working as an electrician at sites requiring a security clearance, such as government buildings. Ct. App. J.A. 89. He has been unable to adopt his young stepson, Garrett. *Ibid.* He is branded a sex offender on searchable Internet databases. And his name, birthdate, physical characteristics, and numerous photographs of him appear on the Texas Department of Public Safety's sex offender website. See Texas Department of Public Safety Public Sex Offender Name Search, http://tinyurl.com/Norfolk01 (search for "Eric Wilson").

D. The federal habeas corpus petition

In March 2010, petitioner filed a petition for habeas corpus relief in the U.S. District Court for the Eastern District of Virginia, presenting three grounds for relief: (1) that he was actually innocent of the crime, (2) that the Commonwealth suppressed exculpatory evidence, and (3) that he was the victim of a corrupt investigative process. Ct. App. J.A. 3-57.[6] The district court dismissed the petition on the ground that petitioner failed to show that the sex offender registration and reporting requirements imposed on him render him "in custody" within the meaning of 28 U.S.C. § 2254. App., *infra*, 39a-45a.

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[6] On February 2, 2011, the Circuit Court of Virginia dismissed a habeas petition that petitioner filed in state court. *Williams* v. *Fahey*, 2011 WL 7808762 (Va. Cir. Ct. 2011).

"Because [petitioner] had made a substantial showing of the denial of a constitutional right," however, the court issued a certificate of appealability "as to the specific issue regarding whether [petitioner] is considered 'in custody,' such that the relief afforded by habeas corpus relief is available to him." *Id.* at 6a.

A divided panel of the court of appeals affirmed. App., *infra*, 1a-35a. According to the majority, this Court has never held that a habeas petitioner may be in custody "'under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed.'" App., *infra*, 9a (quoting *Maleng* v. *Cook,* 490 U.S. 488, 491 (1989) (per curiam)). Here, the majority continued, petitioner "served his sentence and was *unconditionally* released from custody" before filing the habeas petition. *Ibid.* Recognizing that petitioner remains subject to "the sex offender registration requirements of Virginia and Texas," the majority nevertheless held those requirements immaterial here because it characterized them as "collateral consequences of [petitioner's] conviction that are independently imposed on him because of his status as a convicted sex offender and not as part of his sentence." *Id.* at 3a. In the court's view, "[w]hile it is true that the triggering fact for these statutes is [petitioner's] rape conviction, 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." *Id.* at 10a.

The majority further concluded that "the sex offender registration requirements and related consequences do not impose sufficiently substantial restraints on [petitioner's] liberty so as to justify a finding that he is in the custody of state officials." App. *infra*, 3a. Accordingly, although petitioner "forcefully

argue[d] that his petition present[ed] a compelling claim of actual innocence," the majority affirmed the district court's conclusion. *Id*. at 14a-15a.

Judge Davis concurred. Although he believed that the majority correctly applied this Court's "controlling precedents," he wrote separately to emphasize that "when Congress enacted and the President signed the [habeas corpus] bill in which § 2254(a) is now codified, modern violent sex offender statutes were not remotely within anyone's contemplation" and that "the requirements these statutes impose are *sui generis*." App., *infra*, 16a-17a. Judge Davis noted further that when "viewed pragmatically, as they should be, the [sex offender] requirements operate *de facto* as *probationary terms*, the violation of which are expected to lead to the imposition, upon conviction, of custodial sentences," and "[n]either the formalism of the extant legal arrangement crafted in the modern state statutes, nor resort to abstractions such as 'collateral consequences,' obscures this reality." *Ibid*. (emphasis in original). Judge Davis concluded that petitioner "has alleged compelling claims that significant legal burdens and disabilities imposed on him are wholly unjustified by any legitimate governmental interest; morally and legally, he is clearly entitled, in my judgment, to a judicial forum to test the accuracy of his claims." *Id*. at 17a.

Judge Wynn dissented. He noted that petitioner was convicted "following an investigation and trial that have subsequently been shown to be rife with gross police misconduct; indeed, as conceded by the majority opinion, [petitioner] has a 'compelling claim of actual innocence.'" App., *infra*, 18a. And he concluded that the majority's decision is incompatible with precedent of this Court that has flexibly applied the statutory requirements for habeas relief when an

applicant plausibly asserts his actual innocence. *Id.* at 19a-23a (citing *Daniels* v. *United States*, 532 U.S. 374 (2001); *Lackawanna Cnty. Dist. Att'y* v. *Coss,* 532 U.S. 394 (2001)). In Judge Wynn's view, "[t]he Supreme Court's decision to explicitly note that exceptions should be available in cases of actual innocence demonstrates a serious underlying concern that the *Coss* and *Daniels* opinions would be misconstrued to elevate procedural requirements over more fundamental, substantive concerns." *Id.* at 23a.

Judge Wynn also disagreed with "the majority opinion's contention that the deprivations on liberty incident to [petitioner's] sexual offender registration requirements are too trivial and too collateral to satisfy the requirement that a habeas petitioner be in custody." *Id.* at 28a. In reality, petitioner "is subject to a litany of in-person reporting requirements" that "demand his presence at a particular place and time, and such obligations will extend for the duration of [petitioner's] natural life." *Id.* at 30a.

Judge Wynn concluded that the majority's opinion foreclosing petitioner from seeking habeas relief resulted in a fundamental miscarriage of justice:

> I am deeply troubled that our legal system would be construed to prevent a person with compelling evidence of his actual innocence and wrongful conviction from accessing a forum in which to clear his name, while, at the same time, restrain the liberty of such a person under a regime created to surveil society's most disdained criminal offenders. That [petitioner's] completion of an arguably undeserved sentence is the condition that the majority opinion contends serves to seal off the courts is especially egregious. It is in ef-

> fect an additional punishment that the majority opinion inflicts upon [petitioner].

Id. at 35a.

REASONS FOR GRANTING THE PETITION

The decision below relied on what the concurring judge himself labeled "formalism" and "abstractions" to withhold relief from an innocent man who—as a consequence of government misconduct—will be subject for the rest of his life to an extraordinary and intrusive set of state-imposed burdens. This holding should not stand. It departs from this Court's understanding of the meaning of "custody," as well as from the "grand purpose" of the writ of habeas corpus to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). And it addresses recurring questions of undoubted importance, concerning both the general treatment of sex offender rules that affect many thousands of people and the specific application of those rules to persons who are actually innocent. Questions of such importance, involving fundamental issues of liberty and justice, should be settled by this Court.

A. The court of appeals wrongly concluded that petitioner was not "in custody."

At the outset, the holding below is in considerable tension with this Court's rulings. The sex offender requirements at issue here effectively serve as a continuation of the penalty imposed upon petitioner for his rape conviction, and surely restrict petitioner's liberty in ways that this Court has treated as constituting "custody." People in such circumstances who advance a compelling claim of actual innocence are entitled to invoke Section 2254.

1. The sex offender registration and reporting requirements are not merely "collateral consequences" of conviction.

Relying almost exclusively on this Court's holding in *Maleng* v. *Cook*, the Fourth Circuit held that petitioner was not "in custody" because his sentence had fully expired at the time he filed his habeas petition and the sex offender requirements to which he is subject "are not imposed *as a sentence for his rape* [conviction] but rather as a collateral consequence of his having been convicted of rape." App., *infra*, 10a. This holding, however, misconstrues *Maleng* and ignores the reality, recognized by Judge Davis below, that when "viewed pragmatically, as they should be, the [sex offender] requirements operate *de facto* as *probationary terms*, the violation of which are expected to lead to the imposition, upon conviction, of custodial sentences." *Id.* at 16a.

On its face, the Virginia sex offender statute makes imposition of sex offender status an element of the judge's order upon conviction:

> *The court* shall order the person to provide to the local law-enforcement agency of the county or city where he physically resides all information required by the State Police for inclusion in the Registry. *The court shall immediately remand the person to the custody of the local law-enforcement agency* for the purpose of obtaining the person's fingerprints and photographs of a type and kind specified by the State Police for inclusion in the Registry.

Va. Code Ann. § 9.1-903 (emphasis added). There can be no denying that compliance with the sex offender registration regime functions effectively as a contin-

uation of the penalty imposed upon petitioner as punishment for his rape conviction.

Petitioner's situation thus differs materially from that of the defendant in *Maleng*. There, the Court rejected the defendant's challenge to a fully served 1958 conviction for robbery that was used to enhance a 1978 sentence for assault because the defendant was no longer "in custody" under the 1958 conviction. 490 U.S. at 489-490. Here, the relationship between petitioner's sex offender obligations and the underlying conviction is much closer than that between a second conviction and a prior, expired one that is used to enhance the second sentence: Petitioner's conviction is the direct and exclusive predicate for, and cause of, his present restraints. See *Brock* v. *Weston*, 31 F.3d 887, 890 (9th Cir. 1994) ("[I]t is even more appropriate for a court to examine an expired conviction in the present circumstances than for it to do so in the context of an enhanced sentence" because "[w]ith an enhanced sentence, the prior conviction only lengthens the period of confinement; here, the prior conviction is a necessary predicate to the confinement"); see also *Young* v. *Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996).

Moreover, the reality is that the sex offender restrictions operate as continuation of petitioner's punishment. As Justice Ginsburg has noted, such "registration and reporting provisions are comparable to conditions of supervised release or parole." *Smith* v. *Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting). And as Judge Davis recognized in concurrence below, "[n]either the formalism of the extant legal arrangements crafted in the modern state statutes, nor resort to abstractions such as 'collateral consequences,' obscures this reality." App., *infra*, 16a.

Unsurprisingly, this Court has taken account of the practical operation of a sentencing regime in the habeas context. In holding that effective assistance of counsel requires advice about the risk of deportation, for example, the Court recognized that it is "most difficult" to divorce the civil penalty of deportation, which follows as an automatic consequence of conviction, from the related criminal penalties. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481 (2010). Rather than applying the "distinction between direct and collateral consequences," the Court in *Padilla* examined whether the deportation was "intimately related to the criminal process" and formed "an integral part of the penalty." *Id.* at 1480, 1481. Like deportation, sex offender status meets this test.[7]

This Court also has looked beyond the nominal independence of conviction and consequence in the context of consecutive sentences. Petitioners serving one of a series of consecutive sentences for convictions on different, but related, counts are regarded as "in custody" with respect to any one of these convictions. See *Garlotte* v. *Fordice*, 515 U.S. 39 (1995); *Peyton* v. *Rowe*, 391 U.S. 54 (1968). *Garlotte* is especially instructive. Distinguishing *Maleng*, the Court permitted a petitioner who was serving a sentence for murder to attack a conviction for marijuana possession that underlay the first in the series of consecutive sentences, even though the marijuana-

[7] In the habeas context, it makes no difference that sex offender laws are civil and regulatory in nature. The writ of habeas corpus applies to consequences that are not punitive or criminal punishment. See, *e.g.*, *Demore* v. *Kim*, 538 U.S. 510 (2003) (concerning habeas review of immigration detention); *Strait* v. *Laird*, 406 U.S. 341 (1972) (concerning habeas review of the denial of military discharge).

possession conviction had expired. See 515 U.S. at 47 ("[W]e view consecutive sentences in the aggregate, not as discrete segments."). In just the same way, petitioner's prison term and the subsequent restraints he suffers as a registered sex offender constitute a "continuous stream" of custody open to attack, even though they are formally distinct and the conviction has technically expired. *Garlotte*, 515 U.S. at 41.

Unless petitioner is able to attack his conviction in this habeas proceeding, he will have no avenue to obtain relief from the burdens he presently bears.[8] If the Fourth Circuit's decision stands, petitioner's only means of attacking his conviction would be to *violate* the terms of the sex offender registration requirement, triggering a new conviction and a return to prison. See *Zichko* v. *Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001) ("[A] habeas petitioner is 'in custody' for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction 'is a necessary predicate' to the failure to register charge.") (quoting *Brock*, 31 F.3d at 890). Surely federal habeas law should not be understood to establish a Kafkaesque regime in which a wrongfully convicted and actually innocent person may challenge continuing burdensome registration requirements only by committing a new crime that will return him to prison.

2. The court of appeals misapprehended the nature of "custody."

The Fourth Circuit also held, as Judge Wynn characterized the holding in his dissent below, that

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[8] As Judge Wynn pointed out below, petitioner cannot clear his name via a writ of *coram nobis*. App., *infra*, 26a.

"the deprivations on liberty incident to sexual offender registration are too trivial and too collateral to satisfy the requirement that a habeas petitioner be in custody." App.*, infra*, 18a. But this conclusion, too, was wrong. Resorting to a formalistic understanding of "custody," the court of appeals overlooked the significant history and precedent of this Court recognizing people to be "in custody" even when not subject to physical restraints or held within prison walls: The Court has recognized habeas to be "above all, an adoptable remedy," and never understood habeas to be "'a static, narrow, formalistic remedy.'" *Boumediene* v. *Bush*, 553 U.S. 723, 779-780 (2008) (quoting *Jones*, 371 U.S. at 243). Instead, the Court has emphasized consistently, and much more generally, that habeas protects "individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones*, 371 U.S. at 243.

Accordingly, the Court has rejected "stifling formalisms" in recognition that "'[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'" *Hensley* v. *Mun. Court,* 411 U.S. 345, 350 (1973) (quoting *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969)). Although an individual's custody may begin when he is placed "behind prison walls and iron bars," (*Jones*, 371 U.S. at 243), it extends beyond those confines when the state actively supervises a person's movements such that, though he is not physically restrained, "[h]e cannot come and go as he pleases." *Hensley*, 411 U.S. at 351. "What matters" is that the restrictions imposed on the petitioner "significantly restrain petitioner's liberty to do those

things which in this country free men are entitled to do." *Jones*, 371 U.S. at 243.[9]

Thus, for example, a habeas petitioner is "in custody" when he is on parole. That is so because the petitioner is "confined * * * to a particular community, house, and job at the sufferance of his parole officer," instructed him to "keep away from undesirable places," and required to "periodically report to his parole officer." *Jones*, 371 U.S. at 242-243.

Similarly, persons released on their own personal recognizance pending trial are in custody. While a "parolee is generally subject to greater restrictions on his liberty of movement than a person released on bail or his own recognizance," (*Hensley*, 411 U.S. at 348), petitioners in the latter category nonetheless remain "in custody" because their freedom "rests in the hands of state judicial officers." (*Id.* at 351. In *Jones* and *Hensley*, the imposition on the petitioner's free movement was magnified by the state's active

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[9] In applying this understanding, the Court followed the common law tradition that recognized liberty restraints to encompass *both* physical imprisonment and substantial oversight by the state or a private party. Matthew Bacon, Henry Gwyllim & Charles Edward Dodd, 4 A New Abridgment of the Law 563 (1876). The British Habeas Corpus Act of 1679 provided that "any Sheriffe or Sheriffes Goaler Minister or other Person whatsoever for any person in his or their Custody" could be required to bring a "party soe committed *or restrained*" before a magistrate to review the legality of his custody. Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (Eng.) (emphasis added). Habeas corpus thus has been used by a husband to win the release of his wife from the supervision of her guardians, by a father seeking the release of his underage son from the supervision of the military, and by guardians seeking the return of wrongfully taken children. Bacon et al., *supra*, at 570 (citing *United States* v. *Anderson*, 1 Cooke 143 (Tenn. 1812)).

oversight regime, including the threat of future imprisonment. Both Hensley and Jones were subject to rearrest for failure to appear as required. See *Hensley*, 411 U.S. at 348; *Jones*, 371 at 242; see also *Strait* v. *Laird*, 406 U.S. 341 (1972) (habeas available to a reservist in the United States military).

2. Under these principles, petitioner is in custody now; he cannot be said to have "been unconditionally released" (*Jones*, 371 U.S. at 241) and "this is enough to keep him in * * * 'custody.'" *Id.* at 243. Like the defendants in *Jones* and *Hensley*, petitioner here has experienced restraints on his free movement since his release from prison. Immediately upon his arrival in Texas, he was required to report in person to local law enforcement authorities to register as a sex offender. Tex. Crim. Proc. Code Ann. art. 62.058(a). He must perform the humiliating and burdensome process of reregistering in person each year (*ibid.*), publicly identifying himself as a sex offender to the station's staff and onlookers. Petitioner's duty to submit to these physical and emotional impositions is lifelong. *Id.* 62.101(a)(1).

Additionally, petitioner's sex offender registration creates substantial barriers to his free movement, both in and outside his home community.[10] He

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[10] More than half of the States, including Virginia and Texas, have enacted residency-restriction provisions for certain classes of convicted sex offenders. See *Zoned Out: States Consider Residency Restrictions for Sex Offenders*, Council of State Gov'ts 5 (Aug. 2008), http://tinyurl.com/Norfolk02. While many of these apply only to sex offenders whose offenses involved minors, several apply to registrants like petitioner. See, *e.g.*, Cal. Penal Code § 3003.5; Okla. Stat. 57 § 590. If petitioner moved to his neighboring State of Louisiana, he would face even more severe restrictions on many other facets of his life. He would have to give notice to every home, business, and school in his neighbor-

is barred from visiting his stepson's school unless he first undergoes a background check. Ct. App. J.A. 90. He must report his presence in any county or municipality within the State where he spends more than 48 consecutive hours on at least three occasions per month. Tex. Code Crim. Proc. Ann. art. 62.059. In practice, he notifies the authorities in person whenever he is away from home for more than twenty-four hours. Ct. App. J.A. 89. Thus, the Fourth Circuit plainly was wrong when it concluded that, "[u]nlike the physical restraints imposed on the petitioners' freedom of movement in *Jones* and *Hensley* * * * these sex offender registration requirements do not impair [petitioner's] 'ability to move to a different community or residence.'" App., *infra*, 12a.

Moreover, as in *Jones* and *Hensley*, petitioner's obedience is actively compelled. He must arm local police with the information necessary to monitor his whereabouts and ensure that he "faithfully obey[s]" the "restrictions and conditions" imposed by the sex offender registration regime. *Jones*, 371 U.S. at 242. When he registers, he must provide comprehensive and intrusive tracking information, including basic personal identifiers (his home address, social security number, and driver's license number), representa-

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hood and provide identifying information and a photograph. La. Rev. Stat. Ann. § 15:542.1(A)(1). A similar notification would have to be published in an official journal or designated newspaper, and a court could require him to give further notice through "signs, handbills, bumper stickers, or clothing labeled to that effect." *Id.* § 15:542.1(A)(3). He would have to post his sex offender status on any social-networking site he joined. *Id.* § 15:542.1(D)(1). He would be prohibited from working as a bus driver, taxi driver, or residential service worker. *Id.* § 15:553. And if he provided recreational instruction to children, he would have to post a "prominently displayed" notice at the entrance to the building. *Id.* § 15:542.1(B)(1).

tions of his physical characteristics (his shoe size, a recent photograph, and fingerprints), information about his professional activities (all licenses held and the name and address of any place of expected or current employment or education), and all of his online addresses and screen names. Tex. Code Crim. Proc. Ann. arts. 62.051(c). In addition to having to reregister annually, *id.* 62.058(a), he must report any changes to his name, address, physical health, job, educational status, or online identifiers within seven days. *Id.* 62.055(a), 62.0551(a), 62.057(b).

Even when he remains in his home community, the information petitioner surrenders to state authorities allows community members to carefully watch and track his movements. In Texas, his residence in a new neighborhood is announced by a postcard sent by state officials to each resident. See Texas Sex Offender Registration Program, http://tinyurl.com/Norfolk04. And as noted above, this community monitoring has exacting social and monetary consequences. Petitioner has been prevented from working as an electrician at sites requiring security clearance. Ct. App. J.A. 78, 89. On one occasion, he was removed from a Department of Homeland Security worksite owing to his status as a registered sex offender. *Id.* at 89, 99. And he was denied access to electrician school because, despite his technical and intellectual qualifications, his sex offender status keeps him too low on the admission list. *Id.* at 90. Given this panoply of restrictions, a reading of the custody requirement that treats such restrictions as noncustodial "is both inconsistent with the broader purposes of habeas and out of step with modern methods of social control, which * * * place premium importance on the powerful role that information can play in affecting control beyond the reach of prison

walls." Wayne A. Logan, *Federal Habeas in the Information Age*, 85 Minn. L. Rev. 147, 173 (2000); cf. *Doe* v. *Reed*, 130 S. Ct. 2811, 2825 (2010) (Alito, J., concurring) ("If this information is posted on the Internet * * * [t]he potential that such information could be used for harassment is vast.").

Moreover, as in *Jones* and *Hensley*, the punishment for failure to register induces petitioner to "live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison." *Jones*, 371 U.S. at 242. In Texas, petitioner's residential whereabouts are constantly monitored and could at any time be subjected to verification. Tex. Code Crim. Proc. Ann. art. 62.058(d) ("A local law enforcement authority designated as a person's primary registration authority by the department may at any time mail a nonforwardable verification form to the last reported address of the person."). If petitioner fails to register, he is guilty of a felony and subject to immediate re-arrest. *Id.* 62.102. There should be no doubt that these restrictions "significantly restrain [the] petitioner's liberty to do those things which in this country free [people] are entitled to do." *Jones*, 371 U.S. at 243.

It may be added that in virtually all these respects, sex offender registration requirements are quite different from the civic collateral penalties identified in *Maleng* as noncustodial, such as the "inability to vote, engage in certain businesses, hold public office, or serve as a juror." *Maleng*, 490 U.S. at 491-492. Such penalties are not enforced through active or continued monitoring like that required by the Texas sex offender regime. Nor must the individuals subject to them live in constant fear that "a single deviation, however slight, might be enough to result in [their] being returned to prison," *Jones*, 371

U.S. at 242. Penalties of this sort do not effectuate the consistent restraints on individual liberty that are imposed by parole, personal recognizance, and sex offender registration and reporting requirements.

3. Petitioner's actual innocence warrants a flexible interpretation of the "custody" requirement.

There is an additional consideration that should have a significant bearing on the habeas inquiry and the rigor with which the "custody" requirement applies: *Petitioner is actually innocent*. This Court has twice noted that the presence of an actual innocence claim may warrant a more flexible application of the requirements for habeas relief. See *Daniels* v. *United States*, 532 U.S. 374, 383 (2001); *Lackawanna Cnty. Dist. Att'y* v. *Coss*, 532 U.S. 394, 405 (2001). Thus, a habeas petitioner may be able to attack an expired conviction 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." *Daniels*, 532 U.S. at 383 (concerning 28 U.S.C. § 2255, the federal equivalent of § 2254). In *Coss,* a plurality of the Court indicated one such rare case arises when, "after the time for direct or collateral review has expired, a defendant may obtain compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." 532 U.S. at 405. There is good reason to believe that is the situation here, as Judge Wynn noted below; the totality of the evidence that establishes petitioner's innocence was not submitted to the jury and was not timely available to petitioner through no fault of his own. App. *infra*, 27a. The majority, however, regarded that consideration as immaterial, even though other circuit courts have acknowledged the relevance of ac-

tual innocence in this context. See, *e.g.*, *Olivas* v. *Colorado*, 204 F. App'x 734, 735 (10th Cir. 2006); *Resendiz* v. *Kovensky*, 416 F.3d 952, 959 (9th Cir. 2005); *Broomes* v. *Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004), abrogated on other grounds by *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010).

These actual innocence considerations respect the principles that underlie the bar on habeas attacks on expired convictions: the importance of the finality of judgments and preserving the ease of judicial administration. See *Daniels*, 532 U.S. at 378; *Coss*, 532 U.S. at 402-403. Actually innocent petitioners are rare enough that allowing an exception for their petitions will not threaten these values. It is for this reason, and out of concern for justice, that this Court has recognized an actual innocence exception to other barriers to federal habeas relief. See, *e.g.*, *Schlup* v. *Delo*, 513 U.S. 298, 321 (1995) (noting that in appropriate cases "the principles of comity and finality" that justify procedural bars in habeas proceedings "'must yield to the imperative of correcting a fundamentally unjust incarceration'" (quoting *Murray* v. *Carrier*, 477 U.S. 478, 495 (1986))). Cf. *House* v. *Bell*, 547 U.S. 518, 554-555 (2006); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142-43, 160 (1970) (footnote omitted) (advocating a habeas remedy in instances of fundamental unfairness or in cases "where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man"). This case—where the course of police misconduct that underlay petitioner's conviction was not revealed until after petitioner's release from prison and where the claim of actual in-

nocence is compelling—calls for the Court to settle the application and scope of this principle.[11]

B. Confusion among the circuits over the meaning of "in custody" calls for clarification from this Court.

Review here is especially warranted because the divided decision below reflects broad confusion in the courts of appeals about the scope of the habeas custody requirement. In saying this, we recognize that the courts of appeals have not disagreed about application of the habeas statute to the particular factual circumstances here, involving sex offender registration requirements. But since this Court's holdings in *Jones* and *Hensley*, the courts of appeals have more broadly articulated a confusing and arbitrary array of rules distinguishing custodial from noncustodial situations. In particular, there is confusion in the circuits concerning whether and what kind of in-person appearance requirement constitutes a custodial restraint. That confusion has given rise, in turn, to inconsistent outcomes in cases concerning sex offender registration, on the one hand, and mandatory community service and mandatory attendance at rehabilitation classes, on the other. The variation in approach, which stems from differing views on the meaning of this Court's decisions, warrants the Court's attention.

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[11] The Court is currently considering whether and in what manner evidence of actual innocence warrants equitable tolling of the one-year statute of limitations for filing a federal habeas petition. *McQuiggin* v. *Perkins*, 670 F.3d 665 (6th Cir.), cert. granted, No. 12-126 (Oct. 29, 2012). *McQuiggin* concerns a distinct provision of the federal habeas statute and does not bear on this case; because petitioner's petition was timely, he is entitled to relief independent of the outcome of *McQuiggin*.

In holding that sex offender registration requirements do not satisfy the "in custody" requirements, the four circuits that have considered the question have expressed the view that registrants' freedom of movement is not conditioned or limited by the registration and reporting regimes. See App., *infra*, 12a; *Virsnieks* v. *Smith*, 521 F.3d 707, 719-720 (7th Cir. 2008) (statute imposes only "minimal restrictions on a registrant's physical liberty of movement" because registrants may still travel wherever they like, though they must inform the state authorities, which they may do by post or telephone); *Leslie* v. *Randle*, 296 F.3d 518, 522 (6th Cir. 2002) (because the residence reporting requirement "applies to [petitioner] 'whether he stays in the same place or whether he moves,'" "[petitioner's] ability to move to a different community or residence is therefore not conditioned on approval by a government official"); see also *McNab* v. *Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); *Henry* v. *Lungren*, 164 F.3d 1240, 1241-1242 (9th Cir. 1999); *Williamson* v. *Gregoire,* 151 F.3d 1180, 1184-1185 (9th Cir. 1998). The majority of the registration regimes in these cases do not require in-person registration, rendering them significantly less onerous than the Virginia and Texas statutes at issue here. See *Virsnieks*; *Leslie*; *Williamson*.[12]

But under the Virginia and Texas statutes and the California law at issue in *Henry*, registrants *are* required to appear in person to register and re-register. Nevertheless, the courts below held that this in-person registration requirement and the other

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[12] For this reason, as Judge Wynn explained below, the majority was incorrect in finding general support for its holding among the courts of appeals that have addressed sex offender regimes in the habeas context. App., *infra*, 28a-33a.

travel restrictions that limit registrants' free movement do not constitute custody.

In contrast, three circuits have held that restrictions on free movement attendant to mandatory community service and rehabilitation classes, which are *less* onerous than those faced by registered sex offenders, *do* satisfy the "in custody" requirement. For instance, in *Barry* v. *Bergen County Probation Department*, the petitioner was required to complete 500 hours of community service within approximately three years. He had the choice to determine when and how to fulfill this requirement. 128 F.3d 152, 161-162 (3d Cir. 1997). But despite the flexibility of this requirement and the fact that the petitioner faced no imminent threat of incarceration, the Third Circuit recognized that the petitioner was in custody because "an individual who is required to be in a certain place—or in one of several places—to attend meetings or to perform services, is clearly subject to restraints on his liberty not shared by the public generally." *Id*. at 161; see also *Williamson*, 151 F.3d at 1183 (recognizing and endorsing *Barry*).

Similarly, in *Lawrence* v. *48th District Court*, where the petitioner was subject to a stayed sentence of non-reporting probation and community service, the Sixth Circuit found that these elements, whether viewed independently or in combination, impose restraints on liberty sufficient to satisfy the "in custody" requirement: "Probation's restraints on liberty suffice to satisfy the 'in custody' requirement * * * The same is true for community service." 560 F.3d 475, 480-481 (6th Cir. 2009) (citing *Williamson*, 151 F.3d at 1183; *Barry*, 128 F.3d at 159-162). Finally, in *Dow* v. *Circuit Court of the First Circuit,* the Ninth Circuit held that a provision of the habeas petitioner's sentence, requiring that he attend fourteen

hours of an alcohol rehabilitation program satisfied Section 2254's custody requirement because the sentence, "*requiring appellant's physical presence at a particular place*, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as 'custody.'" 995 F.2d 922, 923 (9th Cir. 1993) (emphasis added). The court characterized that in-person appearance requirement as a "greater restraint upon [the petitioner's] liberty * * * than the restraint suffered by a person who is released upon his own recognizance." *Ibid.*

Comparing the outcomes in the sex offender registration cases with those in the community service and rehabilitation cases thus reveals a divide among, and within, the courts of appeals over the significance of in-person appearance requirements in the custody determination. More broadly, the different treatment of these two circumstances—in which the single and short-lived requirement to attend community service or alcohol awareness sessions counts as custody, but the comprehensive and permanent raft of restraints imposed on registered sex offenders does not—reveals how arbitrary the circuits' custody line drawing has become. Without guidance from this Court, lower courts will continue to carve out inconsistent categories of custodial situations.

C. The question presented is one of extraordinary practical importance.

Finally, review is warranted because this case involves a recurring issue of tremendous practical importance. That is so in two respects. First, a great many people are subject to a growing number of increasingly restrictive state and local sex offender reg-

istration regimes. Second, improved forensic techniques have made it possible to establish that significant numbers of these people are actually innocent of the crimes for which they have been convicted. Settling the nature of the habeas remedies available to people in these circumstances is a matter of national significance.

Most obviously, sex offender registration laws have become ubiquitous, enacted by all fifty States and the federal government. An enormous number of people are affected by these laws: There were almost three-quarters of a million registered sex offenders in the United States in January 2012. Press Release, Nat'l Ctr. for Missing & Exploited Children, Number of Registered Sex Offenders in the US Nears Three-Quarters of a Million (Jan. 23, 2012), http://tinyurl.com/Norfolk05. To be clear, nothing in this petition challenges the general validity of those laws, the restrictions they impose, or the observation that "[s]ex offenders are a serious threat in this Nation." *McKune* v. *Lile*, 536 U.S. 24, 32 (2002) (plurality opinion). But the rules governing significant restraints on the liberty of people subject to these requirements—particularly those, like petitioner, who have powerful and persuasive grounds for asserting actual innocence—should be clearly settled by this Court.

That is especially so in the particular, and recurring, circumstances of this case. A quarter-century of experience with sophisticated forensic tests has cast new light on the fallibility of the justice system—particularly for individuals convicted of sex crimes, where DNA evidence is most likely to be available. More than 300 people in the United States have been exonerated through postconviction DNA testing. *Innocence Project Case Profiles*, Innocence Project, http://tinyurl.com/Norfolk07. More than half of those

exonerated individuals were convicted of sex crimes. See *Search the Profiles*, Innocence Project, http://-tinyurl.com/Norfolk06. It is intolerable that no habeas remedy is available to persons who are proven actually innocent but nevertheless remain subject to significant restrictions on their liberty.

And it must be of some relevance that this case involves a fundamental injustice, committed at the hands of the State. As a consequence of government misconduct, petitioner—although innocent of any wrongdoing—will be subject for the rest of his life to onerous state-imposed burdens that affect him in significant ways on a daily basis, governing where he can live, what he can do, where he must (and may not) go, and what intimate personal information he must provide to the government and make available to the world at large. In such circumstances, as this Court observed of habeas corpus three-quarters of a century ago, "[t]o deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice." *Johnson* v. *Zerbst*, 304 U.S. 458, 467 (1938) (footnote omitted). This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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