No._____

IN THE
Supreme Court of the United States

BEN GARY TRIESTMAN,

PETITIONER,

v.

BARBARA D. UNDERWOOD,
ATTORNEY GENERAL
FOR THE STATE OF NEW YORK,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a state court order of protection that imposes severe constraints upon a non-incarcerated person's physical liberty and civil freedoms, and where he suffers "restraints not shared by the public generally" that equal or exceed the restraints held to be "in-custody" in *Jones v. Cunningham*, 371 U.S. 236 (1963) and *Hensley v. Municipal Court*, 411 U.S. 345 (1973):

1. Does a federal district court have jurisdiction to entertain a habeas corpus petition and recognize such person as "in custody pursuant to the judgment of a State court" under 28 U. S. C. §2254(a)?

2. Did the Appellate Court erroneously construe the scope of the habeas "in custody" element to apply only when a petitioner is legally compelled to act in constraint of his liberty? Or does the "in custody" scope also apply where a petitioner is legally restrained from acting in constraint of his liberty?

3. Does the risk of arrest and detention pursuant to an unknowing or unintentional violation of said order of protection, implicate a cognizable risk of loss of liberty, regardless of eventual exoneration of the violation?

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The unpublished Summary Order and memorandum opinion of the United States Court of Appeals for the Second Circuit is included herein as Appendix 1.

JURISDICTION

This Court has jurisdiction to hear this petition to review the judgment of United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1254(1).

The Second Circuit's Summary Order and memorandum opinion was filed on March 22, 2018 and Petitioners' Petition for Rehearing and Rehearing En Banc was denied on May 14th, 2018.

The district court for the Northern District of New York had subject matter jurisdiction pursuant to Article I, §9, Clause 2, of the U.S. Constitution, and through statutory provisions pursuant to 28 U.S.C. §2241, §2254, and the concurrent writ of mandamus authority vested in the court; an exhaustion of all state remedies had been effected.

Additional subject matter and other jurisdiction was invoked pursuant to 28 U.S.C. §1367(a), §1331 and 18 U.S.C. §2265, §2266, as they directly conferred federal jurisdiction upon the subject matter of the petition. The district court was empowered to grant the declaratory and injunctive relief requested pursuant to 28 U.S.C. §2201, et seq., and other law.

The district court had geographical jurisdiction because the events occurred and parties resided in Ulster County, New York.

STATEMENT OF THE CASE

Pursuant to a family court trial (conducted from July 31, 2013 to February 1, 2016), on January 22, 2015, after a hearing the Ulster County family court issued a temporary order of protection prohibiting all contact, proximity or communication between Petitioner and his daughter (except for scheduled therapeutic visitations at a designated office)[1].

A timely notice of appeal for the order was filed to the state appellate court on February 17, 2015.

The temporary order of protection was reissued 4 more times, overlapping each other, and culminated in a final order of protection on May 13, 2016, and made effective until April 11, 2018.

All the orders' terms were identical and relied exclusively upon the hearing of January 22, 2015[2].

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[1]The court provided no findings or grounds for the issuance of the order, and in fact affirmatively refused to do so, although such findings were requested by Petitioner at the hearing, and were required by law, as detailed in the habeas petition below.

[2]The subject order(s) was a no-contact or communication, full stay-away order, against Petitioner as to his daughter, except for highly restricted and infrequent supervised/therapeutic visits; due to the overlapping and continuing nature of the orders, they effectively and

The State Appellate Division denied the appeal on April 7, 2016, declining to entertain the appeal on the merits stating the order on appeal was a temporary order.

Petitioner timely filed a notice of appeal, and motion for leave to appeal to the NY Court of Appeals on May 4, 2016.

On June 30, 2016, the NY Court of Appeals denied leave to appeal.

Petitioner filed a habeas corpus petition in the U.S. District Court for the Northern District of New York, on September 2, 2016.

On September 20, 2016, U.S. Magistrate David Peebles, issued a report-recommendation that the petition be dismissed on the sole basis that Petitioner had not met the "in-custody" element of the habeas statute, and the merits were not entertained.

On October 4, 2016, Petitioner filed his objections to the report-recommendation.

On October 19, 2016, Hon. Lawrence E. Kahn, USDJ, issued a decision and order, adopted the report-recommendation, but made more detailed findings as well, and ordered the petition summarily dismissed based on the district court's lack of jurisdiction on its findings that Petitioner was not "in-custody".

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substantively form one continuous restraining order, as they are based upon the very same originating petition hearing, arguments, facts, and have the same terms of restraint.

Petitioner filed a notice of appeal on November 10, 2016.

Before the appeal was heard, the Respondent filed a motion in the appellate court to dismiss the appeal, citing a lack of a certificate of appealability (COA).

Petitioner argued that since he was not incarcerated, and had not received any instruction from either the district or appellate courts as to the requirement of a COA, but that notwithstanding he moved for the court to consider his notice of appeal as a timely application for a COA.[3]

On May 15, 2017, the appellate court denied the motion to dismiss, construed Petitioner's notice of appeal as a motion for a COA, and granted issuance of the COA.

After the appeal was briefed and oral argument was completed, on March 22, 2018 the appellate court issued a summary judgment affirming the judgment of the district court.

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[3]Petitioner was given no notice of a COA requirement from the district court below; he was served with a notice of the FRAP Rule 4, "Appeal as of Right" instructions attached to the "Judgment in a Civil Case" entry. Additionally, after Petitioner received the appellate filing forms, and Petitioner noted it did not include an application for COA, he had communicated by phone with the Appellate Court clerk, and asked whether there were any other documents needed to be filed, and the clerk responded that everything needed was properly submitted and that he should wait for a scheduling order to file his appellate brief.

Petitioner timely filed a panel rehearing and en banc rehearing petition which was denied by the court on May 14, 2018.

On May 8, 2018, the named Respondent in this case, Eric T. Schneiderman, Attorney General for New York, resigned from office, and as per Rule 35.3, the succeeding Attorney General for New York Barbara D. Underwood was substituted as the Respondent in this petition.

This petition for certiorari ensues.

STATEMENT OF FACTS

Facts Regarding Issuance of the Order of Protection (Factual History of Issuance; Scope & Consequences)

A family court trial was held between July 31, 2013 and February 1, 2016.

During the pendency of the trial both parents had equal custody, and there were no pre-existing restraining orders in place.

On December 12, 2014, the child A.T. requested to Petitioner a birthday gift.

Subsequently Petitioner arrived at his daughter's school at the end of the school day to give his daughter the gift, with no special incident occurring[4].

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[4]Petitioner arrived with the birthday gift, but the child had been taken away by the mother prior to Petitioner even

In response to this, the mother of the child filed for an order of protection that became the subject of instant federal habeas petition below.

On January 22, 2015, a hearing was held to hear the mother's petition, and at the end of which the judge issued a temporary order of protection. The order was a full stay-away, and no-communication or contact order against Petitioner from his daughter, except for therapeutic session visits.

Petitioner requested judicial findings of fact and law from the judge as to the basis of the issuance of the order of protection as permitted by NYS law, but the judge refused to provide any factual findings or legal reason for the issuance, dismissing the request by stating on record that he was "Not going to do that."

The order of protection had a duration of nine months.

However, the court reissued the same temporary order five times, until on May 13, 2016, the order of protection was reissued as a final order, effective for an additional two years.

The order commanded Petitioner to not come in contact or proximity of his daughter.

The consequences of such contact, even if accidental, unknowing or by happenstance, would subject Petitioner to face immediate arrest and incarceration[5], pending further adjudication.

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seeing the child.

[5]See NY Penal Law §215.50, §215.51, §215.52, §215.54

As detailed below in the Memorandum, the order constrained Petitioner's freedoms to come and go as pleased within his community, detrimentally affected his livelihood to work in his community, interfered in personal relationships in the community, and seriously constrained his ability to peaceably participate in his community generally.

Facts of the Case, Pertinent to Petitioner's "Severe Constraints on Liberty Not Shared by the Public Generally"

Petitioner Ben Gary Triestman is the father of their child A.T., and Suzanne Mary Cayley is the mother of their child A.T.

Neither parent has any history of domestic violence, or findings of abuse, neglect, family offenses or contempt of court; neither parent have been found to be unfit parents.

The child resides with the mother in Woodstock NY, about four miles from Petitioner who also lives in Woodstock.

Woodstock, NY is a small community of about 5000 residents, and about 10 miles in extent.

The town has regular and numerous community events hosted by the municipality and other organizations where the town residents are invited to participate in community celebrations, including annual:

- Whole town[6] Halloween municipality hosted events and parades,
- Community Center Thanksgiving Dinners,
- Whole town Christmas Eve Santa Clause Appearance event and parade,
- 4th of July firework displays at the town's common-grounds recreation fields,
- Woodstock Film Festivals,
- Garlic Festival and other festival events

Additionally there are common community areas that the town offers its residents and where the local community assembles:

- Community pool
- Natural swimming areas opened to the public, e.g., Millstream Swimming Hole, Zena Swimming recreation area, and other brook and stream swimming locations
- Shakespeare production on town commons
- Woodstock Playhouse
- Woodstock Museum
- Town Library, and other municipal buildings to service the public
- Meads/Magic Meadow recreation, picnic and camping areas

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[6]These are Municipality hosted events, where the whole town and thoroughfare is cordoned-off from traffic, normal town activity is suspended during the event, and all the town's residents are encouraged to attend.

- Drum Circle meetings weekly in town square inviting the public
- Weekly Farmer's Markets events

Additionally, there are local school events, such as barbecues, picnics, bingo games, carnival nights, stage, music and talent recital and productions, PTA meetings.

The above covers non-exhaustively what is offered by the municipality and is a part of the community life.

Additionally, many recreational private businesses are open to the public, such as the restaurants, juice bars, luncheonettes, supermarkets, general/hardware stores, and places of worship.

Petitioner conducts a local computer repair business, that serves the community with on-site service of residents and businesses, including businesses that have walk-in street customer traffic, and are otherwise directly accessible to the public.

Petitioner normally participates in community life, has held the position of the local school's sPTA chairman, which he had to resign from due to the order; Petitioner has campaigned and run for local office, necessitating his interaction with the public directly and ad hoc within the community, and intends to run again, risking arrest and detention. If elected to the office he seeks, Town Justice of Woodstock, he again would have to necessarily interact with the public at large and the community,

and where the order would constrain his civil liberties.

Petitioner's child A.T. similarly, simultaneously and regularly attended the same common community events, establishments and public areas mentioned above.

Since normal community life in the rural Town of Woodstock unavoidably and unpredictably brings residents within close proximity to each other, during the normal course of daily life, causing Petitioner to constrain his freedoms to come as go within the community.

In order to avoid such contact, to keep in compliance with an order of protection, a person living in the town would necessarily have to constrain their comings and goings to a level inconsistent with a free person, and is subject to "restraints not shared by the public generally".

In this context of living within the small town of Woodstock, effectively constrained Petitioner's physical and civil liberties to reach levels coequal to the standards of being in-custody as held in Supreme Court precedent.

REASONS FOR GRANTING THE PETITION

1. The Second Circuit Court has issued two related decisions – the instant case here on petition, and *Vega v. Schneiderman*, 861 F.3d 72, (2d Cir. 2017) – that conflict with the holdings of the Supreme Court in *Jones v. Cunningham*, 371 U.S. 236 (1963) and *Hensley v. Municipal Court*, 411 U.S. 345 (1973)

2. Specifically, the Second Circuit has held that the "in-custody" element of federal habeas corpus – in the context of non-incarcerated persons under constraints of such restraining orders – does not apply, even where the physical constraints on their liberty equal or exceed the standards held by the Supreme Court.

3. The Second Circuit has also held that the "in custody" jurisdictional element of federal habeas corpus is invoked only where a petitioner is compelled to "to be at a certain place at a certain time", and rejected that a petitioner can be "in custody" if he is restrained from being at places that the general public is not restrained from.

4. The Supreme Court has never reviewed or given guidance as to the "in-custody" standard as it applies to non-incarcerated persons subject to such restraining orders.

5. Despite the fact that every such order directly implicates and infringes upon a person's fundamental federal liberties and civil rights, there is no effective federal avenue of review available, particularly in light of the decisions and standards issued by the Second Circuit Court in this case and in *Vega*, which effectively wipe out as a class any application of the "in-custody" standard as it may apply to persons subject to such restraining orders.

6. Orders of Protection[7] are used with little to no effective oversight or review from federal courts, and have become an increasingly "normal" fixture in modern daily life. Such orders are often issued upon an *ex parte* basis with no input or opportunity to object from the people that come under their restraints.

7. The lack of federal review is particularly acute when such orders are issued as "temporary" orders of protection, which have no right of appeal/review at all as interim orders, can last for years, and be reissued indefinitely, yet carry the same serious constraints upon a

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[7]Terminology for restraining orders varies across jurisdictions. Such restraining orders are also commonly called orders of protection, protective orders, and protection from abuse orders. Approximately 90% of initial petitions for restraining orders are granted.

person's liberty not shared by the public generally as final restraining orders.[8]

8. The Supreme Court has not issued a modern clarifying interpretation of the "in custody" jurisdictional element of habeas corpus for non-incarcerated persons for over 45 years; in light of the instant erroneous interpretations of the Second Circuit, such a review is needed to provide guidance of the element in contemporary circumstances and legal venues that did not exist at the time of prior rulings.

Memorandum of Law in Support of Petition for Certiorari

The appeal below stemmed from a habeas corpus dismissal seeking to address a state court order of protection issued January 22, 2015.

Petitioner did not seek appellate federal review on any merits of the state case, and solely appealed the district court's dismissal based upon the sufficiency

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[8] A restraining order can constrain a person's ability to "come and go as he pleases", to deprive them of the right to travel, to have access to public areas, strip them of their 2nd Amendment rights, deprive them of communication and association with their children or the right to live in or be near their own home. These are otherwise fundamental civil rights guaranteed by the Constitution, that should have an avenue to be reviewed and protected by the federal courts, yet currently do not.

of the "in-custody" element of federal habeas corpus.

The grounds upon which the appellate panel affirmed the appeal were perspicuous and succinct, and thus easily shown to be in direct conflict with this court's holdings and applied interpretation for the "in-custody" element, warranting the grant of the writ for certiorari.

The Appellate Court Misapplied the Scope of the "In-Custody" Element of Habeas Corpus

In its Summary Order and affirmance, the appellate panel used the wrong standard in assessing the scope of the "in-custody" element of the habeas corpus statute.

Specifically, the Appellate Court erroneously limited the applicable reach of the element by fashioning a general rule that it was only effective for circumstances where a petitioner's physical presence is compelled to be at a particular place at a particular time; the Appellate Court holds that lacking such an affirmative directive the "in-custody" element does not apply.

However this interpretation and ruling is in conflict with prior case law in the Supreme Court, as well as in prior Second Circuit caselaw.

The Supreme Court has made it clear that being restrained from going to places that the general public could go, also satisfies the "in custody" element to give federal court jurisdiction to hear a habeas petition.

In *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), the court said simply that the "in custody" element is met when a petitioner is "subject to restraints not shared by the public generally".

This is in conflict with the Second Circuit's erroneous narrowing interpretation of the "in custody" element[9] – the Supreme Court did not limit those restraints to only "being compelled to be somewhere at sometime".

In *Jones v. Cunningham*, 371 U. S. 236, 239(1963), the court recognized that the "in custody" element of habeas corpus extended:

> "to [aliens] seeking entry into the United States, although, in those cases, each alien was free to go anywhere else in the world. . . [H]is movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."

Those petitioners were "in custody" only by virtue of being prohibited from places that the general public could go.

The *Jones* court further held that (at p.371):

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[9]The Second Circuit issued two recent decisions relating to the interpretation of the "in custody" element of federal habeas corpus, in the context of its scope and applicability to the constraints on liberty resulting from restraining orders: *Vega v. Schneiderman,* 861 F.3d 72 (2d Cir. 2017) and *Triestman v. Schneiderman,* Dkt No. 16-3831 (2d Cir. 2018), Summary Order.

> "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."

In an earlier Second Circuit decision, which is inconsistent with the circuit court's instant "in custody" interpretation, the court had ruled that being prohibited from or prevented access and travel to certain places renders a petitioner "subject to restraints not shared by the public generally", and thus satisfies the "in custody" element.

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F. 3d 874 (2nd Cir. 1996), where the petitioners were prohibited from access to their tribal lands, the circuit court held that:

> "Restraint" does not require "on-going supervision" or "prior approval." As long as the banishment orders stand, the petitioners may be removed from the Tonawanda Reservation at any time. That they have not been removed thus far does not render them "free" or "unrestrained." . . . Indeed, we think the existence of the orders of permanent banishment alone — even absent attempts to enforce them — would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus." *Id* at 895.

The circuit court found that even when there was no affirmative command to be in a place at some particular time, simply being officially excluded from a place, was enough to invoke the "in custody" jurisdictional element, see *Poodry*:

> "Unlike an individual on parole, on probation, or serving a suspended sentence — all "restraints" found to satisfy the requirement of custody — the petitioners have no ability to predict if, when, or how their sentences will be executed. The petitioners may currently be able to "come and go" as they please, cf. *Hensley*, 411 U.S. at 351, 93 S.Ct. at 1575, but the banishment orders make clear that at some point they may be compelled to "go," and no longer welcome to "come." That is a severe restraint to which the members of the Tonawanda Band are not generally subject."

As it can be seen, in contrast to its previous findings in *Poodry*, the Second Circuit Court's instant Summary Order puts significant artificial limitations on the threshold requirements before "in custody" can attach, limitations that are also inconsistent with existing Supreme Court precedent.

The Appellate Court did not Propery Credit the Consequences of an Unknowing/Unintentional Violation of a Restraining Order as a Cognizable Future Risk of Incarceration

Significant to the calculus of assessing whether the "in custody" element attaches, is the risk of physical incarceration stemming from a violation of a constraint on a non-incarcerated person's liberty.

In seeking to exclude such risk from the "in custody" analysis, the 2nd Cir. Appellate Court below has stated that:

> "We rejected the argument that an inadvertent encounter with the individual would violate the order, observing that N.Y. Penal Law§ 215.50 requires the state to establish 'intentional disobedience' of an order."
> [See Summary Order at Appx. Page #4]

The simple fact is that the Appellate Court has ignored or misconstrued the practicable consequences of the real-world operation of NY Penal Law§ 215.50 (which is the restraining order violation criminal statute).

Triggering an arrest and detention under the statute does not require intentional disobedience to the order of protection, or wilful intent. Even a restrainee's accidental, or completely unknowing contact with the prohibited person would trigger his arrest and being taken into custody.

Even if Petitioner inadvertently encountered his child, even if he is totally unaware of his proximity to her in public, NY Penal Law § 215.50 would still legally provide for his immediate arrest and taking into custody by local police as a presumptive violation of a NYS Order of Protection.

Probable cause exists for the arrest and detention when such an event occurs; Petitioner's simple proximity is all it takes irrespective of his mens rea as an element of a final disposition.

The Appellate Court's holding that the statute's prerequisite element of intentional disobedience erases any attachable risk of actual incarceration is plainly wrong.

Notwithstanding that wilfulness is an element of the charged crime of violating an Order of Protection, a lack of this element does not prevent an arrest and detention for the charged violation.

Rather it is an element that would only be disproven after a trial was concluded, potentially months into the future during which time Petitioner would be held incarcerated in pre-trial detention.

Petitioner made this fact and circumstance abundantly clear at oral argument when the Appellate Court panel questioned him on it.

Although the Appellate Court has treated this pre-trial detention exposure as legally non-significant or irrelevant for "in custody" habeas consideration, for all practical purposes this is the very eventuality that the Appellate Court says there is no attachable legal risk for.

Simply put, a future exoneration of wilful disobedience makes little difference if a petitioner will still be incarcerated for an extended period of time anyway, prior to that exoneration.

Such real world exposure to incarceration, whether eventually exonerated or not, is significant and consequential in determining whether the "in custody" element of habeas jurisdiction applies. Where there is a very real risk of incarceration as a consequence of the official restraint, the "in custody" element is applicable.

CONCLUSION

For the above and foregoing reasons, Petitioner requests the issuance of a writ of certiorari to the United States Court for the Second Circuit.

Dated: August 13, 2018

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