APPENDICES

APPENDIX #1
SECOND CIRCUIT MEMORANDUM & SUMMARY ORDER

16-3831

Triestman v. Schneiderman

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION A SUMMARY ORDER). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of March, two thousand eighteen.

PRESENT:
ROSEMARY S. POOLER, REENA RAGGI,
CHRISTOPHER F. DRONEY, Circuit Judges.

Ben Gary Triestman,
Petitioner-Appellant,

v.

16-3831

Eric T. Schneiderman, Attorney General,
The State of New York,
Respondent-Appellee.

FOR PETITIONER-APPELLANT:
Ben Gary Triestman, Shady, N.Y.
FOR RESPONDENT-APPELLEE:
Lisa Ellen Fleischmann, Assistant Attorney General (Barbara D. Underwood, Solicitor General, Nikki Kowalski, Deputy Solicitor General for Criminal Matters, on the brief), for Eric T. Schneiderman, Attorney General, State of New York, New York, N.Y.

Appeal from the United States District Court for the Northern District of New York

(Kahn, J.; Peebles, M.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellant Ben Gary Triestman, proceeding pro se, appeals the October 19, 2016 judgment of the district court (Kahn, J.) dismissing his habeas petition filed pursuant to 28 U.S.C. §§ 2241 and 2254. In his petition, Triestman challenges a state family court order of protection, which requires him to stay away from his daughter and refrain from communicating with her, except for therapeutic visitations. The district court dismissed the petition on the ground that the order's restrictions on Triestman's access to his daughter did not render him "in custody" within the meaning of either Section 2241 or 2254. This Court granted a certificate of appealability on the issue whether Triestman met the "in custody" requirement of either statute.

We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

This Court reviews de novo the dismissal of a habeas petition on the ground that the petitioner is not "in custody" and is thus ineligible for habeas relief. Vega v. Schneiderman, 861 F.3d 72, 74 (2d Cir. 2017); Nowakowski v. New York, 835 F.3d 210, 215 (2d Cir. 2016). The "in custody" requirement "is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." Hensley v. Municipal Ct., San Jose Milpitas Jud. Dist., 411 U.S. 345, 351 (1973). An individual may be "in custody" if she is "subject to restraints 'not shared by the public generally.'" Id. (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)). For purposes of the "in custody" inquiry, we analyze the severity of a restraint by looking to the "nature,

rather than the duration, of the restraint." Nowakowski, 835 F.3d at 216.

Recently, in Vega, this Court considered whether a habeas petitioner was "in custody" as a result of an order of protection. 861 F.3d at 73. There, the habeas petitioner was required to abide by a two-year order of protection, which mandated that she stay away from a particular individual, as well as the individual's home, school, business, and place of employment. Id. We held that the order of protection was not so restrictive as to place the petitioner "in custody" for habeas purposes. We observed that the petitioner's sentence did not require her physical presence at any particular time or location, or otherwise affirmatively require her to do anything. Id. at 75.

The only restraint on her freedom "was that she stay away from [the individual]," which we held to be a "narrow and pinpointed restriction [that was] neither severe nor significant." Id. We also noted that the petitioner could "go anywhere at any time and do anything she want[ed] as long as she avoid[ed] an intentional confrontation" with the individual, and that such a restriction was "modest, not severe." Id. 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. Id. at 76.

So too here. Indeed, in deciding Vega, we cited with approval the district court's decision in this case, which is the basis of the instant appeal. Id. at 75 (discussing Triestman v. Schneiderman, 1:16-cv-

01079 (LEK/DEP), 2016 WL 6106467 at *3 (N.D.N.Y. Oct. 19, 2016)).

Reviewing the matter now, we agree that the district court correctly concluded that Triestman is not properly considered to be "in custody" as a result of the order of protection. The order does not require his presence at any particular time or location. Nor is there any other meaningful basis to distinguish our holding in Vega. Accordingly, we reject Triestman's argument that the requirement that he stay away from his daughter except for therapeutic visitations renders him "in custody" within the meaning of the habeas statutes.

We have considered the remainder of Triestman's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX #2
NDNY DISTRICT COURT
MAGISTRATE REPORT-RECOMMENDATION

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF NEW YORK

BEN GARY TRIESTMAN,

Petitioner,

Civil Action No.
1:16-CV-1079
(TJM/DEP)

v.

ERIC SCHNEIDERMAN,
Attorney General, State of New York

Respondent.

APPEARANCES:
OF COUNSEL:

FOR PLAINTIFF:

BEN GARY TRIESTMAN, Pro se
28 Garrison Rd.
Shady, NY 12409

FOR DEFENDANT:
[NONE]

DAVID E. PEEBLES
CHIEF U.S. MAGISTRATE JUDGE

REPORT AND
RECOMMENDATION

This is a proceeding commenced by petitioner Ben Gary Triestman, who seeks to invoke this court's habeas jurisdiction to review orders of protection issued by a New York State Family Court judge. The matter has been forwarded to me for initial review. Because the petitioner cannot satisfy the "in custody" requirement necessary to support a habeas petition under 28 U.S.C. §§ 2241, 2254, this court lacks subject matter jurisdiction over his claims. Accordingly, I recommend that the petition in this matter be dismissed.[1]

I. BACKGROUND

Petitioner and Suzanne Mary Cayley are the unwed parents of a child, A.T., who was born in December 2003. Dkt. No. 1 at 13; Dkt. No. 1-1 at 15.

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[1] Although petitioner has paid the required $5.00 filing fee and has not sought leave to proceed in forma pauperis, the court may nonetheless dismiss the petition sua sponte for lack of jurisdiction. Fed. R. Civ. P. 12(h)(3); see also Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.").

When the relationship between the parents ended in 2010, Cayley became the child's primary caretaker. Dkt. No. 1 at 13-14; Dkt. No. 1-1 at 15. Following termination of the union, Cayley and A.T. continued to reside near petitioner in Woodstock, New York. Dkt. No. 1 at 13.

In 2013, following the issuance of a temporary no-contact order against petitioner and in favor of A.T., petitioner and Cayley filed cross-petitions in Ulster County Family Court for custody of the child. Dkt. No. 1-1 at 15. During the course of the Family Court proceedings, a temporary order of visitation was issued on January 2, 2014, permitting petitioner to engage in therapeutic visitation of A.T. Id. at 16, 39-40; see also Dkt. No. 1 at 13-14.

Precipitated by an incident that occurred at A.T.'s school in December 2014, her mother applied for and obtained from UIster County Family Court a temporary order of protection entered on January 22, 2015 in favor of A.T. and against petitioner. Dkt. No. 1 at 14-15; Dkt. No. 1-1 at 2-3, 15. Petitioner appealed that order to the New York State Supreme Court Appellate Division, Third Department. Dkt. No. 1 at 9; Dkt. No. 1-1 at 12-14. The appeal was dismissed by order entered on April 7, 2016, based upon the court's finding that the Ulster County Family Court order was not final, and therefore was non-appealable. Dkt. No. 1-1 at 15-16. A subsequent petition for leave to appeal to the New York State Court of Appeals was denied on June 30, 2016. Dkt. No. 1 at 9; Dkt. No. 1-1 at 26.

Since the issuance of the temporary order on January 22, 2015, the Ulster County Family Court has entered a series of additional, similar orders of protection, including on August 17, 2015 (temporary order of protection), February 1, 2016 (temporary order of protection and order of protection), and May 13, 2016 (order of protection), all of which restrict petitioner's contact with A.T. See Dkt. No. 1-1 at 4-11. The most recent of those orders will expire on April 11, 2018. Dkt. No. 1-1 at 11.

II. PROCEDURAL HISTORY

Petitioner commenced this proceeding on September 2, 2016, and has paid the required filing fee of $5.00. Dkt. No. 1. Named as the respondent in the matter is Eric Schneiderman, the Attorney General of the State of New York. Id. The petition raises four claims, arguing that (1) the New York Family Court Act, Article 6, section 154, providing for the issuance of orders of protection in connection with visitation and custody proceedings, is unconstitutional; (2) the policy of denying the right to appeal temporary orders of protection is unconstitutional; (3) petitioner's due process rights were violated by the Ulster County Family Court's failure to render factual findings supporting the issuance of the challenged orders of protection; and (4) the issuance of the orders of protection violated substantive due process and the federal parental privilege. Id. at 16-22. As relief, petitioner requests

that the court (1) vacate the orders of protection issued by Ulster County Family Court; (2) issue an order providing for "unsupervised, substantial and equal access of Petitioner to his child, or other equivalent relief;" (3) declare that New York Family Court Act, Article 6, section 154, is unconstitutional; and (4) declare unconstitutional the New York State appellate court policy of denying appeals of temporary orders of protection. Id. at 27.

III. DISCUSSION

A. In-Custody Requirement of 28 U.S.C. §§ 2241, 2254

Section 2241 empowers district courts to grant writs of habeas corpus, inter alia, to persons who are "in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3); see Razzoli v. United States Parole Comm'n, 116 F. App'x 292, 293 (2d Cir. 2004) ("A prerequisite to maintaining a petition for a writ of habeas corpus under [section] 2241 is that the petitioner is 'in custody' or 'detained].'"). Additionally, in relevant part, section 2254 similarly provides that "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 Unites States." 28 U.S.C. § 2254(a); see Finkelstein v. Spitzes, 455 F.3d 131, 133 (2d Cir.

2006) ("Section 2254 allows a federal court to entertain a habeas corpus petition for relief from a state-court judgment only on the ground that the petitioner is in custody in violation of the Constitution . . . . This provision requires that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." (quotation marks and alterations omitted) (emphasis in original)).

The in-custody requirement of sections 2241 and 2254 was discussed by the Supreme Court in its decision in Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara Cnty., State of Calif., 411 U.S. 345 (1973). The petitioner in that case was convicted of a misdemeanor under California law and sentenced to serve one year of incarceration and pay a fine. Hensley, 411 U.S. at 346. Petitioner's appeals and collateral challenges to the conviction were unsuccessful. Id. Petitioner, however, was released on his own recognizance pending sentencing, and remained at large pursuant to a trial court order staying the execution of his sentence. Id. at 346-47. Addressing the custody requirement, the Court noted the following:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large

> extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.
>
> Id. at 351.

While petitioner likens his situation to that faced by the petitioner in Hensley, Dkt. No. 1 at 11, in reality, there are few similarities. In concluding that the petitioner in Hensley was "in custody" for the purposes of sections 2241 and 2254, the Court noted the following:

> He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to 'in custody' in Strait v. Laird, [406 U.S. 341 (1972)].
>
> Hensley, 411 U.S at 351.

The Court further commented that the petitioner in that case remained at large only due to a court-ordered stay and that the State "has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result." Id.

Having carefully reviewed the matter, I conclude that petitioner cannot satisfy the in-custody requirement necessary for him to pursue claims under sections 2241 and 2254. The order of protection at issue in this case restricts only petitioner's access to his child. His contention that he may inadvertently come into contact with his child and, therefore, subject himself to potential incarceration is entirely too speculative to support a finding that he is currently in custody. Accordingly, I recommend that his petition be dismissed. See Moore-Beidl v. Beaudoin, 553 F. Supp. 404, 406-07 (N.D.N.Y. 1981) (Munson, J.) ("Plaintiff's habeas petition seeks to release both the plaintiff, Mary Carol[,] and her son from the 'custody' of the County Department of Social Services. The plaintiff Mary Carol may not invoke the procedural safeguards of 28 U.S.C. §§ 2241, 2254, for she is not in 'custody.' She alleges no restraints upon her person other than the fact that she is forc[i]bly being prevented from being together with her youngest son, Joseph. She is otherwise unrestricted by the County Department of Social Services, hence the habeas petition is hereby dismissed with respect to the plaintiff, Mary Carol."), aff'd without opinion, 697 F.2d 294 (2d Cir. 1982); cf.

Gilmore v. Green Cnty. Dep't of Soc. Servs., No. 06-CV-0318, 2006 WL 1064181 (N.D.N.Y. Apr. 20, 2006) (Mordue, J.) (dismissing habeas petition challenging a Greene County Family Court's determination of permanent neglect resulting in the petitioner's parental rights being terminated based upon the failure to meet the "in-custody" requirement of 28 U.S.C. § 2254).

B.

Whether to Permit Amendment

Ordinarily, a court should not dismiss a petition filed by a pro se litigant without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." Branum v. Clark, 927 F.2d 698, 704-05 (2d Cir.1991); see also Fed. R. Civ. P. 15(a) ("The court should freely give leave when justice so requires."); Littlejohn v. Artuz, 271 F.3d 360, 363 (2d Cir. 2001) (applying Rule 15(a) of the Federal Rules of Civil Procedure to motions to amend habeas petitions). An opportunity to amend is not required, however, where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000); see also Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice.").

Stated differently, "[w]here it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993); accord, Brown v. Peters, No. 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.).

In this case, permitting petitioner an opportunity to amend would be futile because the deficiencies identified above with respect to his habeas petition are substantive in nature, and better pleading would not cure them. In addition, any attempt to amend his petition to assert a civil rights violation, pursuant to 42 U.S.C. § 1983, would also fail for two reasons. First, the claim would squarely implicate the Rooker-Feldman doctrine, which relates to "lack of subject matter jurisdiction, and may be raised at any time by either party or sua sponte by the court." Moccio v. N.Y.S. Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (citations omitted), abrogated on other grounds by Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005). Under the Rooker-Feldman doctrine, a district court lacks jurisdiction to consider a plaintiff's claim when "(1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the

plaintiff's federal suit commenced."[2] McKithen v. Brown, 626 F.3d 143, 154 (2d Cir. 2010) (citation omitted). In this case, the requirements for application of Rooker-Feldman would be satisfied and would preclude this court from reviewing the orders of protection issued in Ulster County Family Court, even in the context of a section 1983 action.

The second issue that would be implicated by a claim brought under section 1983 in the circumstances now presented would be based on the steadfast refusal of federal courts to become involved in domestic disputes.

As the Supreme Court noted more than a century ago, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." In re Burrus, 136U.S. 586, 593-94 (1890). This deference to state law has given rise to a recognized "domestic relations" exception, which deprives federal courts of the power to review, for example, child custody, divorce, alimony, and child

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[2]The preclusion of Rooker-Feldman "merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme Court]." Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002). In other words, district courts do not have jurisdiction to hear cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp., 544 U.S. at 284.

custody decrees. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004). District courts in this circuit have extended the exception to civil rights actions challenging the results of domestic relations proceedings. See, e.g., Martinez v. Cannataro, No. 13-CV-3392, 2013 WL 5409205, at *2 (E.D.N.Y. Feb. 25, 2013) (citing cases).

In sum, it is clear that any attempt by Triestman to amend his habeas petition or convert the petition into a civil rights complaint challenging the orders of protection would be futile. For this reason, I recommend against permitting petitioner an opportunity to file an amended petition.

IV. SUMMARY AND RECOMMENDATION

The petition in this matter, though well drafted and supported by attachments that are well organized and indexed, fails to establish that petitioner can meet the "in custody" requirement for a habeas proceeding under 28 U.S.C. §§ 2241 and/or 2254. Moreover, it appears that granting petitioner leave to amend would be futile; any civil rights claim that may be brought based upon the circumstances set forth in his petition would be precluded by the Rooker-Feldman doctrine and the domestic relations exception to federal court jurisdiction. Accordingly, it is hereby respectfully

RECOMMENDED that the petition in this matter (Dkt. No. 1) be DISMISSED for lack of jurisdiction without leave to amend.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report.
FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

David E. Peebles
U.S. Magistrate Judge

Dated: September 20, 2016
Syracuse, NY

APPENDIX #3
NDNY DISTRICT COURT
DECISION AND ORDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BEN GARY TRIESTMAN

Petitioner,

-against- 1:16-CV-01079 (LEK/DEP)

ERIC SCHNEIDERMAN,

Respondent.

DECISION AND ORDER

I. INTRODUCTION

This matter comes before the Court following a Report-Recommendation filed on September 20, 2016, by the Honorable David E. Peebles, U.S. Magistrate Judge, pursuant to 28

U.S.C. § 636(b) and Local Rule 72.3. Dkt. No. 2 ("Report-Recommendation"). Pro se Plaintiff Ben

Gary Triestman timely filed Objections. Dkt. No. 3 ("Objections").

II. LEGAL STANDARD

Within fourteen days after a party has been served with a copy of a magistrate judge's report-recommendation, the party "may serve and file specific, written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b); L.R. 72.1(c). If no objections are made, or if an objection is general, conclusory, perfunctory, or a mere reiteration of an argument made to the magistrate judge, a district court need review that aspect of a report-recommendation only for clear error. Barnes v. Prack, No. 11-CV-0857, 2013 WL 1121353, at *1 (N.D.N.Y. Mar. 18, 2013); Farid v. Bouey, 554 F. Supp. 2d 301, 306-07, 306 n.2 (N.D.N.Y. 2008); see also Machicote v. Ercole, No. 06-CV-13320, 2011 WL 3809920, at *2 (S.D.N.Y. Aug. 25, 2011)

("[E]ven a pro se party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument."). "A [district] judge . . . may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28

U.S.C. § 636(b). Otherwise, a court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id.

III. DISCUSSION

Triestman objects to the Report-Recommendation's finding that he "cannot satisfy the in- custody requirement necessary for him to pursue [federal habeas] claims under [18 U.S.C. §§] 2241 and 2254." Rep.-Rec. at 7. Judge Peebles found that the order of protection issued against Triestman "restricts only [his] access to his child," and therefore does not place him in custody for purposes of §§ 2241 and 2254. Id. Judge Peebles also rejected as "speculative"[1] Triestman's "contention that he may inadvertently come into contact with his child and, therefore, subject himself to potential incarceration." Id.

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[1]Triestman argues that Judge Peebles erred in finding the allegations in the Petition to be speculative. Triestman notes that courts must accept as true any factual allegations contained in pleadings. Objs. at 16. This argument is moot because in addressing Triestman's objection below, the Court takes as true Triestman's allegations concerning the effects on his liberty of the order of protection.

In his Objections, Triestman vividly illustrates the constraints on his liberty allegedly created by the order of protection requiring him to stay away from his daughter. Woodstock, New York, where he and his daughter live, is a small town, and so "[i]f [he] is shopping for groceries, with a full cart, perhaps ready or in the middle of checkout, [and] the child comes into the market, [he] must leave all his groceries where they are and exit the market." Objs. at 10. "If [he] has a dinner date with someone, and the child enters the same restaurant, [he] must abandon the companion immediately and leave the restaurant, not even having the opportunity to pay for the meal, or time to explain why he must leave." Id. at 8. Triestman offers up several other scenarios in which his freedom of movement is compromised by the order of protection. The upshot of these examples, according to Triestman, is that "[t]his is the classic circumstance and condition that is anticipated and described in . . . case law regarding constraints of liberty [for purposes of federal habeas relief]." Id. at 10.

Habeas petitioners seeking to challenge state court rulings on domestic relations typically argue that their children are in the custody of the state because, for example, they are in foster care. E.g., Davis v. Baldwin, No. 12-CV-6422, 2013 WL

6877560, at *6 (S.D.N.Y. Dec. 31, 2013). Courts have uniformly rejected this argument. Id. (citing Lehman v. Lycoming Cty. Children's Servs. Agency, 468 U.S. 502, 510-12 (1982)). Triestman takes pains to point out that this is not his argument. Objs. at 1-2. Instead, Triestman claims that he is in custody because of the restraints on his liberty caused by the order of protection forbidding him from seeing his daughter. Id. Triestman argues that the two cases cited by Judge Peebles to support the conclusion that he is not in custody are inapposite because the petitioners there were arguing only that their children were in custody. Objs. at 6. Triestman is wrong about this. In Moore-Beidl v. Beaudoin, 553 F. Supp. 404, 406 (N.D.N.Y. 1981), one of the cases cited by Judge Peebles, the court noted that "[p]laintiff's habeas petition seeks to release both the plaintiff, Mary Carol[,] and her son from the 'custody' of the County Department of Social Services." Judge Peebles also cited Gilmore v. Greene Cty. Dep't of Soc. Servs., No. 06-CV-318, 2006 WL 1064181, at *1 (N.D.N.Y. Apr. 20, 2006), in which the court held that the petitioner, who sought to challenge the termination of his parental rights, was "not being held in custody pursuant to any . . . determination by the Family Court." These two cases involve petitioners who appear to have argued that they were in custody. However, because these cases do not

clearly explain why the restraints imposed on persons such as Triestman do not constitute custody for purposes of federal habeas relief, the Court will do so now.

A federal court lacks jurisdiction over a habeas petition unless the petitioner is "in custody pursuant to the judgment of a State court" when she files her petition. 28 U.S.C. § 2254(a); see also 28 U.S.C. § 2241(c). "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." Jones v. Cunningham, 371 U.S. 236, 240 (1963). "The Jones Court found jurisdiction where an individual was released from imprisonment on parole subject to explicit conditions-for example, regular reporting to his parole officer; remaining in a particular community, residence, and job; and refraining from certain activities." Nowakowski v. New York, No. 14-1964, 2016 WL 4487985, at *3 (2d Cir. Aug. 26, 2016) (citing 371 U.S. at 242). Courts faced with the question whether a petitioner is in custody must "judge the 'severity' of an actual or potential restraint on liberty." Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir. 1996). "[C]ourts have considered even restraints on liberty that might appear . . . less burdensome than

probation or supervised release severe enough because they required petitioners to appear in certain places at certain times . . . or exposed them to future adverse consequences on discretion of the supervising court." Nowakowski, 2016 WL 4487985, at *4.

Triestman appears to argue that because the general public does not share the restraints imposed on him as a result of the order of protection, he is in custody for purposes of §§ 2241 and 2254. The Court finds it plausible that Triestman does suffer some limitation on his freedom of movement because of the order of protection. This restriction is not experienced by people not subject to orders of protection. Further, Jones does speak of "restraints not shared by the public generally." 371 U.S. at 240. But it is misleading to suggest that this language alone defines the contours of the custody requirement. Nowakowski collects cases from several circuits in which courts have "recognized that a variety of nonconfinement restraints on liberty satisfy the custodial requirement." 2016 WL 4487985, at *3. What these cases have in common is that, like Nowakowski itself, they involve restrictions that "require [the petitioner's] physical presence at particular times and locations . . . and carry with them the potential for future adverse consequences during the term of the sentence." Id. at

*4. For example, in Barry v. Bergen Cty. Prob. Dep't, 128 F.3d 152, 161 (3d Cir. 1997), the court held that the petitioner was in custody because he was "ordered to perform 500 hours of community service under the direction of the Morris County Community Service Program."

In this case, Triestman is not required to be at a "particular place" at any time.

Nowakowski, 2016 WL 4487985, at *4. He must stay away from his daughter, so in a sense he always has to be where she is not. But the requirement that he avoid his daughter is far less intrusive than the requirement that someone appear at a particular location at a particular time. For example, someone who must appear in court is required to be there at a specified time. She has only one real choice as to how she spends the time allotted for her court appearance, because if she fails to show up, she may face serious consequences. But Triestman can go anywhere he likes at any time so long as he avoids his daughter. The range of options available to him on a given day is therefore much greater than that open to someone who must appear in court that day. Moreover, Triestman can significantly reduce the "constraint of being forced to avoid a moving target" by coordinating with the mother of his child to

ensure that their daughter's schedule does not overlap with his. Objs. at 14.[2]

"The custody requirement is simply designed to limit the availability of habeas review 'to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.'" Poodry, 85 F.3d at 894 (quoting Hensley v. Mun. Court, 411 U.S. 345, 351 (1973)). The reason for caution in this area of the law is that "habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism." Hensley, 411 U.S. at 351. If the Court were to find that Triestman is in custody simply because of the order of protection, then anyone who is subject to such an order, and who lives near the person from whom she must stay away, could seek habeas relief in federal court. That would represent a significant expansion in the scope of federal habeas review. See Meyer v. Drell, 10 F. App'x 741, 743 (10th Cir. 2001) ("Petitioner alleges that the state-court decisions regarding the custody of [his child], supervised visitation, and petitioner's

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[2] The Court does not hold that an order of protection can never place someone subject to it in custody. Instead, the Court rests its decision in this case on the facts alleged in Triestman's Petition and Objections, which fail to rise to the level of severity required to state a cognizable habeas claim.

parental status, violate his constitutional rights. . . . [P]rinciples of comity . . . prevent us from entertaining petitioner's habeas petition . . . ."). The Court is reluctant to undertake such an expansion absent a compelling showing that Triestman's condition involves restraints significant enough to constitute custody. Since Triestman has failed to make this showing, the Court agrees with Judge Peebles's conclusion that Triestman is not in custody for purposes of §§ 2241 and 2254.

The Court has reviewed the remainder of the Report-Recommendation for clear error and has found none.

IV. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the Report-Recommendation (Dkt. No. 2) is APPROVED and ADOPTED in its entirety; and it is further

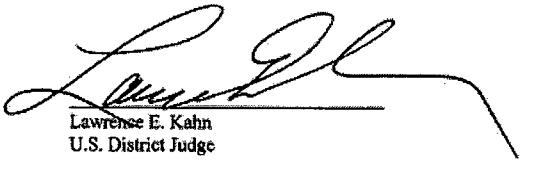
ORDERED, that Petitioner's Petition for a Writ of Habeas Corpus (Dkt. No. 1) is

DISMISSED without leave to amend; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: October 19, 2016
Albany, New York



Lawrence E. Kahn
U.S. District Judge

APPENDIX #4
SECOND CIRCUIT APPELLATE COURT DENIAL OF RESPONDENT'S DISMISSAL MOTION, AND GRANTING OF CERTIFICATE OF APPEALABILITY

N.D.N.Y.
16-cv-1079
Kahn, J.
Peebles, M.J.

Case 16-3831, Document 58, 05/15/2017, 2035322

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of May, two thousand seventeen.

Present:

Pierre N. Leval,
Rosemary S. Pooler,
Peter W. Hall,
Circuit Judges.

Ben Gary Triestman,

Petitioner-Appellant,

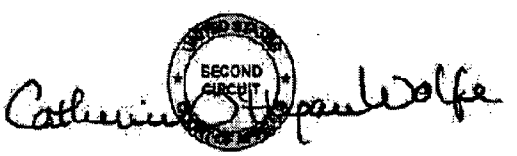
v. 16-3831

Eric T. Schneiderman, Attorney General,
The State of New York,

Respondent-Appellee.

Appellee moves to dismiss the appeal for lack of jurisdiction because the Appellant, pro se, has not obtained a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion to dismiss is DENIED and the Appellant's notice of appeal is construed as a motion for a certificate of appealability. It is further ORDERED that, as construed, the motion is GRANTED on the issue whether Appellant meets the "in-custody" requirement of 28 U.S.C. §§ 2241 or 2254. Appellant has already filed his merits brief on this issue. Appellee shall file his responding brief within 91 days of the entry of this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX #5
SECOND CIRCUIT APPELLATE COURT
DENIAL OF PANEL REHEARING OR
REHEARING EN BANC
Case 16-3831, Document 83, 05/14/2018, 2302168,

United States Court of Appeals
FOR THE
SECOND CIRCUIT

ORDER
Docket No: 16-3831

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand eighteen.

Ben Gary Treistman,

Petitioner - Appellant,

v.

Eric T. Schneiderman, Attorney General,
The State of New York,

Respondent - Appellee.

Appellant, Ben Gary Triestman, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk