No. 20-940

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SEAN WRIGHT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF THE PETITIONER

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INTRODUCTION

In *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001), the Ninth Circuit held that a person is "in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254(a) even after his sentence has expired, as long as the conviction serves as a predicate for a later offense. The Ninth Circuit applied *Zichko* in this case and concluded that Sean Wright, who failed to register as a sex offender upon moving to Tennessee, is in custody pursuant to an Alaska judgment for crimes whose sentences have already expired. App. 3. If allowed to stand, the *Zichko* rule will undermine compelling interests in the finality of judgments and force states to litigate the validity of final judgments simply because an offender has committed a new crime in a different jurisdiction.

The *Zichko* rule conflicts with this Court's holdings that a person in Wright's position is in custody pursuant to his *second* conviction rather than his first, *Maleng v. Cook*, 490 U.S. 488 (1989), and that a prior conviction is "conclusively valid" if it is "no longer open to direct or collateral attack in its own right." *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001). The decision also deepens a split with the Courts of Appeals that have held that an offender is not in custody pursuant to a prior conviction simply because it serves as a predicate for a later offense.

This case presents an ideal vehicle to address the jurisdictional question whether a federal habeas court may consider the validity of a state conviction after the offender has served his entire state sentence. Because the *Zichko* rule is flatly at

odds with this court's precedent, this case would be appropriate for summary reversal.

Wright argues that the decision below is correct because he is currently on federal supervised release due to his Alaska convictions. Br. in Opp. 10. But Wright's federal offense is the result of his intervening conduct, and his argument cannot be reconciled with this Court's holdings that such a person is only in custody for his second offense. Wright's effort to discount the circuit conflict, and the various vehicle issues he conjures, are equally without merit. This Court should grant the petition for certiorari.

ARGUMENT

I. The Ninth Circuit's decision directly conflicts with *Maleng v. Cook* and *Lackawanna County District Attorney v. Coss.*

Federal courts have jurisdiction to consider habeas claims brought by "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). In *Maleng v. Cook*, the Court rejected the argument that an offender "remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." 490 U.S. at 492. Indeed, a person is not in custody even if that possibility "actually materialize[s]." *Id*. The Court noted that it had "never held . . . that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Id*. at 491 (emphasis in original). Because a contrary decision would "read the 'in custody' requirement out of the statute," the "collateral

consequences" of a conviction do not render a person "in custody." *Id*. at 491-92. When an offender has fully served one sentence and is convicted of a new crime, "it is pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in custody.'" *Id*. at 493. The Court limited its holding to the jurisdictional issue and left open the question of "the extent to which the [prior] conviction itself may be subject to challenge in the attack upon the [later] sentences which it was used to enhance." *Id*. at 494.

The Court considered the issue again in *Lackawanna County District Attorney v. Coss*, where a habeas petitioner challenged an expired state conviction that was used to enhance the sentence he was currently serving. 532 U.S. at 396. The Court reiterated that an offender who "is no longer serving the sentences imposed pursuant to his [earlier] convictions . . . cannot bring a federal habeas petition directed solely at those convictions." 532 U.S. at 401. The Court resolved *Maleng*'s unanswered question, holding that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid." *Id*. (citing *Daniels v. United States*, 532 U.S. 374, 379 (2001)). The Court suggested that an exception might apply if a prior conviction was entered in violation of the right to counsel. *Id*. at 404.

These decisions recognize the "compelling interest" in the finality of convictions. *Id*. at 402. "[E]ven after a defendant has served the full measure of his sentence, a State retains a strong interest in preserving the convictions it has

obtained." *Daniels*, 532 U.S. at 379. States have "a real and continuing interest in the integrity of [their] judgments" as well as the presumption of regularity that attaches to a final judgment. *Id*. at 380-81; *see also Parke v. Raley*, 506 U.S. 20, 29 (1992) (the presumption of regularity is "perhaps most familiar" in habeas actions). Similarly, a person cannot challenge a prior conviction in a later prosecution for possessing a firearm as a felon or failing to register as a sex offender. *See Lewis v. United States*, 445 U.S. 55, 67 (1980) (felon in possession of firearm); *United States v. Roberson*, 752 F.3d 517, 520-25 (1st Cir. 2014) (failure to register as a sex offender). The *Zichko* rule disregards these decisions and states' interest in repose.

Wright argues that this case is distinguishable because it treats a prior conviction as an element of a new offense rather than a sentencing enhancement, Br. in Opp. 10, but this makes no difference. This Court's analyses were not contingent on the type of collateral consequence at issue, but on the fact that the sentence for the challenged conviction had fully expired. *See Davis v. Nassau County*, 524 F. Supp. 2d 182, 190 (E.D.N.Y. 2007). A state's interest in finality is strong no matter how a conviction is subsequently used. Allowing an offender to revive a final judgment by committing a new crime is contrary to this Court's precedent.

Wright also claims that he is in custody pursuant to his Alaska convictions because he must register as a sex offender. Br. in Opp. 10. Because the Ninth Circuit relied on *Zichko* it did not reach this argument. Other courts have overwhelmingly rejected the argument because the duty to register is a collateral consequence of a conviction. *See Hautzenroeder v. Dewine*, 887 F.3d 737, 740 (6th Cir. 2018) (collecting

authority). Wright's assertion that he is in custody based on his registration duties is insufficient to overcome *Maleng* and *Lackawanna County*.

This Court's decisions demonstrate that Wright is in custody pursuant to his federal judgment, not his Alaska judgment. The Ninth Circuit's ruling to the contrary—based on longstanding circuit precedent—should not be allowed to stand.

II. The Circuit split is real.

Wright argues that there is no conflict among the Courts of Appeals on the issue of custody under § 2254(a). Br. in Opp. 6-9. But the outcome would have been different if these same facts had arisen in a different Circuit.

In *Stanbridge v. Scott*, 791 F.3d 715, 716-17 (7th Cir. 2015), Stanbridge was civilly committed because he had been convicted of a sexually violent offense and suffered from a mental disorder predisposing him to future acts of sexual violence. Instead of challenging his civil commitment, Stanbridge challenged his underlying conviction, whose sentence he had already served. *Id.* at 717. The Seventh Circuit rejected this attack, holding that the civil commitment was a collateral consequence of the conviction. *Id.* at 719. Stanbridge's current restraint was not a "direct consequence of his criminal conviction" because "it was not part of the judgment in the criminal case." *Id.* at 721. The court noted that a habeas court would have jurisdiction over the civil commitment itself, but *Lackawanna County* foreclosed any attack on the underlying criminal conviction in such a case. *Id.* at 721-22. *See also Gargiulo v. Hayman*, No. 1:09-cv-00775, 2009 WL 1346620, at *2-4 (D.N.J. May 13,

2009) (civilly committed sex offender was not in custody pursuant to criminal judgment).

It makes no difference that *Stanbridge* involved a civil commitment rather than a second criminal offense. Even though the conviction was a necessary predicate to the civil commitment, Stanbridge was not confined pursuant to the criminal judgment or as a direct consequence of the conviction. Instead, the expired conviction was one of multiple facts that led to his civil commitment. Under *Stanbridge*, Wright would be considered in custody pursuant to his federal judgment, not his Alaska judgment.

Similarly, the Sixth Circuit ruled that the threat of incarceration for failing to register is "not enough to render a sex offender 'in custody.'" *Hautzenroeder*, 887 F.3d at 740 (citing *Dickey v. Allbaugh*, 664 Fed. Appx. 690, 693-94 (10th Cir. 2016); *Calhoun v. Attorney General of Colorado*, 745 F.3d 1070, 1072-74 (10th Cir. 2014); *Wilson v. Flaherty*, 689 F.3d 332, 337-38 (4th Cir. 2012); *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999)). "[A]ny repercussions [for failing to register] would not stem from her original conviction but from a new, separate criminal proceeding. On this point we can differentiate Hautzenroeder from a parolee who may face reimprisonment stemming from her original conviction." *Id*. at 743 (citing *Maleng*, 490 U.S. at 492-93 ("When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in custody.'"); *Thomas v. Morgan*, 109 F. Supp. 2d 763, 767 (N.D. Ohio 2000) ("A petitioner not in physical custody must be subject to some sort of supervisory control along with the imminent

possibility of incarceration without a formal trial and criminal conviction.")). Because the duty to register and any consequences for a violation are collateral to a criminal judgment, the court rejected the petitioner's argument that the threat of criminal liability hung over her head as a "sword of Damocles." *Id.* Under *Hautzenroeder*, Wright would be considered in custody pursuant to his federal conviction rather than his Alaska convictions.

The Third Circuit held that a sex offender was in custody in *Piasecki v. Court of Common Pleas*, 917 F.3d 161, 163 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 482 (2019). Piasecki served his entire Pennsylvania sentence but remained subject to Pennsylvania's registration laws because he still resided within the state. *Id.* at 163-65. He filed a habeas petition claiming he was in custody pursuant to the state judgment. *Id.* at 165. The Third Circuit recognized that other Courts of Appeals had rejected similar claims, but it found that Pennsylvania's registration requirements amounted to custody because they were more onerous than other states' requirements. *Id.* at 172. While recognizing that even onerous collateral consequences do not support jurisdiction unless they are imposed pursuant to a state judgment, the court concluded that Piasecki's registration requirements were included in his sentence as a matter of Pennsylvania law and were therefore imposed pursuant to his criminal judgment. *Id.* at 173-74.

Although *Piasecki* superficially appears to support Wright's position, it is the exception that proves the rule. Addressing other courts' predictions that such a ruling would render the custody requirement superfluous, the court limited its holding to

"severe, immediate, physical, and (according to the state's own definition) punitive restraints that are imposed pursuant to—and included in—the judgment of a state court such as the one here." *Id.* at 176. The court emphasized that it did not confront a case where the offender "was in custody as a result of an intervening judgment such as a separate conviction or a civil commitment hearing." *Id.* (citing *Stanbridge*, 791 F.3d at 719). "In those cases, a litigant could not challenge a previously expired conviction that is no longer the source of any restrictions." *Id.*

Under *Piasecki*, Wright would not be considered in custody pursuant to his Alaska judgment. Registration requirements are not part of a sentence in Alaska, *Boles v. State*, 210 P.3d 454, 456 (Alaska App. 2009), and Wright was in custody because of an intervening judgment from a separate sovereign. The Ninth Circuit did not consider these questions. Instead, the court simply found that Wright was in custody because his Alaska convictions were "positively and demonstrably related" to his federal conviction. App. 3 (quoting *Zichko*, 247 F.3d at 1019). The *Zichko* test goes beyond *Piasecki*'s limited holding and would find custody whenever a sex offender is charged with violating any jurisdiction's registration requirements.

Tellingly, the Third Circuit expressly rejected *Zichko* in a case that mirrors this one. In *Bonser v. District Attorney*, 659 Fed. Appx. 126, 127 (2016), a sex offender served his sentence and then filed a habeas petition while incarcerated for failing to register as a sex offender. The court rejected the argument that Bonser was in custody on the first conviction simply because it was connected to his second. *Id.* "Being subject to registration requirements is itself a collateral consequence, and so too are

any penalties—including conviction and incarceration—that result from the violation of such requirements." *Id.* at 128. The court found that *Zichko*'s rule "contravenes the well-established principle that registration requirements are collateral consequences and thus do not create custody." *Id.* at 129 n.4 (citing *Davis v. Nassau County*, 524 F. Supp. 2d 182, 190 (E.D.N.Y. 2007) (rejecting *Zichko*); *Daniels v. Jones*, No. 10-cv-00763, 2010 WL 3629835, at *5 (D. Colo. Sept. 9, 2010) (same)). Although *Bonser* is unpublished, it highlights the different tests applied by the Third and Ninth Circuits.

III. This case presents an ideal vehicle for this Court to resolve an important recurring issue.

Wright levies a series of supposed vehicle problems with this case, none of which withstands scrutiny.

Although the Ninth Circuit's decision in this case is unpublished, that does not mean this is a poor vehicle for resolving this issue. Br. in Opp. 4. The court applied the longstanding *Zichko* rule, which conflicts with the decisions of this Court and other Courts of Appeals. This Court regularly reviews unpublished decisions that relied on prior, published circuit precedent. *See, e.g., Terry v. United States*, No. 20-5904 (cert. granted Jan. 8, 2021); *United States v. Palomar-Santiago*, No. 20-437 (cert. granted Jan. 8, 2021).

Wright also notes that the Ninth Circuit did not address his alternative claim that his registration obligations are onerous enough to constitute custody themselves, Br. in Opp. 5-6, 10, a claim that has been overwhelmingly rejected by courts across the country. This Court commonly remands cases for further proceedings to consider

arguments not previously addressed. *See, e.g., Brownback v. King,* No. 19-546, Slip op. at 5 n.4 (Feb. 25, 2021); *Skinner v. Switzer*, 562 U.S. 521, 537 (2011).

This issue warrants review because a habeas respondent is harmed not only by an unfavorable decision on the merits, but also by being forced to defend against claims in a court that lacks the authority to hear those claims. The Court therefore should not wait to decide the jurisdictional question presented until it has a case that has been resolved on the merits, as Wright asks. Br. in Opp. 4. There should never be a decision on the merits when a case ought to be dismissed for lack of jurisdiction. A lack of jurisdiction is itself "outcome-determinative." Br. in Opp. 4.

Finally, Wright contends that this jurisdictional issue rarely arises. Br. in Opp. 11-12. Not so. As the cases above demonstrate, habeas petitioners have sought to challenge expired convictions for decades. In some cases they sought to avoid enhanced sentences, and in other cases they sought to avoid sex offender registration requirements. Still others, like Wright, have sought habeas relief after failing to register as a sex offender. *See Zichko*, 247 F.3d at 1019; *Bonser*, 659 Fed. Appx. at 127; *Davis*, 524 F. Supp. 2d at 189-90; *Daniels*, 2010 WL 3629835, at *5; *Fulbright v. Biltort*, 336 F. Supp. 3d 1347, 1349-50 (D. Kan. 2018) (awaiting trial); *Kasel v. Kansas*, No. 5:17-03077, 2017 WL 2618839, at *2-4 (D. Kan. June 16, 2017); *Ridley v. Florida Dep't of Corrections*, No. 5:16-cv-00192, 2016 WL 6634943, at *1 (N.D. Fla. Oct. 4, 2016). This case is not a rarity.

Nor will the limitation period to file a habeas petition, 28 U.S.C. § 2244(d), prevent these claims from arising. Br. in Opp. 11. The period may be tolled for

numerous reasons, and cases often take years to make their way through state appellate and post-conviction relief proceedings. Moreover, this issue does not arise solely in the context of sex offenses that carry lengthy sentences. The Ninth Circuit's reasoning would also apply in cases involving possession of a firearm by a prohibited person, allowing petitioners to challenge convictions for many non-sexual offenses. *See Wells v. United States*, 826 F. Supp. 2d 446 (N.D.N.Y. 2011) (petitioner was in custody pursuant to federal crime, not underlying state misdemeanor crime of domestic violence). The *Zichko* rule would put many final judgments at risk.

In short, this case presents an important issue warranting this Court's review. The *Zichko* rule allows criminal defendants to revive final judgments simply by committing new offenses. Finality will not depend on the judgment itself or the law of the issuing state, but on the law wherever the defendant may relocate. Alaska and twenty other states are justifiably concerned that the *Zichko* rule will force states to defend convictions whose sentences expired long ago, based on new conduct that might occur in any jurisdiction. Amicus Br. 10-14. This case presents an excellent vehicle for the Court to reverse the Ninth Circuit's decision and overturn the *Zichko* rule.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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