No. _____

In The
Supreme Court of the United States

COURT OF COMMON PLEAS, BUCKS COUNTY, PA
DISTRICT ATTORNEY BUCKS COUNTY;
ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

JASON PIASECKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A prerequisite for judicial review of a federal habeas petition filed under section 2254 of Title 28 of the United States Code is that the petitioner is "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). *See also* 28 U.S.C. § 2241(c)(3) (extending writ of habeas corpus to those "in custody in violation of the Constitution or law or treaties of the United States"). The relevant determination for purposes of this provision is whether the petitioner is in custody at the time he or she filed the federal habeas petition. *Spencer v. Kemna*, 523 U.S. 1, 6 (1998) (citing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)); *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989) (per curiam). The question presented in this case is:

Whether the Third Circuit Court of Appeals erroneously concluded, in conflict with all other circuit courts to have addressed this issue, that Respondent, who was no longer serving his state sentence of probation at the time he filed his federal habeas corpus petition and is only subject to the mandates of Pennsylvania's Sex Offender Registration and Notification Act (SORNA), met the jurisdictional "in custody" requirement for federal habeas review?

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The opinion of the Third Circuit Court of Appeals (Pet. App. 1-33) is reported at 917 F.3d 161 (3d Cir. 2019). The opinion of the district court (Pet. App. 34-40) is not published but is available at 2016 WL 6246547. The Report and Recommendation issued by the magisterial district judge is reprinted at Pet. App. 41-56.

JURISDICTION

On February 27, 2019, the Third Circuit Court of Appeals entered a precedential decision holding that Respondent, Jason Piasecki, whose probationary sentence expired in its entirety prior to filing his federal habeas corpus petition, nevertheless met the "in custody" requirement for federal habeas jurisdiction, 28 U.S.C. § 2254(a), merely because, at the time, he was subject to the registration requirements imposed by Pennsylvania's Sex Offender Registration and Notification Act (SORNA), 42 Pa. C.S. §§ 9799.10-9799.41. *See* Pet. App. 1-33.

This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), which, in relevant part, confers jurisdiction in the Supreme Court from cases in the courts of appeals by writ of certiorari upon the petition of any party to any civil or criminal case.

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, entitled "State custody; remedies in Federal Courts" provides in relevant part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person *in custody pursuant to a judgment of the State court* only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person *in custody pursuant to the judgment of a State court* shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(a), (b) (emphasis added).

STATEMENT OF THE CASE

1. Relevant proceedings below.

On April 26, 2010, Respondent, Jason Piasecki, was sentenced in the Bucks County Court of Common Pleas to a three-year period of probation following his conviction on fifteen counts of possession of child pornography, 18 Pa. C.S. § 6312(d)(1). As a result of this conviction, Respondent was subject to a ten-year period of registration as a sex offender under Pennsylvania's then-extant sex offender registration statute, commonly referred to as Megan's Law III. Respondent was advised of this obligation as well as the conditions of his probation at the time of his sentencing, as follows:

> The conditions of his sentence are that he undergo sex offender supervision, that he be subject to ten-year registration, that he have no unsupervised contact with minor children under the age of 18, excluding your son and your girlfriend's son, without written permission of Bucks County Adult Probation and Parole.
>
> You're to have no computer Internet use. You're to continue in treatment with Dean Dixon and Dr. Nover. You're not to drink, and you're to take medications as directed. You're ordered to pay court costs.

Pet. App. 3.

Respondent filed a direct appeal to the Pennsylvania Superior Court on July 25, 2011, which was denied.

The Pennsylvania Supreme Court denied Respondent's Petition for Allowance of Appeal on January 6, 2012.

On December 20, 2012, the provisions of Megan's Law III expired and Respondent became subject to the requirements of Pennsylvania's SORNA at 42 Pa. C.S. §§ 9799.14 & 9799.15, which became effective on that same date.

Respondent timely sought collateral review of his conviction in the state courts under Pennsylvania's Post Conviction Relief Act (PCRA) 42 Pa. C.S. § 9541, *et seq*. Evidentiary hearings were held in that matter and, by order filed April 24, 2013, Respondent's request for post-conviction collateral relief was denied on the merits. Two days later, on April 26, 2013, Respondent's probationary sentence expired in its entirety.

On May 22, 2013, Respondent filed an appeal of the PCRA court's order. The Superior Court dismissed the appeal as Respondent was no longer serving a sentence. The Pennsylvania Supreme Court denied his petition for allowance of appeal on August 19, 2014.

None of Respondent's claims in state court on either direct or collateral review challenged his sex offender registration requirements under either Megan's Law III or SORNA.

On December 14, 2014, Respondent filed a counseled petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254, wherein he raised various grounds challenging his state court conviction. Once again, none of the claims

related to any of Respondent's sex offender registration requirements. Petitioners filed a response to the habeas petition arguing, in relevant part, that the federal court did not have jurisdiction to entertain the merits of Respondent's claims because he was no longer in custody.

On April 21, 2016, the Honorable Marilyn Heffley, United States Magistrate Judge for the Eastern District of Pennsylvania, filed a Report and Recommendation that the petition in this case be denied and dismissed for lack of jurisdiction. Judge Heffley determined that because Respondent's sentence had terminated prior to the filing of his federal habeas petition, Respondent was not in custody. She rejected Respondent's claim that the requirements imposed on him by SORNA rendered him "in custody" for purposes of establishing federal habeas jurisdiction, concluding instead that such requirements were merely a collateral consequence of his conviction. *See* Pet. App. 41-56. On May 3, 2016, Respondent filed objections to the Report and Recommendation, challenging Judge Heffley's determination that he was no longer in custody.

By Order dated October 26, 2016, the Honorable Legrome D. Davis, United States District Court Judge for the Eastern District of Pennsylvania, overruled Respondent's objections and approved and adopted Judge Heffley's Report and Recommendation. Judge Davis similarly concluded that Respondent was not in custody as a result of the requirements imposed by SORNA, and dismissed Respondent's habeas corpus petition. Furthermore, the district court did not issue

a certificate of appealability, determining that reasonable jurists would not debate the correctness of the court's holding. *See* Pet. App. 34-40.

On November 23, 2016, Respondent filed a notice of appeal to the Third Circuit Court of Appeals. On December 19, 2016, Respondent thereafter filed an application for a certificate of appealability to the circuit court. By Order entered June 5, 2017, the Third Circuit granted a certificate of appealability.

Oral argument was held before the Third Circuit Court of Appeals on March 6, 2018. On February 27, 2019, the court filed its precedential decision reversing the Order of the district court, and concluding, for the first time, that Respondent met the "in custody" jurisdictional requirement for federal habeas review solely because he was subject to the requirements of SORNA – the first circuit court to do so. The Third Circuit remanded the case to the district court for further proceedings on the merits of Respondent's habeas claims. *See* Pet. App. 1-33. It is that ruling from which Petitioner now seeks a writ of certiorari.

2. Evolution of Pennsylvania's sex offender registration laws.

The Pennsylvania General Assembly enacted Pennsylvania's first sex offender registration law, Megan's Law I, on October 24, 1995, P.L. 1079, No. 24, Act 1995-24,[1]

[1] Such laws are named for Megan Kanka, a seven-year-old New Jersey girl who was sexually assaulted and murdered by a neighbor who – unbeknownst to the Kanka family – had two prior

in response to the 1994 federal law entitled the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("Wetterling Act"), 42 U.S.C. § 14071. The Wetterling Act authorized the United States Department of Justice to establish minimum guidelines for state Megan's Laws. To encourage state compliance with those standards, Congress conditioned ten percent of federal funding for state and local law enforcement on certification by the Department of Justice that the state's version of Megan's Law conformed to the Wetterling Act and its guidelines. 42 U.S.C. § 14071(g).

Since that time, the Pennsylvania legislature has passed various amendments to its registration law, primarily in response to decisions of the Pennsylvania Supreme Court regarding the constitutionality of specific provisions of the law. At the time Respondent committed the sex offenses which subjected him to registration, the version of the law in effect in Pennsylvania was commonly referred to as Megan's Law III. Under that law, Respondent was required to register for a period of ten years. 42 Pa. C.S. § 9795.1(a). He was also required to verify his address in person annually, and notify police within forty-eight hours of any change to residence, employment or school. 42 Pa. C.S. §§ 9795.2(a)(2), 9796(b).

Megan's Law III remained in effect, with some minor amendments, until 2012 when the legislature

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convictions for sexual offenses against children. *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997).

replaced it with the Sexual Offender Registration and Notification Act ("SORNA"), 42 Pa. C.S. § 9799.10-9799.41 (effective December 20, 2012, through February 20, 2018). SORNA was enacted to bring Pennsylvania into compliance with the federal Adam Walsh Child Protection and Safety Act of 2006, P. L. 109-248, 120 Stat. 587, amended as 34 U.S.C. §§ 20911, *et seq.* ("Adam Walsh Act"). *See* 42 Pa. C.S. §§ 9799.10(1), 9799.11(b)(1)-(2). Title I of the Adam Walsh Act is also referred to as SORNA. This Honorable Court recognized the federal SORNA's purpose as follows:

> SORNA's general changes were designed to make more uniform what had remained a patchwork of federal and 50 individual state registration systems, with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost[.] SORNA's more specific changes reflect Congress' determination that the statute, changed in respect to frequency, penalties, and other details, will keep track of more offenders and will encourage States themselves to adopt its uniform standards.

U.S. v. Kebodeaux, 570 U.S. 387, 399 (2013) (internal citations and quotations omitted).

The Adam Walsh Act required jurisdictions throughout the country to develop and make available to the public a website containing all information about each sex offender on its registry, and further required that the website be compatible with the National Sex Offender Registry. *See* 34 U.S.C. §§ 20920-20922. The

Adam Walsh Act further directed states to structure their sex offender registration systems in certain ways, including establishing three tiers for offenders who were obligated to register for 15-year, 25-year, or lifetime periods respectively, requiring periodic in-person reporting, and directing what information must be maintained on the registry. *See* 34 U.S.C. §§ 20913-20915, 20918, 20919.

Pennsylvania's SORNA, written to comply with the terms of the Adam Walsh Act, mirrored much of the federal statute. Like the federal version of SORNA, Pennsylvania's SORNA categorized offenses into one of three tiers based on the sexual offense committed. Tier I offenders are required to register for a period of 15 years, and verify their registration information in person once per year; Tier II offenders are required to register for 25 years, and verify their registration information in person twice per year; and Tier III offenders are required to register for life, and verify their registration information in person four times a year. *Compare* 42 Pa. C.S. §§ 9799.14, 9799.15, 9799.25 (effective December 20, 2012, through February 20, 2018*)*, *and* 34 U.S.C. §§ 20915, 20918. As required by federal law, SORNA was retroactive, meaning that anyone who, on the effective date of SORNA, was incarcerated, under county or state supervision, or on the sex offender registry, was subject to the new SORNA requirements. 42 Pa. C.S. §§ 9799.13(3), (3.1), (3.2) (effective December 20, 2012, through February 20, 2018).

As a result of SORNA, Respondent purportedly became subject to lifetime registration as a Tier III offender due to his multiple convictions for possession of child pornography, a Tier I offense. 42 Pa. C.S. § 9799.14(d)(16) (including "two or more convictions of offenses listed as Tier I or Tier II sexual offenses" as a Tier III offense).[2] Thus, at the time he filed his federal habeas petition in 2014, Respondent was required to verify his address in person every three months, and to notify law enforcement in person within three business days of any changes to name, residence, employment, school, telephone number, vehicle, email address, temporary lodging, or professional licensure. 42 Pa. C.S. § 9799.15(e), (g).

On July 19, 2017, the Pennsylvania Supreme Court held for the first time that SORNA's registration requirements were punitive and, as applied retroactively to those who committed their offenses prior to December 20, 2012, violated the *ex post facto* clauses of the federal and/or state constitutions. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied* 138 S.Ct. 925 (2018).[3]

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[2] The Pennsylvania Supreme Court, in *Commonwealth v. Lutz-Morrison*, 143 A.3d 891 (Pa. 2016), subsequently determined that an act, a conviction, and a subsequent act was required to trigger the lifetime registration requirement based on multiple offenses. *Id*. at pp. 894-95. As Respondent's "multiple offenses" occurred in the same conviction, he thus became, as a result of that decision, a Tier I offender, subject to the fifteen-year registration period under SORNA.

[3] The court was split on whether the state constitution provided more *ex post facto* protection than did the federal constitution and

In response, on February 21, 2018, the Pennsylvania General Assembly passed a new sex offender registration law, Act 2018, Feb. 21, P.L. 27, No. 10, HB 631 of 2017 ("Act 10"). 42 Pa. C.S. §§ 9799.11(b)(4), 9799.51(b)(4) (effective February 21, 2018 through June 11, 2018). Act 10 overhauled Pennsylvania's sex offender registration and notification provisions primarily by dividing the law into two subchapters. The first, Subchapter H (codified at 42 Pa. C.S. §§ 9799.10-9799.42), is essentially SORNA with a few revisions, including the addition of a provision allowing all sex offenders to petition for removal from registration after 25 years and less-onerous in-person reporting requirements for Tier II and Tier III offenders. *See* 42 Pa. C.S. §§ 9799.15(a.2); 9799.25(a.1-a.2). Subchapter H applies to offenders who commit a sexually violent offense on or after December 20, 2012, the effective date of SORNA. 42 Pa. C.S. § 9799.11(c). The second, Subchapter I (codified at §§ 9799.51-9799.75), entitled "Continued Registration of Sexual Offenders," applies to offenders who were "convicted of a sexually violent offense committed on or after April 22, 1996, but before December 20, 2012." 42 Pa. C.S. § 9799.52. The requirements of Subchapter I are similar to those imposed by Megan's Law III.

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whether the retroactive application of SORNA violated both the federal constitution and state constitution. The end result of the various plurality opinions, nonetheless, is that SORNA violates constitutional *ex post facto* provisions, and thus cannot be applied retroactively.

On June 12, 2018, the General Assembly passed a new law, Act 2018, June 12, P.L. 140, No. 29, HB 1952 of 2018 ("Act 29"), which reenacted Act 10 as a free-standing bill with only a few, minor changes. Act 29 was effective immediately and applies to Respondent through Subchapter I. 42 Pa. C.S. §§ 9799.51, 9799.52, 9799.54, 9799.55(a), (b)(2)(i)(A).

As a result of the passage of Act 10 (and then Act 29), Respondent is once again subject to a ten-year period of registration, and is required to report in person annually. 42 Pa. C.S. §§ 9799.55, 9799.60(b). He must notify law enforcement within three business days (though not in person) of any changes to residence, employment, or school. 42 Pa. C.S. § 9799.56(a)(2).[4]

REASONS FOR GRANTING ALLOWANCE OF THE WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S DECISION IS CONTRARY TO THOSE OF ALL OTHER CIRCUIT COURTS FACED WITH THE SAME ISSUE.

In holding that Respondent's registration requirements under SORNA constituted "custody" for purposes of establishing federal habeas jurisdiction, the Third Circuit recognized that "several of our sister circuit courts of appeals have found that various sex offender schemes were not sufficiently restrictive to

[4] Respondent's current ten-year registration period concludes on or about May 4, 2020.

constitute 'custody.'" Pet. App. 20. In fact, of the circuit courts of appeals that have considered this question, none but the Third Circuit have concluded that being subject to a sex offender registration statute constitutes custody for purposes of establishing federal habeas jurisdiction.[5]

As recently as 2018, the Sixth Circuit addressed this very issue with respect to Ohio's SORNA law. *See Hautzenroeder v. Dewine*, 887 F.3d 737 (6th Cir. 2018). Ohio's statute, like the federal and Pennsylvania versions of SORNA, requires in-person verifications annually (Tier I), semi-annually (Tier II), or quarterly (Tier III). Ohio Rev. Code § 2950.06. The court of appeals acknowledged that it had previously rejected a claim that Ohio's prior sex offender registration statute constituted custody in *Leslie v. Randle*, 296 F.3d 518 (6th Cir. 2002), and that Ohio's SORNA statute differed from its prior iteration. *Hautzenroeder*, 887 F.3d at 741. However, the Sixth Circuit concluded that the differences were "only in degree, not in kind," and that the petitioner's "freedom of movement is unconstrained, her registration and reporting obligations notwithstanding." *Id*. Indeed, the Sixth Circuit reached this determination even though Ohio's law forbade sex offenders from residing within one thousand feet of any school or child-care premises – a restriction nonexistent in any form in Pennsylvania's SORNA statute. The Sixth Circuit concluded that, while burdensome, "the vast majority of real estate" was open to the petitioner,

[5] The First, Second, Eighth, Eleventh and D.C. Circuits have yet to address this issue.

and, as such, the residency requirement remained a consequence collateral to conviction. *Id*. at 743.

Similarly, the Tenth Circuit has twice held in recent years that a state sex offender registration law does not constitute custody for purposes of establishing federal habeas jurisdiction. In reviewing Colorado's sex offender registration law, which required annual in-person registration,[6] annual verification of address, and the provision of information similar to that required by Pennsylvania, the court of appeals observed that the petitioner was "free to live, work, travel, and engage in all legal activities without limitation and without approval by a government official." *Calhoun v. Attorney General of Colorado*, 745 F.3d 1070, 1074 (10th Cir. 2014). As such, the court concluded that the sex offender registration requirements were a collateral consequence of the petitioner's criminal conviction and did not impose a severe restriction on an individual's freedom. *Id*.

The Tenth Circuit reached a similar conclusion two years later when reviewing Oklahoma's sex offender registration scheme. *Dickey v. Allbaugh*, 664 Fed.Appx. 690 (10th Cir. 2016). That state's registration law, like SORNA, establishes 15-year, 25-year, and lifetime registration periods, and requires annual, semi-annual or quarterly in-person verification of residence. 57 Okla. Stat. Ann. §§ 583(C), 584(A)(5). Further, the

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[6] The statute required monthly or quarterly in-person verification for those with no fixed abode. Colo. Rev. Stat. § 16-22-109(3.5).

law prohibited the petitioner from working with children or on school premises, from living within 2,000 feet of a school, campsite, playground, park, or child-care center, and from living with another registered sex offender. *Dickey*, *supra*, at 692. Although the court acknowledged that Oklahoma's statute was more restrictive than Colorado's statute, the court nonetheless determined that the petitioner "remains free to live, work, travel, associate, and engage in lawful activities without government approval," thereby rendering the registration conditions a collateral consequence. *Id*. at 693-94. The Tenth Circuit further concluded that to hold to the contrary, "would read the 'in custody' requirement out of the statute." *Id*. at 694 (quoting *Maleng*, 490 U.S. at 492).

The Fourth Circuit rejected the contention of a petitioner subject to both Texas and Virginia sex offender registration laws that he was "in custody" for purposes of federal habeas jurisdiction. The petitioner in that case was required to register in person annually, and re-register every 90 days; to provide a wide array of physical and other personal information; to register in person when he changed his residence, employment, vehicle or online contact information; to carry a sex offender registration card on him at all times; and to renew his driver's license every year rather than every six years. *Wilson v. Flaherty*, 689 F.3d 332, 335 (4th Cir. 2012). Nonetheless, the court of appeals held that such requirements were "not imposed *as a sentence for his rape* but rather as a collateral consequence of his having been convicted of rape." *Id*. at 337 (emphasis in

original). The court further stated that "[t]o rule otherwise would drastically expand the writ of habeas corpus beyond its traditional purview and render § 2254's 'in custody' requirement meaningless." *Id*. at 338.

The other circuit courts of appeals to have addressed this question all have similarly concluded that a state's sexual offender registration law does not constitute "custody" for purposes of federal habeas jurisdiction. *See Johnson v. Davis*, 697 Fed.Appx. 274, 275 (5th Cir. 2017) (Texas statute); *Sullivan v. Stephens*, 582 Fed.Appx. 375, 375 (5th Cir. 2014) (same); *Virsnieks v. Smith*, 521 F.3d 707, 717-20 (7th Cir. 2008) (Wisconsin statute); *Henry v. Lungren*, 164 F.3d 1240, 1241-42 (9th Cir. 1999) (California statute); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (Oregon statute); *Williamson v. Gregoire*, 151 F.3d 1180, 1182-84 (9th Cir. 1998) (Washington statute). Although the statutes analyzed in those cases did not require the same level of in-person registration as does Pennsylvania's version of SORNA, the courts' rationale for concluding that the requirements of the respective statutes constituted collateral consequences of the underlying conviction did not hinge on the lack of such an in-person requirement alone. *See, e.g.*, *McNab*, 170 F.3d at 1247 (observing that offenders subject to registration law are "free to move to a new place of residence so long as they notify law enforcement"); *Virsnieks*, 521 F.3d at 718 (observing that precedent expanding the definition of custody "each involved restraints on a habeas petitioner's ability to move about freely"); *Williamson*, 151 F.3d at 1183-84 (considering fact that

requirements apply regardless of whether petitioner moves or stays in the same place, that law does not require in-person registration, and that law does not specify any place petitioner may not go).

Despite the near-universal conclusion of courts of appeals that sex offender registration laws do not constitute custody, the Third Circuit did not find the decisions of its sister circuit court of appeals' decisions "compelling" for two reasons. First, it found that those cases involved registration requirements that were less onerous than those imposed by Pennsylvania's SORNA statute. Pet. App. 21. Yet, as discussed above, some of the statutes analyzed imposed conditions that were the same or *more* restrictive than Pennsylvania's law and required more than the mere obligation to notify law enforcement of certain information. Those courts nonetheless concluded the registration requirements were collateral. Second, the Third Circuit relied on its own precedent and acknowledged that it had "explicitly departed from the courts that have held that registration requirements are not custodial because they do not require pre-approval from the government before a registrant travels, thus not limiting his or her ability to move freely." *Id*. It is precisely this departure from the reasoning of other circuit courts of appeals that warrants review by this Honorable Court.

As the *Piasecki* court itself recognized, Pennsylvania's SORNA was enacted to bring the Commonwealth into substantial compliance with the Adam Walsh Act, which required all states to implement restrictions similar to those imposed by the Act or lose funding. Pet.

App. 3-4. As of March 2015, seventeen states, three territories, and numerous American Indian tribes had substantially complied with SORNA, and many states were still seeking to become compliant. *See* "Federal Involvement in Sex Offender Registration and Notification: Overview and Issues for Congress, In Brief," Lisa N. Sacco, Congressional Research Service, March 25, 2015. As a result, the requirements of state registration laws are becoming more consistent across the country, and more consistent with federal SORNA. Yet, only the Third Circuit has thus far concluded those requirements amount to "custody." The definition of custody to establish federal habeas jurisdiction should not be disparate across the circuits, or be broader in only one circuit due to that particular court of appeals' departure from the proper analysis of the restrictive nature of sex offender registration laws. The need for a more consistent and uniform interpretation of the custody requirement for establishing federal habeas jurisdiction requires this Honorable Court's review.

II. THE THIRD CIRCUIT ERRONEOUSLY EXPANDED THE JURISDICTION OF FEDERAL COURTS TO REVIEW STATE COURT CRIMINAL CONVICTIONS BY MISAPPLYING PRECEDENT OF THIS HONORABLE COURT.

Long ago this Honorable Court recognized that the "in custody" requirement is not limited to those cases in which a petitioner is confined to a prison cell. Rather, the "Great Writ" of habeas corpus can be invoked

by those subject to conditions that "significantly confine and restrain" one's freedom as a result of a criminal conviction, which are not imposed on the public generally. *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963). The *Jones* Court unanimously held that a state parolee met the definition of "in custody" where the parolee was:

> [C]onfined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life.

Jones, *supra*, at 242.

This Honorable Court further applied the "in custody" requirement to a petitioner who was released on bail pending execution of his prison sentence. *See Hensley v. Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County, California*, 411 U.S. 345 (1973). There, writing for the majority, Justice Brennan observed that Hensley could not come and go as he pleased, but instead his freedom of movement rested in the hands of state judicial officers "who may demand his presence at any time and without a moment's notice." *Hensley*, *supra*, at 351. The Court further noted that Hensley remained at liberty only as a result of a stay entered by the state court, and that his

incarceration was not "a speculative possibility." *Id*. Under such conditions, the Court determined that Hensley met the custody requirement of the habeas statute.

Notably, Justice Blackmun, in his concurrence, expressed concern that "[a]lthough recognizing that the custody requirement is designed to preserve the writ as a remedy for severe restraints on individual liberty [. . .], the Court seems now to equate custody with almost any restraint." *Hensley*, 411 U.S. at 353-54 (Blackmun, J., concurring). The three dissenting judges similarly concluded that the Court had "further stretched both the letter and the rationale of the statute." *Id*. at 354 (Rehnquist, J., dissenting).

In determining the boundaries of federal habeas jurisdiction over state cases based on the "in custody" requirement, this Honorable Court later observed:

> The writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims. Because of this tension between the State's interest in finality and the asserted federal interest, federal courts properly have been reluctant to extend the writ beyond its historic purpose.

Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502, 512-13 (1982) (holding that state court order granting custody of petitioner's children to the state and placing them in a foster home does not meet the definition of "in custody" for purposes of federal

habeas review). The *Lehman* Court's reluctance to expand the breadth of federal court review of state court cases is consistent with the Supreme Court's later statements on the writ of habeas corpus, particularly after the passage of the Anti-Terrorism and Effective Death Penalty Act:

> Federal habeas corpus principles must inform and shape the still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.

See Williams v. Taylor, 529 U.S. 420, 436 (2000). One manifestation of this Honorable Court's reluctance to expand the writ beyond its historical purpose is that the Court has never held that a habeas petitioner is "'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Maleng*, 490 U.S. at 491 (emphasis in original).

In the instant case, the sentence imposed by the state court – a three-year period of probation – had fully expired at the time Respondent filed his federal habeas petition. No conditions imposed as a result of that probationary sentence remained in effect: he was not restricted in any way with whom he interacted; he

could once again use the internet;[7] he could drink; he could refuse to take his medications or stop treatment with his therapist if he so chose. Respondent was no longer subject to potential revocation of his probation should he fail to abide by the court-imposed conditions, nor did he face any potential imprisonment for a violation of said probation. He was no longer required to report to a probation officer. The only imposition on Respondent that remained were the requirements imposed not by the court or the probation department but by statute. In fact, at that point, neither the trial court nor the probation department had jurisdiction or authority over Respondent in connection to any enforcement of SORNA's registration requirements.

Nevertheless, the Third Circuit found that those statutorily-imposed requirements constituted "custody" imposed pursuant to the judgment of the state court under attack. This holding lacks any basis in this Honorable Court's precedent and, in fact, expands the jurisdiction of federal courts over state court adjudications beyond that supported by the purpose of the writ and in violation of the delicate balance required between state and federal court authority.

As this Honorable Court's precedents make plain, not every restriction imposed by the state constitutes "custody" for purposes of the federal habeas statute.

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[7] The Third Circuit erroneously ascribed the prohibition on Respondent's internet use as a condition imposed by Megan's Law III. That was in fact a condition of his probationary sentence and expired at the termination of his probation. Nothing in Megan's Law III or SORNA permitted or required such a prohibition.

Rather, only significant or severe restraints on liberty so qualify. As the *Jones* Court noted, in tracing the history of the writ to its origins in England, the test employed by the English courts was simply whether one was at "liberty to go where she pleased." *Jones*, 371 U.S. at 239 (quoting *Rex v. Clarkson*, 1 Str.444, 445, 93 Eng.Rep. 625, 625 (K.B. 1722)). The ability of the petitioners in *Jones* and *Hensley* to come and go as they pleased was restrained by the state as a direct result of their criminal convictions.

In stark contrast, Respondent in this case is wholly at liberty to come and go as he pleases. He is not prohibited from living or working where he chooses. He is not required to seek permission from any state actor before changing his residence, schooling, or employment. No judicial officer, probation or parole officer, or law enforcement officer may demand his presence "at any time and without a moment's notice." *Cf*. *Hensley*, 411 U.S. at 351. Indeed, the only obligation imposed upon Respondent under SORNA is to provide specific information to the state police at specific, defined times as set forth in the statute. The duty to provide information is not a significant restraint and nothing in this Honorable Court's precedent suggests otherwise.

This Honorable Court has previously noted the differences between the obligations imposed by a sex offender registration law and those imposed by probation or supervised release, and rejected the comparison:

> Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original sentence.

Smith v. Doe, 538 U.S. 84, 101-02 (2003) (internal citations omitted).

While the Third Circuit placed great emphasis on the fact that Respondent was required to provide the requisite information in person, this is not in and of itself a sufficiently severe restraint on liberty so as to convert this otherwise noncustodial obligation into a custodial one. The in-person requirement is undoubtedly inconvenient, but such inconvenience is hardly tantamount to the type of severe restraint required for establishing custody under the federal habeas statute. To be sure, "registration obligations present a serious nuisance" but "even grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the

presence of custody." *Hautzenroeder*, 887 F.3d at 741 (quoting *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987)). *Cf. U.S. v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012) (concluding that quarterly in-person verification requirement of federal SORNA is "doubtless more inconvenient than doing so by telephone, mail or web entry," but serves a remedial purpose and did not render SORNA punitive).

Other consequences of a criminal conviction are arguably more impactful on a defendant's life than an in-person reporting requirement in that they prevent the practice of certain professions, the ability to drive a car, or the ability to engage in important civic responsibilities. Yet, all such impositions have been deemed to be collateral consequences of a criminal conviction. *See Carafas v. LaVallee*, 391 U.S. 234, 237 (1968); *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998) (collecting cases). The inconvenience of having to report information to law enforcement at regularly scheduled times is not more onerous or restrictive on one's freedom than those. *Cf. Williamson*, 151 F.3d at 1184 ("Certainly, the loss of a driver's license amounts to a much greater limitation on one's freedom of movement than does the Washington sex offender law, but the former does not satisfy the 'in custody' requirement either.").

Furthermore, the Third Circuit wrongly concluded that the requirement to provide information under SORNA was pursuant to the judgment of a state court. In fact, the requirements were pursuant to a statutory scheme created by the state legislature. While the conviction of a sex offense was the triggering event for

SORNA's registration requirements, the court had no discretion in imposing the registration requirements, nor was the court able to alter those requirements. Indeed, this is made plain by the fact that at the time Respondent's sentence was imposed by the trial court, the SORNA registration requirements upon which the Third Circuit based its decision in this matter, was not yet in existence. Rather, Respondent was informed that he was subject to a ten-year registration period under then-extant Megan's Law III. *See* Pet. App. 3. No court later altered those requirements or extended his registration for the duration of his lifetime. That was done by the passage of a new sex offender registration statute, SORNA.

Nonetheless, in concluding that the registration requirements were a form of custody imposed pursuant to a state court judgment, the Third Circuit gave great weight to the fact that the court sheet from the state court sentencing proceeding specifically reflected that Respondent was subject to a ten-year period of registration under Megan's Law III. *See* Pet. App. 23-24. Significantly, however, Megan's Law III required the sentencing court to inform Respondent of his sex offender registration requirements.[8] This Honorable Court addressed a similar situation in *Smith v. Doe*, *supra*, when considering whether Alaska's sex offender registration statute constituted punishment. There, this Court rebuffed appellants' claim that because the

[8] 42 Pa. C.S. § 9795.3 Sentencing court information. The sentencing court shall inform offenders and sexually violent predators at the time of sentencing of the provisions of this subchapter.

statute required the court to inform criminal defendants of their registration requirements at the time of plea or sentencing, it was intended to be criminal punishment. Rather, the Court concluded that "[t]he policy to alert convicted offenders to the civil consequences of their criminal conduct does not render the consequences themselves punitive." *Id*. 538 U.S. at 95-96. Likewise, here, the mere fact that the court was required to inform Respondent of the statute's requirements, or that the court sheet reflected the court's compliance with this notification requirement, does not render the registration requirements themselves part of, or pursuant to, a state court judgment. Those registration requirements remain the collateral, not direct, consequence of a sex offense conviction imposed by the legislature and not the court, and are not otherwise transformed merely because the statute required the sentencing court to notify Respondent of these statutorily-imposed obligations.

Nor is it material to the determination by a federal court of federal jurisdiction over a federal habeas claim that Pennsylvania state courts deemed SORNA punitive. The effects of the Pennsylvania Supreme Court's categorization of Pennsylvania's SORNA statute as punitive has had far-reaching implications within the Commonwealth of Pennsylvania. The Third Circuit's reliance on that decision to interpret a federal statute risks far-reaching implications well beyond the Commonwealth's borders. Indeed, as the *Piasecki* court noted, "Pennsylvania courts have concluded that SORNA's registration requirements are punitive, not remedial –

unlike the courts in nearly every other state." Pet. App. 28. As discussed, *supra*, the Third Circuit has now taken a position unlike the circuit courts in nearly every other circuit.

Federal statutes should be interpreted consistently based on federal precedent. *Cf*. *Urie v. Thompson*, 337 U.S. 163, 174 (1949) (holding that interpretation of negligence under federal statute is a federal question and did not vary according to differing conceptions of negligence determined by state or local laws for other purposes). Particular to this case, the interpretation of what amounts to "custody" for purposes of determining federal habeas jurisdiction should be consistent across circuits. It should not turn on individual state court determinations regarding the distinct question of whether such registration laws are punitive for purposes of an *ex post facto* analysis, and the Third Circuit's reliance on Pennsylvania decisional law was misplaced. *Cf. Hautzenroeder*, 887 F.3d at 744 (rejecting claim that Ohio Supreme Court's holding that Ohio's SORNA statute was punitive was relevant to determination of habeas custody inquiry of whether the petitioner is subject to severe restraints on individual liberty).[9]

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[9] Indeed, it was only in 2017 – three years after Respondent filed his federal habeas petition – that the Pennsylvania Supreme Court for first the time held SORNA to be punitive. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). Prior to that, the Pennsylvania Superior Court had routinely held SORNA to be a collateral consequence of conviction. *See, e.g.*, *Commonwealth v. Britton*, 134 A.3d 83 (Pa. Super. 2016); *Commonwealth v. Giannantonio*, 114 A.3d 429 (Pa. Super. 2015); *Commonwealth v. Perez*, 97

This is particularly true given that Pennsylvania's SORNA is modeled after federal SORNA. Notably, with few exceptions, circuit courts have concluded that federal SORNA is not punitive. *See, e.g.*, *U.S. v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012) (holding federal SORNA not punitive under the reasoning of *Smith v. Doe* despite the in-person verification requirements); *U.S. v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012) (same); *U.S. v. Felts*, 674 F.3d 599, 605-06 (6th Cir. 2012) (collecting cases). Therefore, to the extent a determination of whether a registration statute is punitive has bearing on the separate issue of whether it constitutes "custody" under the federal habeas statute, it should be far more influential in analyzing a federal statute what other federal courts, not individual state courts, have decided. Yet, the Third Circuit gave no heed to such decisions.

Accordingly, because the Third Circuit Court of Appeals' expansive reading of the federal habeas custody requirement in this case is not supported by precedent of this Honorable Court and broadens access to federal court review of state court adjudications in a manner inconsistent with the historical purposes of the habeas writ and the necessary balance between

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A.3d 747 (Pa. Super. 2014). Thus, for many years, including when Respondent filed his habeas petition, the decisions of the state's appellate courts would not have supported a determination that SORNA was imposed pursuant to a state court judgment. The Third Circuit's focus on only the most recent pronouncements of the state appellate courts regarding SORNA's punitive nature – all of which occurred after Respondent filed his petition – to support its conclusion that SORNA's requirements constitute custody is arbitrary.

federal and state court authority, we respectfully request this Honorable Court issue a writ of certiorari.

III. THIS CASE PRESENTS A RECURRING QUESTION OF GREAT IMPORTANCE THAT WARRANTS THIS HONORABLE COURT'S RESOLUTION.

While Respondent is no longer subject to SORNA, and is now subject to the latest iteration of Pennsylvania's sex offender registration law, Act 29, this change does not limit the impact of the Third Circuit's holding in this matter. As discussed, *supra*, while those defendants convicted of sex offenses prior to SORNA's effective date of December 20, 2012, are now, once again, subject to requirements largely identical to those imposed by Megan's Law III, all those defendants who are convicted of crimes committed after that date remain subject to nearly identical requirements imposed by SORNA. In addition, because Pennsylvania's SORNA requirements are similar to those imposed by federal SORNA, petitioners who are subject to the federal version may also now be permitted to avail themselves of habeas jurisdiction pursuant to 28 U.S.C. § 2255, even when their sentences have fully expired. *See* 28 U.S.C. § 2255(a) (requiring petitioner collaterally challenging a federal conviction to be "*in custody* under sentence of a court established by Act of Congress") (emphasis added). The Third Circuit's analysis in this case would remain, for all intents and purposes, unchanged were another petitioner to come seeking federal habeas

review while subject only to the provisions of Subchapter H of Act 29 or federal SORNA.

Moreover, the Third Circuit's decision creates ambiguity in how even its own interpretation should be applied to future petitioners. The court held that "[t]he legislature determined that long-term, in-person registration and supervision was necessary for those who commit sexual offenses [. . .]. Today, we hold only that the restrictions that follow from *that level of supervision* constitute custody for the purposes of habeas jurisdiction." Pet. App. 32 (emphasis added). Significantly, under SORNA (and Act 29), the length of one's registration period and the number of times a person is required to report in person varies based on the crime and into what tier the offender is classified. While current and future registrants who are classified as Tier III offenders or sexually violent predators under SORNA must verify their information quarterly for life, those who are Tier I offenders need only do so annually for 15 years, and Tier II offenders semi-annually for 25 years. 42 Pa. C.S. § 9799.15(e). Thus, given the variations in registration requirements within SORNA itself, precisely what "level of supervision" is sufficient to qualify as custody for purposes of establishing federal habeas jurisdiction remains an open question. It is unclear under the Third Circuit's opinion in this case whether the "in custody" requirement is met only when the habeas petitioner is subject to lifetime quarterly reporting, as Respondent once was, or whether all petitioners who must register under SORNA (or Act 29) so qualify. It also begs the question

whether the requirements imposed by New Jersey or Delaware's sex offender registration statutes satisfy the "custody" requirement under the court's reasoning. The court's definition of "custody" would certainly seem to apply to the requirements of federal SORNA as well, thus creating conflict among the circuits as to whether petitioners may satisfy the custody requirement of section 2255 merely because they are subject to its provisions.

The Third Circuit's opinion, in short, has created a foothold upon which those petitioners who remain subject only to the requirements of a sex offender registration law may now gain access to the previously-closed doors of the federal courthouse. The rationale of the court of appeals' decision on its face applies to all Tier III offenders under Subchapter H of Act 29, and also creates a slippery slope upon which defendants subject to other Tiers, SORNA's prior iterations, variations of SORNA enacted in other states within the Third Circuit, or federal SORNA, will now be able to claim that they too meet the jurisdictional custody requirement for federal habeas review. Additionally, it leaves petitioners within the Third Circuit more expansive access to federal courts than petitioners in other circuits based on the very same federal habeas statute. The court of appeals' decision threatens chaos and confusion over the fundamental question of who is entitled to collaterally challenge their criminal convictions in

federal court. This question begs for the kind of clarity that only a decision by this Honorable Court can provide.

CONCLUSION

The Third Circuit Court of Appeals' decision in this case widens the gateway to federal habeas review of state court criminal convictions in a way that is out of step with other courts of appeals who have addressed this very same issue and is inconsistent with and/or contradictory to the applicable precedents decided by this Honorable Court. As the law now stands, those state prisoners seeking habeas review within the Third Circuit will be able to seek such review well beyond the time their sentence fully expires and well beyond the time frame when similarly-situated petitioners in other circuits would be able to invoke federal habeas review. Given the need to have the "in custody" requirement of the federal statute interpreted uniformly across the circuits, and to maintain the delicate balance between state and federal court authority, the Third Circuit's precedential opinion in this case warrants consideration by this Honorable Court.

WHEREFORE, Petitioner, the Commonwealth of Pennsylvania, respectfully requests this Honorable

Court grant its petition for writ of certiorari in this matter.

Respectfully submitted,

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