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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN ROBERT DECK, Petitioner-Appellant, v. STATE OF CALIFORNIA, Respondent-Appellee.	No. 22-55923 D.C. No. 8:21-cv-01525-MWF-SP MEMORANDUM* (Filed Sep. 5, 2023)

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted August 14, 2023
Pasadena, California

Before: WARDLAW, CHRISTEN, and SUNG, Circuit Judges.

Stephen Robert Deck appeals a district court order denying his 28 U.S.C. § 2254 petition for lack of jurisdiction because the sex offender registration conditions with which Deck must comply do not constitute "custody" within the meaning of the federal habeas statute. Because the parties are familiar with the facts,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

we do not recount them here. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253, and we affirm.

The purpose of habeas relief is "to effect release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 486 n.7 (1973). Accordingly, a district court's jurisdiction to entertain § 2254 petitions is limited to petitioners who are in custody and challenge the lawfulness of their custody. *Munoz v. Smith*, 17 F.4th 1237, 1241 (9th Cir. 2021). Whether sex offender registration conditions are sufficiently restrictive to constitute "custody" depends primarily on "'whether the legal disabilit[ies] in question somehow limit[ ] the putative habeas petitioner's movement' in a 'significant' way." *Id.* at 1242 (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183–84 (9th Cir. 1998)). We recently addressed this issue in *Munoz*, where the putative petitioner challenged Nevada's imposition of lifetime supervision requiring him to register in person "every few months," to pay a $30 monthly fee, to be subject to electronic monitoring, to reside only at locations approved by his parole officer, and to keep his parole officer informed of his current address. *Id.* at 1238–39, 1246. We held that "these conditions do not severely and immediately restrain the petitioner's physical liberty," and thus do not constitute "custody." *Id.* at 1239.

Under our case law and on this record, Deck has not made the required showing that the applicable restrictions rise to the level of "custody." Although Deck is required to re-register in person annually, we have held that "[r]egistration, even if it must be done in person at the police station, does not constitute the type of

severe, immediate restraint on physical liberty necessary to render a petitioner 'in custody' for the purposes of federal habeas corpus relief." *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (holding that California's then-operative registration conditions did not constitute "custody").

Deck enumerates several disclosure and notification requirements, as well as limitations imposed on him by third parties such as the federal government, other states, and private companies. Deck also argues that he is ineligible for certain types of employment, services, and benefits. Deck contends that these restrictions, considered cumulatively, are sufficient to constitute custody. But most of these collateral consequences have little to no bearing on Deck's freedom of movement, and none of them severely and immediately restrain his physical liberty. *See Maleng v. Cook*, 490 U.S. 488, 491–92 (1989) (per curiam) (explaining that "collateral consequences" such as a petitioner's "inability to vote, engage in certain businesses, hold public office, or serve as a juror" "are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack").

We are not persuaded by Deck's arguments based on *Dow* and *Piasecki*. *See Dow v. Cir. Ct. of the First Cir. ex rel. Huddy*, 995 F.2d 922 (9th Cir. 1993) (per curiam); *Piasecki v. Ct. of Common Pleas*, 917 F.3d 161 (3d Cir. 2019). *Dow* held that a sentence requiring fourteen hours of attendance at an alcohol rehabilitation program restricted the petitioner's physical liberty enough to amount to "custody." *Dow*, 995 F.2d at 923.

But, unlike here, the rehabilitation sentence in *Dow* specified a particular period during which the defendant was required to be at a closely supervised location from which he was not free to leave. *Henry* and *Munoz* both held, after *Dow*, that a reasonable requirement to re-register in person, without more, does not render a petitioner "in custody." *See Munoz*, 17 F.4th at 1246; *Henry*, 164 F.3d at 1242. Deck has not shown that the frequency with which he is required to re-register in person renders him "in custody."

This case is also unlike *Piasecki*, in which the Third Circuit held that the conditions Pennsylvania imposed on a putative habeas petitioner were sufficiently restrictive to constitute "custody." *See* 917 F.3d at 163. We acknowledge that many of the restrictions Deck faces are similar to those considered in *Piasecki.* Like the petitioner in *Piasecki*, Deck must re-register in person at regular intervals and when he moves. *Id.* at 164. Piasecki "was required to be in a certain place or one of several places" during in-person registration, and the Third Circuit reasoned that "the state's ability to compel a petitioner's attendance weighs heavily in favor of concluding that the petitioner was in custody." *Id.* at 170 (internal quotation marks and citation omitted). Deck argues that the same logic applies to California's in-person registration requirement, and that Deck's "failure to abide by the restrictions [is] itself a crime," as in *Piasecki*. *Id.* at 171 (internal quotation marks omitted); *see* Cal. Penal Code § 290.018(b).

These arguments are unavailing. As we observed in *Munoz*, "*Piasecki's* analysis was consistent with our

own precedent, but simply confronted far more severe restrictions." 17 F.4th at 1244. Deck's baseline in-person registration is only annual. Further, the statute in *Piasecki* imposed other in-person re-registration requirements that Deck has not shown apply to him. *See id.* at 164–65, 170.

Because Deck has not shown that the conditions to which he is subject severely and immediately restrain his physical liberty, the district court correctly concluded that it lacked jurisdiction to entertain Deck's § 2254 petition.[1]

AFFIRMED.

[1] Respondent's unopposed motion to take judicial notice (Dkt. 15) is GRANTED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN ROBERT DECK, Petitioner, v. STATE OF CALIFORNIA, Respondent.	Case No. 8:21-cv-01525-MWF (SP) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE** (Filed Sep. 27, 2022)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

As one would expect of such eminent counsel, the analysis of the existing case law is extremely sophisticated. Nonetheless, this Court is not persuaded, for three reasons:

***First*,** the sheer weight of the authority is convincing, even if petitioner attempts to distinguish each individual case. The magistrate judge treated the issue as black-letter-lawish, and one understands why.

Second, while this is not an AEDPA issue, that line of thinking can't help but color one's thinking here – shouldn't the Court hesitate to use habeas corpus to adjudicate the merits of California's registration regime, absent a clear invitation to do so from either the U.S. Supreme Court or the Ninth Circuit?

Third, this Court agrees with the magistrate judge that the thrust of habeas corpus is the actual sentence.

IT IS THEREFORE ORDERED that respondent's Motion to Dismiss (Docket No. 9) is **GRANTED**, and Judgment will be entered denying the Petition and dismissing this action with prejudice.

Dated:
September 27, 2022

/s/ Michael W. Fitzgerald
MICHAEL W. FITZGERALD
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN ROBERT DECK, Petitioner, v. STATE OF CALIFORNIA, Respondent.	Case No. 8:21-cv-01525-MWF (SP) **ORDER GRANTING A CERTIFICATE OF APPEALABILITY** (Filed Sep. 27, 2022)

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted, citation omitted).

Two showings are required "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim." *Slack*, 529 U.S. at 484. In addition to showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," the petitioner must also make a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may

> entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

Id. at 485.

Here, the Court has denied the Petition for lack of jurisdiction because petitioner was not "in custody" for federal habeas purposes. After duly considering petitioner's contentions in support of his argument that the court has jurisdiction over his claims, including in his objections to the Report and Recommendation, the Court finds that petitioner has made the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" that it lacks jurisdiction over petitioner's claims. Specifically, petitioner's counsel engaged in a sophisticated analysis of the pertinent case law. Although this Court was not persuaded, other jurists of reason might well be.

Moreover, given how stringent the California regime is, there should be some sort of appellate review. Of course, that could occur on a petition for writ of certiorari to the United States Supreme Court from the California Supreme Court's denial of review or (much more realistically) through a habeas corpus petition brought at the proper time. But it seems understandable that a defendant would not appreciate the full

weight of the registration requirements when, as here, is sentence was short.

Accordingly, a Certificate of Appealability is **GRANTED**.

Dated:
September 27, 2022

/s/ Michael W. Fitzgerald
MICHAEL W. FITZGERALD
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN ROBERT DECK, Petitioner, v. STATE OF CALIFORNIA, Respondent.	Case No. 8:21-cv-01525-MWF (SP) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Sep. 1, 2022)

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On September 16, 2021, petitioner Stephen Robert Deck filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition").[1] Petitioner challenges his 2018 conviction following a retrial for

[1] Attached to the form Petition is a Supplemental Petition ("Supp. Pet."). In addition, the day after filing the Petition, petitioner filed a Memorandum of Points & Authorities and Exhibits in Support of 28 U.S.C. § 2254 Petition ("Pet. Mem.").

attempted lewd act on a child under the age of 14 years.[2] For his 2018 conviction, petitioner was sentenced to five years of probation and one year in county jail, both of which terms petitioner had by then already completed following his original sentencing in 2010, and petitioner was again required to register as a sex offender.

Petitioner raises three grounds for relief in the Petition: (1) the trial court erroneously expanded the temporal element of attempt; (2) the trial court failed to give a unanimity instruction; and (3) the trial court failed to suppress petitioner's statements taken in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), and *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

Respondent file a Motion to Dismiss Petition ("MTD") on November 2, 2021, maintaining this court lacks jurisdiction because petitioner was not in custody or under a term of probation when he filed the Petition. Petitioner filed a Reply opposing the Motion to Dismiss ("Opp.") on November 18, 2021.

For the reasons discussed below, this court lacks jurisdiction. Accordingly, the Petition should be dismissed with prejudice.

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[2] Petitioner erroneously lists his year of conviction as 2019. *Compare* Petition at 2 and Motion to Dismiss, Ex. 2.

II.

PROCEEDINGS

Petitioner was first convicted and sentenced in 2010 for attempted lewd act with a minor under the age of 14 in violation of California Penal Code § 288(a). MTD, Ex. 1; *see* Pet. Mem., Ex. A. The trial court sentenced petitioner to five years of probation, one year in jail, and other terms including registration as a sex offender. MTD, Ex. 1. Petitioner's conviction was upheld on direct appeal, but after petitioner filed a federal habeas petition, the Ninth Circuit found prejudicial prosecutorial error, and petitioner was granted a new trial. *See* Pet. Mem., Ex. A.

After a second trial, a jury again found petitioner guilty of attempting to commit a lewd action on a child. *See id.* On December 13, 2018, the trial court again sentenced petitioner to one year in county jail and five years of probation. MTD, Ex. 2. The court found that petitioner "has completed his jail sentence and that he has also completed his probation term that was previously given on 03/19/2010." *Id.* The trial court additionally ordered petitioner to register for life as a sex offender pursuant to California Penal Code § 290. *Id.*

Petitioner, represented by counsel, appealed his conviction. *See* Pet. Mem., Ex. A. Petitioner contended the trial court erred in denying a motion to suppress and raised multiple instructional error claims. *See id.* In a reasoned decision, the California Court of Appeal affirmed the judgment on May 12, 2020. *Id.*

Petitioner filed a petition for review in the California Supreme Court, which summarily denied it on July 22, 2020. Pet. Mem., Ex. B. Petitioner then filed a petition for certiorari in the United States Supreme Court, which was denied on December 7, 2020. Pet. Mem., Ex. C.

Petitioner filed the instant Petition on September 16, 2021.

III.

DISCUSSION

A district court may entertain a petition for writ of habeas corpus filed by 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." 28 U.S.C. § 2254(a); *see Munoz v. Smith*, 17 F.4th 1237, 1238 (9th Cir. 2021). The Supreme Court has interpreted § 2254(a) "as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). Although the petitioner need not necessarily be physically confined in order to file a habeas petition, he must still be under a criminal sentence that has not yet expired, such as on parole. *Id.* at 491-92.

Here, it is undisputed that petitioner had completed both his one-year jail term and his five-year probation term before he filed the instant federal habeas

Petition. *See* MTD, Ex. 2; Pet. Mem. at 10. What remains is the lifetime requirement that he register as a sex offender. The question is whether the conditions imposed on petitioner by California's sex offender registry statutes render him "in custody" for purposes of federal habeas corpus.

"Historically, the 'chief use of habeas corpus' was 'to seek the release of persons held in actual, physical custody in prison or jail.'" *Munoz*, 17 F.4th at 1241 (quoting *Jones v. Cunningham*, 371 U.S. 236, 238, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963)). But the Supreme Court in *Jones* held "'[h]istory, usage, and precedent can leave no doubt that, besides 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.'" *Id.* (quoting *Jones*, 371 U.S. at 240). The Supreme Court interpreted "custody" as not limited to physical custody but also encompassing circumstances in which the state has imposed conditions significantly restraining a person's liberty. *Jones*, 371 U.S. at 242-43; *see Hensley v. Municipal Ct.*, 411 U.S. 345, 351, 93 S. Ct. 1571, 36 L. Ed. 294 (1973) (focusing on the freedom of movement when discussing liberty). The Supreme Court then concluded that a paroled prisoner was "in custody" for habeas purposes because the conditions imposed on him – including being confined to a particular residence and subject to searches of his home and job at any time – "significantly confine[d] and restrict[ed] his freedom." *Jones*, 371 U.S. at 242-43. But "once the sentence

imposed for a conviction has completely expired, the collateral consequences of that conviction [(*e.g.*, the inability to vote, engage in certain businesses, hold public office, or serve as a juror)] are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it.'" *Maleng*, 490 U.S. at 491-92.

The Ninth Circuit has consistently held that the conditions imposed by sex offender registries do not render a petitioner "in custody" for federal habeas purposes. In *Williamson v. Gregoire*, the court stated "the boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence of a conviction.'" 151 F.3d 1180, 1183 (9th Cir. 1998). The court held that Washington's law requiring convicted sex offenders to register with the county sheriff in the county of residence, provide annual verification, and notify authorities of moves, school enrollment, and name changes, as well as community notification, did not amount to custody because there was no significant restraint on the petitioner's physical liberty. *Id.* at 1181-84 ("The precedents that have found a restraint on liberty rely heavily on the notion of a physical sense of liberty – that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement."). Although Williamson had to register each year and notify authorities of moves, "the constraints of this law lack the discernible impediment to movement that typically satisfies the 'in custody' requirement." *Id.* at 1184. The law's restrictions were merely collateral consequences

of the petitioner's conviction. *See id.* In addition, the fact that Washington's sex offender registry statute was regulatory rather than punitive also supported the same conclusion. *Id.* (noting the Ninth Circuit previously found Washington's sex offender law to be regulatory and not punitive within the context of the Ex Post Facto Clause); *see Smith v. Doe*, 538 U.S. 84, 105, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (for purposes of the Ex Post Facto Clause, Alaska's sex offender registry law was non-punitive).

Following *Williamson*, the Ninth Circuit held that California's, Oregon's, and Nevada's sex offender registration requirements similarly did not severely restrain a petitioner's physical liberty and render a petitioner "in custody" for the purposes of federal habeas relief. *Munoz*, 17 F.4th 1237, 1240 (9th Cir. 2021) (the court lacked jurisdiction because Nevada's sex offender registration requirements – lifetime $30 monthly fee to defray supervisory costs, electronic monitoring, and pre-approval of residence – did not render petitioner "in custody"); *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999) (even if California required annual in-person registration, such requirement did not constitute a severe, immediate restraint on physical liberty); *McNab v. Kok*, 170 F.3d 1246, 1247 (1999) (per curiam) (as in Washington and California, Oregon's sex offender registration requirements did not place the petition in custody). With regard to California specifically, the Ninth Circuit noted the minimal differences between California's and Washington's registration requirements – namely that California

required annual registration, even if in person – did not constitute "the type of severe, immediate restraint on physical liberty" necessary for a habeas custody finding. *Henry*, 164 F.3d at 1242.

Other circuit courts have reached the same conclusion as the Ninth Circuit that the imposition of sex offender registration requirements does not place a person "in custody." *See*, *e.g.*, *Hautzenroeder v. Dewine*, 887 F.3d 737, 740-43 (6th Cir. 2018) (although the new Ohio sex offender registration law had enhanced reporting requirements, mandated a "more extensive dissemination of information," and barred residence in certain areas, petitioner was not in custody for federal habeas purposes because the obligations were not severe restraints on liberty); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (Colorado sex offender registration statutes did not satisfy "in custody" standard); *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012) (petitioner was not "in custody" because Virginia's and Texas's sex offender registration requirements did not impair the ability to move or condition his movement on government approval); *Virsnieks v. Smith*, 521 F.3d 707, 719-20 (7th Cir. 2008) (court had no jurisdiction because Wisconsin's sex offender registration law imposed minimal restrictions on the petitioner's movement); *see also Munoz*, 17 F.4th at 1243-44 (Ninth Circuit and other circuits have found "a range of post-release conditions imposed on sex offenders . . . did not place offenders 'in custody' under § 2254") (citations omitted).

In contrast, the Third Circuit found that Pennsylvania's sex offender registration requirements were sufficiently severe to constitute custody. *Piasecki v. Ct. of Common Pleas*, 917 F.3d 161, 170 (3d Cir. 2019). In *Piasecki*, Pennsylvania's statutes required a registered sex offender to: register in person with the state police every three months; appear in person for registration if there are changes to name, residence, employment, education, phone number, vehicle information, e-mail address or other online designation, and occupational or professional license; appear in person if he wanted to leave home for more than seven days; and appear in person at an approved site 21 days prior to international travel. *Id.* at 164-65. Registered sex offenders were also prohibited from drinking or internet usage. *Id.* at 164, 170. The Third Circuit concluded that the combined effect of these conditions was sufficiently restrictive to constitute custody. *Id.* at 170. Specifically, the Third Circuit noted Piasecki was required to be at a certain place four times a year for the rest of his life, his movement was restricted by the requirement that he report any change of address – including temporary stays – to the state police in person within three business days, he was prohibited from internet use, and he had to personally appear to report changes in vehicle and contact information. *Id.* at 170-71.

Petitioner acknowledges the Ninth Circuit has held that California's sex offender registration requirement does not satisfy the federal habeas "in custody" requirement, and does not challenge the legality of the registration requirement itself. Pet. Mem. at 7-8 (citing

Henry, 164 F.3d at 1241-42). Nevertheless, petitioner contends that *Henry* and its progeny are outdated. *Id. at* 7; Opp. at 3-4. Specifically, petitioner contends it is irrational to lump all sex offenders together without distinction, the lifetime registration restrains his freedom, California now imposes more requirements on registered sex offenders than when *Henry* was decided, the cumulative requirements are onerous and restrain his freedom, and *Henry* did not address the fact that registration is part of criminal sentence and a violation of the conditions can result in criminal prosecution. *See* Pet. Mem. at 7-10, 17; Opp. at 5-10.

Here, petitioner argues California's sex offender registration's multiple lifetime conditions and restrictions are onerous and render him "in custody." Petitioner asserts he must: (1) register in-person annually with law enforcement authorities in order to provide his employment information, have his fingerprints and photograph taken, provide vehicle information, sign an acknowledgment that he is required to register and update his information, acknowledge that he may have a duty to register in any other state where he may relocate, and provide proof of residence; (2) have his name, aliases, photograph, physical description, date of birth, home address, conviction, criminal history, and risk level be posted on a public state-run website; and (3) notify the authorities of any change of address and any move out of state. Pet. Mem. at 10-13; Opp. at 5-6. As a registered sex offender, petitioner is: prohibited from accessing the Megan's Law website's "search functionality;" ineligible for statutory

expungement, a certificate of rehabilitation, Transportation Security Agency ("TSA") PreCheck,[3] jury duty, and federally assisted housing; and prohibited from entering school grounds without lawful business and advance written permission. Pet. Mem. at 11, 14-15; Opp. at 6-7. Additionally, as a result of his registration status in California, federal laws require a unique identifier be placed on petitioner's passport and for petitioner to provide advanced notice to officials of intended international travel. Pet. Mem. at 13-14; Opp. at 6. Upon notification of petitioner's sex offender status, countries may ban petitioner from entry. *Id.* Finally, petitioner may be criminally prosecuted for a violation of these conditions. Pet. Mem. at 10.

California's current law has more registration requirements than addressed in *Henry*, but petitioner has not show that the requirements are so onerous that they are a restraint on his liberty.

First, the fact that petitioner has lifetime registration requirements does not render him in custody. The Ninth Circuit has found that lifetime registration requirements do not constitute custody. *Munoz*, 17 F.4th at 1246 (Nevada's lifetime supervision conditions are not custodial); *Henry*, 164 F.3d at 1242 (California's lifetime annual in person registration requirement does not constitute a severe restraint on physical liberty); *see also Maciel v. Cate*, 731 F.3d 928 (9th Cir.

[3] TSA PreCheck "is an expedited screening program that makes risk assessments about passengers prior to their arrival at an airport checkpoint." https://www.tsa.gov/news/press/factsheets/tsa-precheck.

2013) (treating California's lifetime requirements as non-custodial).

Second, the registration requirements do not significantly restrain petitioner's movement. Although petitioner must update his registration and notify the authorities of changes to, among other things, his name and address, they do not actually restrict his movement.[4] *See Henry*, 164 F.3d at 1242. Petitioner is free to work, travel, engage in lawful activities, and move to different residences, including in other states. *See Munoz*, 17 F.4th at 1246-47 (requiring petitioner to update his parole officer with his current address does not restrict his movement); *McNab*, 170 F.3d at 1247 (petitioner is not in custody because registered sex offenders in Oregon are free to move to a new residence so long as they notify authorities of their new address); *Williamson*, 151 F.3d at 1184 (Washington's registration and notification requirements neither target petitioner's movements nor specify anywhere he cannot go).

Third, petitioner contends that since *Henry*, there are additional notification burdens the Ninth Circuit has not considered, in particular, the dissemination of information to the public. California law mandates the state maintain a public website to notify the public about registered sex offenders. Cal. Penal Code

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[4] Petitioner states he believes California's residence registration requirement also applies to hotels when traveling. Pet. Mem., Ex. D (Declaration of Stephen Deck ("Deck Decl.")) at 3. Sections 290.010 and 290.015(b) of the California Penal Code do not state such a requirement.

§ 290.46. The website includes the registered sex offender's "name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, prior adjudication as a sexually violent predator, the address at which the person resides, [] any other information that the [California] Department of Justice deems relevant," and risk level. Cal. Penal Code § 290.46(b)(1). Petitioner contends the internet postings make registered sex offenders targets of vigilantes. Pet. Mem. at 12-13.

Henry does not mention notification requirements, but the Ninth Circuit addressed such requirements in *Williamson*, where it found that the community notifications provisions do not significantly restrain a person's liberty. *Williamson*, 151 F.3d at 1184. In *Williamson*, public agencies were authorized to release information about a sex offender to the public when they determined such disclosures were relevant and necessary to protect the public. *Id.* at 1181-82. The court found that although public disclosures might create a "subjective chill" on a registered sex offender's desire to travel, the chill is subjective and the notification provisions apply regardless of whether the registered sex offender moves. *See id.* The public notification requirements in *Williamson* may differ from California's current obligations, but the difference is simply in the degree of its reach. The purpose behind public notification is the same – to protect the public – and the broader reach through the internet does not

render petitioner in custody.[5] *Id.*; *see Hautzenroeder*, 887 F.3d at 741-42 (the fact that Ohio's revised public notification law, which are meant to protect the public, resulted in a more extensive dissemination of information did not place the petitioner in custody); *see also Smith v. Doe*, 538 U.S. 84, 98, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment . . . The purpose and the principal effect of notification are to inform the public for its own safety.").

Fourth, the international travel requirements, whose purpose is to protect children and the public at large, do not severely restrict petitioner's liberty. *See* International Megan's Law § 2(3). A registered sex offender is required to have a unique identifier of his sex offender status on his passport and inform officials of intended foreign travel at least 21 days in advance, who will then notify the destination countries of the intended travel. 34 U.S.C. § 21503(e)(3); 22 U.S.C. § 212b. The requirements neither prohibit petitioner from traveling nor require approval prior to travel. Instead, the federal government is communicating publicly available information to a foreign country. While some countries may deny a registered sex offender entry upon notification, it is the sovereign right of that

[5] Petitioner further claims it "is a crime" for him to access 'the websites search functionality,'" and he therefore cannot check to verify its information. Pet. Mem. at 11 (citing Cal. Penal Code § 290.46(k), effective in 2021 and now enumerated as Cal. Penal Code § 290.46(i)). Petitioner's inability to check the website does not impede on his freedom of movement.

country to decide the conditions of entry, including, among other things, whether a person is a convicted felon or has the proper vaccines.

Fifth, none of the remaining restrictions petitioner complains of – his ineligibility for TSA PreCheck, jury service, and federally assisted housing, and the prohibition on entering school grounds without lawful business and advance permission – are so onerous to severely restrain his physical liberty. Ineligibility for TSA PreCheck is not an ineligibility to travel. It is, at most, an inconvenience to require petitioner to proceed through the normal security lines at airports. Petitioner's exclusion from jury service is unrelated to his physical liberty. *See Maleng*, 490 U.S. at 491-92 (the inability to serve as a juror is a collateral consequence of conviction). Ineligibility for federally assisted housing likewise has no bearing on his physical liberty. As for the condition requiring petitioner to have advance written permission before entering school grounds, this hardly amounts to a severe restraint on liberty. The restriction is designed to protect children from harm. Indeed, these restrictions are all collateral consequences of petitioner's conviction and despite each of these restrictions, petitioner remains able to travel, move, and work.

Finally, the fact that petitioner may be criminally prosecuted for violating the sex offender registration requirements does not render him in custody for federal habeas purposes. *Williamson*, 151 F.3d at 1184 (the potential for future incarceration for failure to obey requirements is similar to non-custodial

restitution orders); *see Hautzenroeder*, 887 F.3d at 743 (any repercussion from violating Ohio's sex offender registration requirements would not stem from the original conviction but rather a new criminal proceeding); *Calhoun*, 745 F.3d at 1074 (the threat of future incarceration for failure to obey registration requirements is insufficient to satisfy the custody requirement).

None of the restrictions petitioner cites – whether individually or cumulatively – are severe restrictions on his liberty. Petitioner cites only one out of circuit case to support his argument, *Piasecki*, in which the Third Circuit found the combined effects of Pennsylvania's sex offender registration requirements were sufficiently severe to amount to custody.[6] 917 F.3d at 170-73. But as the Ninth Circuit noted, *Piasecki* involved "much more burdensome conditions than" it has addressed, including: the requirement to re-register in person every three months; the requirement to appear in person anytime the petitioner wanted to leave home for more than seven days, change employment, change a phone number, and change an e-mail address; and the prohibition against "computer internet use." *Munoz*, 17 F.4th at 1244. The extent of conditions present in *Piasecki* do not exist in this case.[7]

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[6] Despite acknowledging ex post facto laws are not at issue here, petitioner cites myriad state court cases discussing the retroactive application of sex offender registration requirements. See Pet. Mem. at 16-20.

[7] Because the court finds the restrictions are not a severe restraint on petitioner's liberty, it need not discuss the other factor

At bottom, Ninth Circuit precedent is controlling, and petitioner has not shown that any of the additional requirements California imposes severely restrain his physical liberty. Petitioner remains free to reside, work, travel, and engage in other lawful activities without government approval. The conditions, whether individually and cumulatively, are merely collateral consequences of his conviction and do not render petitioner "in custody" for federal habeas purposes. This court consequently lacks jurisdiction.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting respondent's Motion to Dismiss (docket no. 9); and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 1, 2022 /s/ Sheri Pym
SHERI PYM
United States
Magistrate Judge

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raised in *Williamson*, whether the registration restrictions were regulatory or punitive.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN ROBERT DECK, Petitioner-Appellant, v. STATE OF CALIFORNIA, Respondent-Appellee.	No. 22-55923 D.C. No. 8:21-cv-01525-MWF-SP ORDER (Filed Oct. 13, 2023)

Before: WARDLAW, CHRISTEN, and SUNG, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.