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The "Innocence and Redressability" Exception: A Fair Alternative to Habeas Jurisprudence's Direct Versus Collateral Consequence Dichotomy*

INTRODUCTION

On June 21, 1999, a Virginia state jury convicted Eric Wilson of rape, sentencing him to eight and one-half years in prison.[1] In addition to requiring a substantial prison sentence, Wilson's status as a sex offender also requires him to comply with the sex offender registration requirements of any state in which he chooses to reside.[2] Wilson must annually re-register in person with local law enforcement, inform the authorities of any updates in "contact information, ... educational status, and employment," and notify them of any travel plans.[3] Wilson cannot change his address without first notifying the local authorities in "both his previous [county of] residence and his new [county of] residence."[4] Nor can he legally adopt his stepson, or even visit him at school, without first passing a background check.[5] Retribution is the penological rationale that would normally validate the punishments imposed.[6] But what if evidence existed that proved Wilson had been wrongfully convicted?[7]

Ostensibly, the writ of habeas corpus—a legal mechanism by which courts can inquire into the lawfulness of an individual's detainment—exists to exonerate individuals in the situation described

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1. Wilson v. Flaherty, No. 3:10CV536, 2011 WL 2471207, at *1 (E.D. Va. June 20, 2011), *aff'd*, 689 F.3d 332 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2853 (2013); *see infra* Part II.A (detailing Eric Wilson's state court conviction).

2. *See* Wilson v. Flaherty, 689 F.3d 332, 334 (4th Cir. 2012) (noting that Wilson initially registered in Virginia, but has been registered under Texas statutes since he moved there).

3. *See* Petition for Writ of Certiorari at 9–10, *Wilson*, 689 F.3d 332 (No. 12-986).

4. *See id.* at 9; *see also infra* notes 215–19 and accompanying text (describing more restrictions imposed upon Wilson as a result of his sex offender status—restrictions that are, perhaps, even more invasive).

5. *See Wilson*, 689 F.3d at 335.

6. *See* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 658 (1989) ("[Retribution] has enjoyed wide scholarly acceptance in recent writings on punishment."). In short, the retribution theory of punishment holds that intentional pain (or restriction of liberty) should be imposed on offenders for violating their moral responsibility to abide by the law. *See id.* at 659 ("The theory holds that punishment is justified when it is deserved.").

7. *See infra* Part II.A.

above. The "Great Writ" is generally known as the principal means by which individuals can restore liberty that has been unlawfully taken from them.[8] Congress has statutorily armed federal courts with the power to invoke the writ of habeas corpus in Title 28 of the U.S. Code.[9] Notably, 28 U.S.C. § 2254 provides that anyone convicted of a state crime can challenge the constitutionality of such a conviction in federal court.[10] Similar to other federal habeas statutes, § 2254 only grants federal jurisdiction to an individual who applies for the writ while she is "in custody pursuant to the judgment of a . . . court."[11] More specifically, those who apply for § 2254 habeas relief must be "in custody under the conviction . . . under attack" at the moment the habeas petition is filed for a federal court to exercise proper jurisdiction over the claim.[12]

Not since the 1960s, however, have federal courts restricted § 2254's "custody" language to refer only to physical detainment.[13] In the seminal case *Jones v. Cunningham*,[14] the Supreme Court ruled that, "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally," that are restrictive enough to fulfill the habeas custody requirement.[15] Although the *Jones* decision held that an individual released on parole suffers enough restraint to meet the custody requirement,[16] in other circumstances federal courts have struggled to determine

8. *See* RONALD P. SOKOL, FEDERAL HABEAS CORPUS 13 (2d ed. 1969) ("[T]he writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty if he hath been against law deprived of it . . . ." (quoting Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. BAR REV. 172, 181 (1940))).

9. *See* 28 U.S.C. §§ 2241–2255 (2012).

10. *Id.* § 2254(a). *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 181–224 (1980) (discussing the history of Congress's decision to grant federal habeas relief to individuals challenging a state conviction).

11. *See* § 2254(a) (requiring an individual to be in custody under a state conviction); *see also id.* § 2255 (requiring an individual to be in custody pursuant to a federal statute).

12. Maleng v. Cook, 490 U.S. 488, 490–91 (1989) (per curiam) (internal quotation marks omitted) (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968)).

13. *See* Wilson v. Flaherty, 689 F.3d 332, 336 (4th Cir. 2012) (citing Jones v. Cunningham, 371 U.S. 236, 239–40 (1963)); *see also* SOKOL, *supra* note 8, at 66 ("Custody does not necessarily mean actual physical detention in a jail or prison."); Ruth A. Moyer, *Avoiding "Magic Mirrors"—A Post-*Padilla *Congressional Solution to the 28 U.S.C. § 2254 "Custody" and "Collateral" Sanctions Dilemma*, 67 N.Y.U. ANN. SURV. AM. L. 753, 771 (2012) (noting that the Supreme Court began expanding its definition of "custody" during the 1960s).

14. 371 U.S. 236 (1963).

15. *Id.* at 240 (interpreting the custody requirement of § 2241).

16. *Id.* at 243.

whether one's liberty has been restrained enough to make the writ of habeas corpus available.[17]

Recently, a Fourth Circuit panel fervently debated the limits of § 2254's custody requirement in *Wilson v. Flaherty*.[18] The petitioner argued that the sex offender registration requirements rendered him "in custody" under § 2254.[19] After the federal district court dismissed his petition, Wilson, who had previously been convicted of rape and had fully served his sentence, turned to the Court of Appeals for the Fourth Circuit.[20] Wilson based his petition on the emergence of new evidence—evidence that strongly indicated his innocence.[21] Ultimately, the Fourth Circuit affirmed the district court's dismissal, stating that it did not have subject matter jurisdiction since Wilson was not in custody at the time he filed his petition.[22] In other words, the Fourth Circuit majority did not believe that the collateral consequences of Wilson's rape conviction restrained his liberty severely enough to allow him access to the writ of habeas corpus.[23] Moreover, the majority opinion suggested that no collateral consequences, no matter how severe, could ever restrain an individual's liberty enough to entitle that individual to habeas relief.[24]

This Recent Development argues that the Fourth Circuit erred in dismissing Wilson's petition for a writ of habeas corpus and, as a result, haphazardly promoted an overly restrictive interpretation of § 2254's custody requirement. Given the increasing frequency and severity of collateral consequences in our criminal justice system,[25] it

17. *See* SOKOL, *supra* note 8, at 67 (describing the custody requirement as a spectrum between mere "moral restraint"—which does not rise to the level of "in custody" for habeas relief—and "actual incarceration"—which clearly does). *See generally* Moyer, *supra* note 13 (analyzing the effects of collateral consequences on the interpretation of § 2254 and Sixth Amendment jurisprudence generally).

18. 689 F.3d 332 (4th Cir. 2012).

19. *Id.* at 333.

20. *See id.*

21. *See id.* at 333–34. In fact, the new evidence eventually resulted in another man confessing to the rape and murder of Michelle Bosko, the woman Wilson had been accused of raping. *Id.* at 334; *see infra* Part II.A (discussing the facts in more detail).

22. *Wilson*, 689 F.3d at 333.

23. *See id.*

24. *See id.* at 337 ("If we were to find that the [sex offender registration] requirements of those statutes were not in fact collateral consequences, then we would be holding that any convicted sex offender could challenge his conviction 'at any time on federal habeas,' with the consequence that the in-custody jurisdictional requirement of § 2254 would be read out of the statute." (quoting Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam))). As discussed in Part III, this viewpoint—though arguably incorrect—is not uncommon.

25. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent*

is alarming that the court's opinion hastily precludes any argument a future habeas petitioner may have that such consequences fulfill the custody requirement. This Recent Development contends that, instead of focusing primarily on the direct versus collateral consequence dichotomy, the court should have adopted the approach proposed by Judge Wynn's dissent—what this Recent Development deems the "innocence and redressability" exception. This exception—which considers whether a habeas petitioner has exhausted all other potential remedies and can state a convincing claim of innocence—more aptly encompasses the purpose of the writ of habeas corpus, while still abiding by the strictures of habeas statutes like 28 U.S.C. § 2254.[26]

The facts in *Wilson* provided the court with a prime opportunity to dispose of the harsh effects of the direct versus collateral consequence dichotomy. Yet despite the fact that Supreme Court precedent explicitly allows for a narrow expansion in the interpretation of the custody requirement,[27] the Fourth Circuit opted for an unduly conservative reading of § 2254 over the "more fundamental, substantive concerns" of habeas corpus.[28] The result is a disappointing, and morally alarming, restraint on an individual's liberty.

Analysis proceeds in four parts. Part I briefly reviews the history behind 28 U.S.C. § 2254 and discusses the increased use of collateral consequences and its associated problems. Next, Part II summarizes the facts and holding of *Wilson*. Part III then analyzes the *Wilson* opinion, concluding that the majority mistakenly adopted a narrow interpretation of Supreme Court precedent and non-binding cases from its sister circuits. Thereafter, Part IV examines Judge Wynn's dissent, focusing on his "innocence and redressability" argument.[29] This Recent Development ultimately concludes that the Fourth Circuit should have adopted the "innocence and redressability" exception to help interpret the custody requirement and ensure that habeas corpus's focus on justice is not sacrificed for adherence to procedure.

Predators," 93 MINN. L. REV. 670, 673 (2008) ("The number and severity of collateral consequences . . . have greatly expanded in recent years.").

26. *See infra* Part IV.

27. *See infra* Part III.A.

28. *See Wilson*, 689 F.3d at 343 (Wynn, J., dissenting).

29. Judge Wynn has not coined any specific term for his argument. This phrase merely serves as a simple way for this Recent Development to refer to Judge Wynn's dissent as a whole.

I. INTERPRETATION OF § 2254'S "IN CUSTODY" REQUIREMENT: HOW COLLATERAL CONSEQUENCES FIT (OR DON'T FIT) INTO THE EQUATION

Before proceeding into a discussion of the facts in *Wilson* and the rationales behind the majority and dissenting opinions, it is instructive to first examine the history behind federal habeas statutes, as well as the challenges courts face in light of the increasing frequency and severity of collateral consequences.

A. Reviewing State Convictions in Federal Court: A Brief History of the Federal Habeas Statutes

Congress formally enacted federal habeas statutes in Title 28 of the U.S. Code.[30] The writ of habeas corpus itself, however, has existed since well before the Founding Fathers even conceptualized our nation's Constitution.[31] Intriguingly, the writ of habeas corpus was not originally used for challenging detentions based on alleged wrongful convictions.[32] Instead, in its original use, the writ of habeas corpus was a method by which the authorities in Anglo-Saxon England could compel a person to appear, perhaps involuntarily, before the king's council.[33]

Although authorities employed the writ of habeas corpus in its modern understanding as early as the fourteenth century,[34] it was not until the seventeenth century that the writ's contemporary function—to determine whether an individual's imprisonment was "just or legal"—became its primary use.[35] By the time the colonies were founded, however, the modern writ had already become a permanent

30. *See supra* notes 9–12 and accompanying text.

31. *See* DUKER, *supra* note 10, at 12 (establishing the writ's existence as far back as the thirteenth century).

32. *See id.* at 13.

33. *See id.* at 13–15. Another reason—perhaps the primary reason—the Norman King, William the Conqueror, utilized the writ of habeas corpus was to centralize the existing court system he found upon his arrival in England. *See id.* at 14. If making the formerly localized court system in England more efficient did not provide enough impetus to issue the writ, then the financial benefits provided by fines and payments associated with the hearings certainly did. *See id.* at 15.

34. *See* SOKOL, *supra* note 8, at 5–6 ("Then in 1341 comes a case involving a writ of habeas corpus issuing out of the king's court and directed to a jailer ordering him to produce the body of the named person with the cause of the arrest and detention." (quoting Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 CAN. BAR REV. 10, 13 (1940)) (internal quotation marks omitted)). Actually, since the writ is now typically invoked by detainees themselves, this fourteenth century example is not completely akin to the writ's modern use. The purpose, however—to prove a valid cause of arrest—is the same.

35. *See id.* at 12 & n.45.

part of English common law.[36] For good measure, the writ's inclusion in the U.S. Constitution dispelled any lingering doubts about its permanence in American jurisprudence.[37]

The Habeas Corpus Act of 1867 laid the foundation for the modern Title 28 federal habeas statutes.[38] The Act provided federal courts with the power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[39] Although not explicit, the language of the Act is certainly broad enough to conclude that this applied to both state and federal prisoners.[40] Initially, jurisdiction of federal courts to review a state conviction engendered heated debate concerning state sovereignty.[41] In modern times, however, arguing against the federal courts' jurisdiction in this arena is practically futile: 28 U.S.C. § 2254 explicitly provides federal courts with the power to issue writs of habeas corpus for individuals in custody under a state conviction.[42] Instead, the debate now revolves around the following question: When is an individual in custody?[43]

B. The Collateral Consequence Conundrum

Reliance on the modern doctrine of collateral consequences has not aided courts in their quest to determine the contours of the custody requirement.[44] Unlike the direct consequences of a conviction, which are those punishments that stem directly from the

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36. *See id.* at 15.

37. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* SOKOL, *supra* note 8, at 16 (explaining that the habeas clause "was added over the objection of three states which advocated that the writ ought never to be suspended").

38. *See* DUKER, *supra* note 10, at 189.

39. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241 (2012)).

40. *See* DUKER, *supra* note 10, at 189–90.

41. *See id.* at 181–224 (providing a thorough analysis of the history behind the federal habeas power to review state convictions).

42. *See* 28 U.S.C. § 2254 (2012).

43. The Supreme Court has considered this question several times. *See, e.g.*, Maleng v. Cook, 490 U.S. 488, 491 (1989) (per curiam) (holding that a petitioner is not in custody under an already served state conviction "simply because that conviction [can be] used to enhance the length of a current or future sentence imposed for a subsequent conviction"); Hensley v. Mun. Court, 411 U.S. 345, 345, 351 (1973) (holding that a defendant "released on his own recognizance" prior to the start of his sentence was still in custody for federal habeas purposes); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (establishing that a petitioner released on parole was still "in custody" pursuant to the relevant state conviction for § 2241 purposes).

44. *See* Moyer, *supra* note 13, at 755.

"sentence of the court"—such as fines or the length of the sentence itself—collateral consequences "stem from the fact of conviction."[45] The category can include anything from "civil commitment" and "registration requirements" to prohibitions against owning firearms.[46] Many collateral consequences, like direct consequences, are codified in federal, state, and local statutes.[47] But in large part, collateral consequences, such as the effects certain convictions have on an individual's employment prospects, are determined by society at-large.[48]

Though the direct consequences of a conviction—like the prison sentence itself—typically receive more attention in scholarly debates about the severity of punishments inflicted by the criminal justice system, in many cases the collateral consequences of a conviction can affect an individual long after the direct consequences have disappeared.[49] For example, a first-time offender for certain felonies can plead guilty and "walk out of court."[50] Although the direct consequences of such an offense are relatively small, the collateral consequences could be significant.[51] As Gabriel Chin and Richard Holmes have noted, collateral consequences can render individuals ineligible for many benefits and, in some circumstances, even strip them of certain rights:

> By virtue of the conviction, the offender may become ineligible for federally funded health care benefits, food stamps and Temporary Assistance for Needy Families, and housing assistance. She is ineligible for federal educational aid. Her driver's license will probably be suspended and she will be ineligible to enlist in the military, receive a security clearance, or possess a firearm. If an alien, she will be deported; if a

45. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006).

46. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705 (2002).

47. *See, e.g.*, Moyer, *supra* note 13, at 761.

48. *See, e.g.*, *id.* at 761–62 ("[C]ollateral consequences may include, for example, the loss of the right to vote, to engage in some occupations, to hold public office, or to serve as a juror, as well as the possibility of deportation."). In general, collateral consequences "limit the convicted individual's social, economic, and political access." Pinard, *supra* note 45, at 634–35.

49. *See* Moyer, *supra* note 13, at 764.

50. *See* Chin & Holmes, *supra* note 46, at 699.

51. *See id.*

> citizen, she will be ineligible to serve on a federal jury and in some states will lose her right to vote.[52]

As demonstrated, "collateral" does not necessarily mean "insignificant." Regardless, courts generally hold collateral consequences, in and of themselves, as insufficient for purposes of satisfying the habeas custody requirement—a stance that has evoked its fair share of criticism in the legal community.[53]

In some circumstances, a per se rule that collateral consequences do not fulfill the § 2254 custody requirement can actually prevent those convicted of minor offenses—"short sentence" petitioners—from ever mounting a federal habeas challenge to their conviction.[54] First, consider that under § 2254(b)–(c), which codifies the "exhaustion doctrine,"[55] a habeas petitioner must seek all available state remedies before a federal court will review her petition.[56] In addition, the petitioner must file the petition for a writ of habeas corpus while she is still in custody under the challenged conviction.[57] Therefore, in the situation of a "short sentence" conviction, by the time the petitioner has exhausted all available state court remedies—a process that could take years—she will likely have already completed the original sentence and thus be precluded from filing for habeas corpus under § 2254.[58] Despite the fact that the petitioner could be subject to the collateral consequences for years after her sentence has expired,[59] and regardless of whether she is actually innocent, federal habeas statutes provide zero relief.

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52. *See id.* at 699–700 (citations omitted).

53. *See, e.g.*, Wilson v. Flaherty, 689 F.3d 332, 341 (4th Cir. 2012) (Wynn, J., dissenting) (disagreeing with the majority's view that sex offender registration is "too collateral to satisfy the requirement that a habeas petitioner be in custody"); Moyer, *supra* note 13, at 792–95. *See generally* Roberts, *supra* note 25 (arguing that the automatic exclusion of collateral consequences from "in custody" consideration has created myriad problems in providing effective counsel to defendants who are considering plea bargains).

54. This idea and the example that follows can be found in Ruth A. Moyer's 2012 article, *Avoiding "Magic Mirrors"—A Post-*Padilla *Congressional Solution to the 28 U.S.C. § 2254 "Custody" and "Collateral" Sanctions Dilemma. See* Moyer, *supra* note 13, at 794–95.

55. *See* MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 847 (2d ed. 2011) (noting that the exhaustion doctrine was first announced in *Ex parte Royall*, 117 U.S. 241 (1886)); *see also infra* note 144 (discussing the exhaustion doctrine).

56. *See* 28 U.S.C. § 2254(b)–(c) (2012). *See generally* O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (discussing, extensively, the "exhaustion doctrine").

57. *See* Maleng v. Cook, 490 U.S. 488, 490–91 (1989) (per curiam) (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968)).

58. *See* Moyer, *supra* note 13, at 794–95.

59. *See supra* notes 49–52 and accompanying text.

The Supreme Court, nonetheless, has never entirely precluded the possibility that at least some collateral consequences might be severe enough to satisfy the custody requirement of § 2254.[60] Initially, following the *Jones* decision, the Supreme Court took a step towards including collateral consequences in its definition of "in custody."[61] In *Carafas v. Lavelle*,[62] the Court held that an individual could be in custody for habeas purposes, even after fully serving the sentence of the challenged conviction, as long as two requirements were met: the petitioner must have applied for habeas relief while still serving the sentence, and the petitioner must still be experiencing collateral consequences from the challenged conviction.[63] After *Carafas*, however, the following question still loomed: Could the collateral consequences of a conviction, by themselves, satisfy the custody requirement?[64] The 1989 Supreme Court case *Maleng v. Cook*[65] partially answered this question when the Court held that if the only collateral consequence a petitioner suffers from a previous conviction is that such conviction can be used to enhance a sentence imposed by a subsequent conviction, then the consequence will not fulfill the habeas custody requirement.[66]

As the *Wilson* majority correctly noted, *Maleng* explicitly established that the Supreme Court "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."[67] Rather, the *Maleng* Court stated that precedent "strongly implie[d]" that after a sentence expires, the collateral consequences of a conviction do not restrain an individual's liberty severely enough

60. *See* Wilson v. Flaherty, 689 F.3d 332, 345 (2012) (Wynn, J., dissenting) ("In my view, the general rule articulated and refined by the Supreme Court in *Maleng*, *Daniels*, and *Coss* precluding a petitioner from challenging a fully expired prior conviction does not preclude Wilson from challenging his Virginia conviction."); *infra* Part III.A.

61. *See* Carafas v. LaVallee, 391 U.S. 234, 239 (1968).

62. 391 U.S. 234 (1968).

63. *See id.* at 238 ("[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application."). The Court stated that the second requirement—that petitioner must still experience collateral consequences stemming from the challenged conviction—was necessary to prevent mootness. *See id.* at 237–38.

64. *See* Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam) ("We rested [the *Carafas*] holding *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed." (citing *Carafas*, 391 U.S. at 238)).

65. 490 U.S. 488 (1989).

66. *See id.* at 492.

67. *See* Wilson v. Flaherty, 689 F.3d 332, 336 (4th Cir. 2012) (quoting *Maleng*, 490 U.S. at 491).

to satisfy the habeas custody requirement.[68] Since *Maleng*, courts have generally continued this trend.[69] In some instances, even prior to *Maleng*, courts have gone as far as to categorically bar *any* collateral consequences, however harsh, from satisfying the custody requirement.[70] However, the recent increase in the use and severity of collateral consequences in the criminal context[71] has prompted some legal commentators to urge that courts refrain from automatically labeling all collateral consequences as insufficient to fulfill the custody requirement.[72]

In contrast to its treatment of collateral consequences in habeas jurisprudence, in the context of Sixth Amendment cases, the Supreme Court has emphasized the potential impact certain collateral consequences have on individuals' lives.[73] In *Padilla v. Kentucky*,[74] for example, the Supreme Court established that in order to provide effective counsel, an attorney must warn clients of the possible effects a guilty plea may have on deportation proceedings—a collateral consequence.[75] It is therefore clear that the Supreme Court at least acknowledges the gravity of certain collateral consequences. Nevertheless, courts still commonly hold that collateral consequences, as a class, fail to sufficiently restrain liberty enough to make the writ

68. *See Maleng*, 490 U.S. at 491–92. The previous case which *Maleng* specifically referred to was *Carafas*.

69. *See, e.g.*, Daniels v. United States, 532 U.S. 374, 384 (2001) (holding that petitioner could not use 28 U.S.C. § 2255 to challenge prior fully-served convictions simply because such convictions were used to enhance the sentence of a new conviction); Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 396–97 (2001) (holding the same for a § 2254 claim). *But see, e.g.*, Zichko v. Idaho, 247 F.3d 1015, 1017 (9th Cir. 2001) (allowing petitioner to collaterally challenge a previous rape conviction despite the fact that the petitioner's sentence for the conviction had already been fully served).

70. *See, e.g.*, Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987) ("[E]ven grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the presence of custody for the purpose of habeas review." (citations omitted)).

71. *See* Chin & Holmes, *supra* note 46, at 699 ("[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process."); Moyer, *supra* note 13, at 763–64; Roberts, *supra* note 25, at 673.

72. *See, e.g.*, Joshua D. Smith, Comment, *Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitutionality of a Deportation Based on an Expired Conviction?*, 58 OKLA. L. REV. 59, 83 (2005) (arguing that the collateral consequence of deportation proceedings based on a prior, fully served conviction should render a petitioner "in custody" for habeas purposes).

73. *See* Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

74. 559 U.S. 356 (2010).

75. *See id.* at 374. *See generally* Moyer, *supra* note 13 (proposing a "Post-*Padilla*" solution to the inconsistent treatment of collateral consequences between federal habeas actions and ineffective counsel cases).

of habeas corpus available to petitioners—no matter how much evidence exists indicating a particular petitioner's innocence.[76]

II. WILSON V. FLAHERTY

A. *Wilson's Controversial Conviction*

On July 8, 1997, following Navy basic training, William Bosko returned home to Norfolk, Virginia, hoping to see his new wife of three months, Michelle, waiting for him at the pier.[77] After she failed to appear, Bosko returned to the couple's apartment.[78] Upon arrival, he witnessed a gruesome scene; his wife lay dead on the bedroom floor, in a pool of her own blood.[79] Police and forensics analysts later determined that before her death, caused by multiple knife-wounds to the chest and strangulation, Michelle had also been raped.[80]

Immediately, police interrogated Danial Williams, who lived in the same apartment complex as the Boskos.[81] After one night of interrogation, Williams confessed that he raped and killed Michelle Bosko by himself.[82] Oddly, three more men—Joseph Dick, Jr., Derek Tice, and Eric Wilson—soon confessed that they too had raped Michelle Bosko.[83] Despite inconsistencies between each suspect's statements regarding the event,[84] all four men were prosecuted as

76. *See* Wilson v. Flaherty, 689 F.3d 332, 334 (4th Cir. 2012) (noting the "exculpatory new evidence" pointing to the petitioner's actual innocence); *see also* Virsnieks v. Smith, 521 F.3d 707, 718 (7th Cir. 2008) ("[T]he collateral consequences of a conviction, those consequences with negligible effects on a petitioner's physical liberty of movement, are insufficient to satisfy the custody requirement." (citations omitted)); Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) ("[T]he boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence of a conviction.' ").

77. Tice v. Johnson, 647 F.3d 87, 89 (4th Cir. 2011). The *Wilson* court references *Tice* in the majority opinion, stating that *Tice* "set forth the facts relating to the Bosko murder, the investigation, trials, and exculpatory new evidence in detail." *Wilson*, 689 F.3d at 334.

78. *Tice*, 647 F.3d at 89. Williams stated that he thought Michelle had begun working a new job, thus preventing her from greeting him. *Id.*

79. *Id.*

80. *See id.* The opinion also states that the police found a bloody steak knife in the vicinity, "the serrated blade bent at nearly a right angle to its handle." *See id.*

81. *See id.* at 90, 93.

82. *Id.* at 93.

83. *Id.*

84. For example, Joseph Dick originally only implicated Danial Williams and himself when first interrogated, but later implicated Eric Wilson and a man named "George Clark," whom police later determined to be Derek Tice. *See* Opening Brief at 7–8, 11, *Tice*, 647 F.3d 87 (No. 09-8245). Tice, however, informed investigators that two additional men, Rick Pauley and Jeffrey Farris, were present during the crime. *See id.* at 14. Interestingly, Tice expressed doubt concerning whether Rick Pauley was actually involved

though they had perpetrated the horrendous crime together.[85] Out of the four men—collectively referred to in the media as the "Norfolk Four"—three eventually either pleaded guilty or were found guilty of murder and rape.[86] Eric Wilson, however, was convicted only of rape and sentenced to eight and one-half years in prison.[87]

Despite allegations that the Norfolk Four killed Michelle Bosko during an evil, spontaneous romp, the results of the investigation suggested a much different truth.[88] Notably, though one suspect testified to the contrary,[89] there were no signs of forced entry at the Bosko residence.[90] Moreover, forensics determined that DNA testing of semen found at the scene of the crime did not match any member of the Norfolk Four.[91] The DNA tests implicated a man who had not even been included in the original suspect list, Omar Ballard.[92] After confrontation by authorities, Ballard eventually confessed to the

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with the crime. *See id.* These inconsistencies only provide a small glance at the confusing results of the interrogations and trials.

85. *See* Executive Summary Relating to the Petition for Clemency for Joseph J. Dick, Jr., Derek E. Tice & Danial J. Williams 2 (Nov. 10, 2008) [hereinafter Executive Summary], *available at* http://www.norfolkfour.com/images/uploads/pdf_files/Executive_Summary.PDF ("[A]fter police could not find a DNA match to the crime scene, the Commonwealth's theory began to evolve, ultimately morphing into a gang rape scenario . . . .").

86. *See* Tice v. Johnson, No. 3:08CV69, 2009 WL 2947380, at *3 (E.D. Va. Sept. 14, 2009), *aff'd*, 647 F.3d 87 (4th Cir. 2011). Danial Williams and Joseph Dick both pleaded guilty to murder and rape in 1999. *Id.* Derek Tice was convicted of murder and rape two separate times due to an improper jury instruction during his first trial. *See Tice*, 647 F.3d at 89, 93.

87. Wilson v. Flaherty, No. 3:10CV536, 2011 WL 2471207, at *1 (E.D. Va. June 20, 2011), *aff'd*, 689 F.3d 332 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2853 (2013). The state court jury delivered its verdict on June 21, 1999, finding Wilson not guilty on the charge of first-degree murder and guilty on the charge of rape. *See id.* Wilson's appeal was denied by the Court of Appeals of Virginia on March 8, 2000, and he did not appeal to the Supreme Court of Virginia. *Id.*

88. *See Tice*, 647 F.3d at 89–94 (offering a detailed fact summary of Michelle Bosko's rape and murder and the subsequent litigation); *see also* NORFOLK FOUR: A MISCARRIAGE OF JUSTICE, http://www.norfolkfour.com/index.php? (last visited Jan. 1, 2014) (providing thorough documentation of the media coverage concerning the "Norfolk Four"). Although remarkable, a detailed discussion of the facts and procedural history of the various trials concerning the "Norfolk Four" is beyond the scope of this Recent Development.

89. *See Tice*, 647 F.3d at 90 (stating that Derek Tice testified that he and the other suspects broke into the Bosko residence with a "claw hammer").

90. *Id.* at 91.

91. *Id.*

92. *See id.* at 91, 93. Interestingly, authorities probably would never have investigated Omar Ballard had he not written a letter that implicated himself while he was serving time in prison for separate violent crimes. *See id.* at 89. After pleading guilty to the rape and murder of Michelle Bosko, Ballard was sentenced to life in prison. *Id.*

murder and rape of Michelle Bosko and pleaded guilty to both crimes on March 22, 2000.[93]

In both his 2000 confession and subsequent testimony under oath in 2006, Ballard confirmed that he alone committed the crimes against Michelle Bosko.[94] So then, why were the Norfolk Four convicted for Ballard's crimes? As it turns out, Williams, Dick, Tice, and Wilson likely never would have set foot in a federal prison had investigators acted diligently, accounting for *all* of the evidence.[95]

Originally, investigators theorized that only one individual raped and murdered Michelle Bosko.[96] Indeed, the evidence at the crime scene in no way supported the gang-rape theory. First, no furniture or pictures had been disturbed, even in the bedroom, which would not have been the case had a large group of men forcefully marauded through the apartment.[97] The polish on the apartment's wood floors also showed no signs of disturbance: they were free of scuff-marks, inconsistent with a theory that a group of men had run through the residence.[98] Next, the pool of blood around the victim had not been smeared in any way, as it likely would have been if multiple individuals had attacked her.[99] The victim's wounds, however, provided the clearest evidence against the gang-rape theory: the three stab wounds found on the victim's body were each located on her left chest, "5 inches deep, equidistant apart, and in the same direction."[100] The chances of finding such a consistent stabbing pattern from an attack by multiple assailants are slim to none—especially with a struggling victim.[101]

Yet despite these findings, investigators—led by homicide detective Robert Glenn Ford—insisted that a group of men committed the crimes against Michelle Bosko.[102] In an attempt to elicit high-profile confessions, Detective Ford and the other investigators harshly dismissed the Norfolk Four's claims of

93. *See id.*
94. *See id.* at 93, 95.
95. *See* Executive Summary, *supra* note 85, at 2–3.
96. *See id.* at 2.
97. *See id.* at 2–3.
98. *See id.* at 2.
99. *See id.* at 3.
100. *Id.*
101. *See id.* ("That wound pattern was created by one person who rapidly stabbed the victim several times consecutively. The stabbing pattern could not have been caused by eight excited men gang-raping a young woman, passing a knife around, and taking turns stabbing the victim as she struggled to survive.").
102. *See id.* at 4.

innocence while conducting coercive interrogations.[103] The detectives threatened those who did not confess with the death penalty and lied to each defendant regarding incriminating evidence and witnesses prepared to testify against him.[104] Even more disconcerting, during Omar Ballard's original confession, Detective Ford threatened to take Ballard's plea agreement off of the table unless Ballard adopted a story where he and the other defendants "took turns raping and killing" Michelle Bosko.[105] Detective Ford told Ballard that "the only way [Ballard] could escape the death penalty was to" admit to Ford's version of the events.[106]

The inconsistent statements and confessions elicited from each defendant during questioning should have indicated that something was amiss.[107] Despite the obvious discrepancies, Detective Ford accepted the pleas.[108] Though it proved no help to the Norfolk Four,[109] Detective Ford's questionable investigatory techniques would eventually catch up to him: in 2010, a federal jury convicted him of two counts of extortion and one count of lying to the FBI, calling into question the tactics he used in many, if not all, of the nearly 200 homicide cases he solved as a detective.[110]

By the time of Omar Ballard's plea in 2000, Eric Wilson had already served two years of his eight-and-one-half-year sentence.[111] In 2004, after learning of the new evidence surrounding the Bosko murder and having his direct appeal denied,[112] Wilson asked the Governor of Virginia to grant "an absolute pardon on the grounds of

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103. *See id.*

104. *See id.*

105. Tice v. Johnson, 647 F.3d 87, 95–96 (4th Cir. 2011).

106. *Id.* at 96. Ballard described, under oath, Detective Ford's manipulation in 2006. *See id.*

107. *See supra* note 84 and accompanying text (mentioning examples of the inconsistent statements).

108. *See* Executive Summary, *supra* note 85, at 4.

109. *See* Sabrina Tavernise, *Officer's Extortion Conviction Prompts Calls for Full Exoneration of 'Norfolk Four,'* N.Y. TIMES, Nov. 6, 2010, at A11 (stating that the charges against Detective Ford "covered a period that began in 2003").

110. *See* Editorial, *Cop's Conviction Taints Other Cases*, PILOTONLINE.COM (Oct. 29, 2010), http://hamptonroads.com/2010/10/cops-conviction-taints-other-cases ("The feds . . . turned up witnesses, including 10 criminals who said they paid Ford, split . . . reward money and handed over a bag of cash in a Burger King parking lot. . . . The detective received as much as $70,000 . . . .").

111. *See Tice*, 647 F.3d at 89; *see also* Wilson v. Flaherty, 689 F.3d 332, 333 (4th Cir. 2012) ("Wilson was released from custody in 2005 after having fully served his sentence . . . .").

112. *See* Wilson v. Flaherty, No. 3:10CV536, 2011 WL 2471207, at *1 (E.D. Va. June 20, 2011), *aff'd*, 689 F.3d 332, *cert. denied*, 133 S. Ct. 2853 (2013).

innocence."[113] Nearly five years passed before then-Governor Tim Kaine ruled on the petition, and while he finally acknowledged that new evidence "raised substantial doubt about the validity of [the Norfolk Four's] convictions," he also stated his belief that the evidence did not "conclusively establish[] their innocence."[114] As a result, Governor Kaine granted partial pardons to Dick, Tice, and Williams—all of whom were still serving their sentences—releasing them from prison while "keeping their convictions in place."[115] Since Wilson had already been released from prison in 2005, no relief was granted to him.[116]

B. Wilson's Application for a Writ of Habeas Corpus

In March 2010, after the Governor refused to grant him any relief, Wilson filed for a writ of habeas corpus under 28 U.S.C. § 2254.[117] To properly file a § 2254 petition in federal court, a petitioner must fulfill the following requirements: (1) he must file the petition while in custody under a state court conviction; (2) he must be challenging the conviction for which he is currently in custody; (3) he must be challenging such custody as violative "of the Constitution or laws ... of the United States"; and (4) he must not have any remedies available in state court.[118] The United States District Court for the Eastern District of Virginia determined that Wilson failed to fulfill the first of these requirements: he was not in custody for purposes of § 2254, thus precluding the court's subject matter jurisdiction.[119] Wilson subsequently appealed to the Fourth Circuit.[120]

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113. *Wilson*, 689 F.3d at 334. The other three members of the Norfolk Four also petitioned the Governor of Virginia. *Id.* The petitions were filed "pursuant to Article V, § 12, of the Virginia Constitution and Virginia Code § 53.1-229." *Id.* Article V of the Virginia Constitution establishes, in pertinent part, "[t]he Governor shall have power ... to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates ...." VA. CONST. art. V, § 12. Section 53.1-229 of the Virginia Code provides the Governor of Virginia "the power to commute capital punishment and to grant pardons or reprieves." *See* VA. CODE ANN. § 53.1-229 (2008).

114. *Wilson*, 689 F.3d at 334.

115. *Id.*

116. *See id.* However, Wilson still faced collateral consequences of the crime. For a discussion of how collateral consequences can last far longer than the direct consequences of a crime, see *supra* Part I.B.

117. *See Wilson*, 689 F.3d at 334.

118. Requirements (1), (3), and (4) are explicitly stated in § 2254 itself. *See* 28 U.S.C. § 2254(a)–(b) (2012). Requirement (2) is an interpretation of § 2254 set forth by the Supreme Court in *Maleng*. *See* Maleng v. Cook, 490 U.S. 488, 490–91 (1989) (per curiam) (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968)).

119. *See Wilson*, 689 F.3d at 334–35 ("[T]he Superintendent of the State Police contended that the district court should deny the motion ... because Wilson was not in

Wilson's habeas petition "requested that his rape conviction be declared null and void; that he be immediately released from his violent sex offender status; and that Virginia expunge any and all records relating to his conviction."[121] Although Wilson was no longer incarcerated at the time of filing, he continued to be subject to the registration requirements of the Virginia Sex Offender and Crimes Against Minors Registry Act.[122] Notably, the statute required Wilson "to reregister for any significant changes in residence, employment, online contact information, or vehicle ownership while a Virginia resident."[123] Because the jury convicted Wilson of a "sexually violent offense" he "was required to reregister and confirm all of his identifying information every 90 days."[124] Furthermore, Wilson's conviction prevented him from adopting his stepson and from working at certain construction sites.[125] These consequences have not diminished in severity since Wilson moved his residence to Texas.[126]

Recognizing that he was not in custody under the normal interpretation of the phrase, Wilson argued that the requirements of the sex offender registration statute imposed such "substantial restraints on his liberty" as to satisfy the custody requirement of

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custody for purposes of federal habeas corpus and thus [the district court] lack[ed] jurisdiction to consider his current habeas case." (second and third alterations in original) (citations omitted) (internal quotation marks omitted)).

120. *See id.* at 335.

121. *Id.* at 334. Wilson claimed that he was "actually innocent" as a "victim of a corrupt investigative process" and "that the Commonwealth of Virginia suppressed exculpatory evidence." *Id.* Although Wilson did not know it at the time of filing, the lead detective in the Bosko case—Detective Ford—would eventually be convicted on federal charges of corruption in connection with work separate from the Bosko case itself. *See* Tim McGlone, *Ex-Norfolk Detective Gets 12 1/2 Years For Corruption*, PILOTONLINE.COM (Feb. 26, 2011), http://hamptonroads.com/2011/02/exnorfolk-detective-gets-12-12-years-corruption. Wilson also moved to stay and abey his habeas petition in order to be able to exhaust his remedies in state court. Wilson v. Flaherty, No. 3:10CV536, 2011 WL 2471207, at *1 (E.D. Va. June 20, 2011), *aff'd*, 689 F.3d 332 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2853 (2013).

122. *See Wilson*, 689 F.3d at 334. Wilson began registering as a sex offender before his release from prison. *Id.*

123. *Id.* (citing VA. CODE ANN. § 9.1-903 (2008)).

124. *Id.* (internal quotation marks omitted) (citing VA. CODE ANN. § 9.1-904). Wilson also had to register in a similar manner in Texas as a result of moving there. *Id.* at 334.

125. *See id.* at 335 ("[Wilson] claims that he is unable to work as an electrician at particular jobs, such as at government buildings, or to enroll in electrician school to advance his career because he cannot pass the required background checks. He claims that he has been unable to adopt his eight-year-old stepson; that, to visit his stepson in school, he must submit to a humiliating background check; that, for an unexplained reason, he was not permitted to travel to Canada for his honeymoon; and that he must notify authorities if he is going to be away from home for more than 24 hours.").

126. *See id.* at 334.

§ 2254.[127] Wilson acknowledged that collateral consequences, by themselves, generally fail to impose restraints sufficient to meet the custody requirement; he argued, however, that the sex offender registration requirements caused him to experience "far more substantial restraints than the normal consequences of a felony conviction."[128] In addition, Wilson emphasized the criminal consequences of failing to obey the registration requirements.[129]

C. *The Fourth Circuit's Decision*

Despite recognizing that a petitioner need not be physically detained in order to fulfill the custody requirement of § 2254, the Fourth Circuit, in an opinion by Judge Niemeyer, rejected Wilson's argument.[130] After acknowledging that Wilson "mounted a serious constitutional challenge to his conviction"[131] and that there existed a strong possibility that Wilson was in fact innocent of raping Michelle Bosko,[132] the majority held that the sex offender registration requirements were only collateral consequences of Wilson's rape conviction.[133] The majority viewed the accessibility of § 2254 habeas relief through the lens of a direct versus collateral consequence dichotomy, implying that a habeas petitioner may only fulfill the custody requirement if he is suffering from direct consequences of the challenged conviction.[134] Thus, the court denied the habeas petition, relying heavily on the Supreme Court's 1989 *Maleng* opinion.[135] In addition, the majority cited numerous cases from its sister circuits in

127. *Id.* at 335.

128. *Id.*

129. *See id.* Under Virginia law, Wilson would be guilty of a "Class 6 felony" if he "knowingly" failed to reregister or "knowingly provide[d] materially false information to the Sex Offender and Crimes Against Minors Registry." VA. CODE ANN. § 18.2-472.1(B) (2009).

130. *See Wilson*, 689 F.3d at 339 ("We simply and narrowly affirm the district court's conclusion that Wilson is not 'in custody' within the meaning of 28 U.S.C. § 2254(a) and that therefore the district court lacked subject matter jurisdiction to entertain his habeas petition.").

131. *Id.* at 333.

132. *See id.* at 339.

133. *See id.* at 337.

134. *See id.* at 338 (stating that Wilson's "restrictions are simply particularized collateral consequences" and holding that to interpret such consequences as sufficient for § 2254's in custody requirement "would drastically expand the writ of habeas corpus beyond its traditional purview").

135. *See id.* at 336–37. The court emphasized that the registration requirements were not enforced as a direct punishment for Wilson's rape conviction—they were "independent requirements imposed by the sex offender registration statutes in Virginia." *Id.* at 337.

an effort to bolster the conclusion that Wilson's collateral consequences did not render him in custody for § 2254 purposes.[136]

In focusing on the *Maleng* opinion, the majority emphasized that although the Supreme Court expanded the definition of "in custody" in *Jones*,[137] the Court never explicitly addressed whether it considered a habeas petitioner to be in custody if the challenged conviction's sentence had "*fully expired*" by the time of filing.[138] The majority stressed that if a petitioner could challenge a conviction after having completely served the resulting sentence then the "in custody" language of § 2254 would be superfluous and unnecessary.[139] Furthermore, the majority categorically rejected Wilson's argument that the registration requirements imposed a burden upon his liberty that was greater than the adverse consequences generally experienced by convicted felons.[140]

Perhaps in an effort to ease the pain of the decision, the majority explained that Wilson might still have the writ of *coram nobis* available as a remedy in state court.[141] The majority, however, hedged this statement in a footnote,[142] and rightly so: Wilson cannot take advantage of the writ of *coram nobis* since it is generally unavailable "for newly-discovered evidence or newly-arising facts."[143] Thus,

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136. *See id.* at 338; *infra* Part III.B (analyzing the propriety of the *Wilson* majority's reliance on its sister circuits' opinions).

137. *See Wilson*, 689 F.3d at 336 (citing Jones v. Cunningham, 371 U.S. 236, 242 (1963) (establishing that an individual subject to the consequences of a possible parole violation is considered to be "in custody" for habeas purposes)).

138. *Id.* (quoting Maleng v. Cook, 490 U.S. 488, 491 (1989) (per curiam)).

139. *See id.* at 336 (allowing a habeas challenge in such circumstances "would read the 'in custody' requirement out of the statute"(quoting Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam))).

140. *See id.* at 338 ("[T]hese restrictions are simply particularized collateral consequences stemming from the way States and individuals have reacted to persons who have been convicted of sex offenses, just as statutes impose other collateral consequences generally on persons convicted of a felony." (citing Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam))).

141. *See id.* at 339. Ostensibly, the writ of *coram nobis* is "available for an error of fact not apparent on the record, not attributable to the applicant's negligence, *and which if known by the court would have prevented rendition of the judgment.*" *See id.* at 339 n.3 (emphasis added) (quoting Commonwealth v. Morris, 705 S.E.2d 503, 506 (2011)) (internal quotation marks omitted).

142. *See id.* at 339 & n.3 ("[T]he dissent may be correct that Virginia has limited the application of the writ of *coram nobis* . . . .").

143. Reply Brief for Petitioner at 10–11, Wilson v. Flaherty, No. 12-986, 2013 WL 2428989 (U.S. June 4, 2013) (quoting Recent Cases, *Federal Habeas Corpus – Custody Requirement – Fourth Circuit Denies Forum to Sex Offender with Actual Innocence Claim. – Wilson v. Flaherty, 689 F.3d 332 (4th Cir. 2012)*, 126 HARV. L. REV. 2105, 2107 n.30 (2013)) (internal quotation marks omitted); *see also* Neighbors v. Commonwealth, 650 S.E.2d 514, 517 (Va. 2007) (interpreting VA. CODE ANN. § 8.01-677 (2006) to restrict the

Wilson's only remedy was to file for a writ of habeas corpus.[144] Regardless, the majority's ruling was clear: Wilson's sex offender registration requirements did not satisfy the § 2254 custody requirement.[145] Therefore, according to the majority, the court lacked the subject matter jurisdiction necessary to grant Wilson's petition for federal habeas relief.[146]

Not all three judges on the Fourth Circuit panel agreed. In addition to Judge Davis's concurring opinion,[147] Judge Wynn published a robust dissent.[148] Judge Wynn took special issue with the majority's failure to recognize a "pertinent line of precedents issued after *Maleng*" that he contended "recognizes an exception for a petitioner with compelling evidence of actual innocence and no available forums for redress."[149] Judge Wynn argued that if the "grand purpose" of the writ of habeas corpus was to "protect[] . . .

availability of the common law writ of *coram nobis* even further, only "[f]or any clerical error or error in fact" (alteration in original)).

144. Under § 2254, a habeas petitioner must "exhaust[] the remedies available in the courts of the State" before a federal court can have subject matter jurisdiction over the petition. *See* 28 U.S.C. § 2254(b)–(c) (2012). This requirement is commonly referred to as the "exhaustion doctrine." *See* O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). The purpose of the exhaustion doctrine is "to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *Id.* at 845. This does not mean, however, that a petitioner must exhaust *every* possible method of review in the state court system. *See id.* at 844 (citing Wilwording v. Swenson, 404 U.S. 249, 249–50 (1971) (per curiam)). Specifically, petitioners are not required to seek remedies "where the state courts have not provided relief through those remedies in the past." *Id.* (citing Wilwording v. Swenson, 404 U.S. 249, 249–50 (1971) (per curiam)). It follows then that Wilson does not have to file for a writ of *coram nobis* simply to satisfy the exhaustion requirements of § 2254. *See supra* notes 141–43 and accompanying text (explaining that the writ of *coram nobis* would not provide Wilson any relief). The Commonwealth of Virginia also weakly suggested that Wilson could pursue "a writ of actual innocence based on non-biological evidence previously unknown or unavailable to the petitioner." *See* Brief in Opposition to Petition for a Writ of Certiorari at 26, *Wilson*, No. 12-986, 2013 WL 2280951 (U.S. May 22, 2013). However, that Virginia neglected to even mention this procedure at the district court and court of appeals levels indicates the doubtfulness of its availability. *See* Reply Brief for Petitioner, *supra* note 143, at 10. In addition, the writ of actual innocence based on non-biological evidence "offers no opportunity to raise constitutional challenges," *see id.*, and some of Wilson's new evidence includes DNA test results, which are not "non-biological," *see id.*; *Wilson*, 689 F.3d at 334.

145. *See Wilson*, 689 F.3d at 339.

146. *See id.*

147. *See id.* at 339–40 (Davis, J., concurring) (acknowledging that "when Congress enacted . . . the bill in which § 2254(a) is now codified, modern violent sex offender statutes were not remotely within anyone's contemplation").

148. *Id.* at 340–49 (Wynn, J., dissenting); *see also infra* Part III.A–B (providing a more in-depth discussion of Judge Wynn's rationale). Judge Davis's relatively short concurrence stated that Wilson may have a remedy under 42 U.S.C. § 1983 if he could not pursue the *coram nobis* procedure. *See Wilson*, 689 F.3d at 340 (Davis, J., concurring).

149. *See Wilson*, 689 F.3d at 341 (Wynn, J., dissenting).

individuals against erosion of their right to be free from wrongful restraints upon their liberty" then Wilson—an individual "with a compelling claim of innocence"—should have an opportunity to challenge his rape conviction under federal habeas laws.[150] Judge Wynn's dissent highlighted the fact that no binding precedent foreclosed the relief Wilson sought and that, in fact, the Supreme Court requires that the custody requirement be interpreted liberally, especially in extreme cases, like Wilson's.[151]

III. THE *WILSON* MAJORITY DECISION: NARROW INTERPRETATION & NON-BINDING PRECEDENT

By dismissing Eric Wilson's petition for a writ of habeas corpus, the Fourth Circuit helped to inch federal habeas jurisprudence closer to categorically precluding any collateral consequences from ever meeting the habeas custody requirement. But no precedent compelled the court to rule as it did in *Wilson*, a case of first impression in the Fourth Circuit.[152] In fact, as Judge Wynn observed, federal case law actually left the Fourth Circuit an opening to interpret § 2254's custody requirement as offering a remedy to petitioners, like Eric Wilson, who would otherwise be perpetually plagued by the collateral consequences of a wrongful conviction.[153] Unfortunately, the majority refused to adopt Judge Wynn's "innocence and redressability" exception, relying instead on non-binding precedent from other circuits and thereby forcing Eric Wilson to continue to live with the collateral consequences of a crime that DNA evidence strongly indicates he never committed.[154]

A. A Narrow Interpretation

The *Wilson* majority accurately quoted *Maleng* when it stated that the Supreme Court "never held . . . that a habeas petitioner may

150. *Id.* (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)).

151. *See id.* at 348. There is no doubt that Wilson's situation is extreme, even for a wrongful conviction case. *See* Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES MAG., Aug. 19, 2007, at 36 ("[E]ven in the upside-down world of wrongful convictions, the extravagant case of Joseph Dick and his supposed partners in crime is in a class of its own."). Berlow's article goes on to detail the Norfolk Four's situation, emphasizing that all evidence points to their innocence. *See generally id.*

152. *See Wilson*, 689 F.3d at 348 (Wynn, J., dissenting) ("[N]o precedent forecloses the relief sought in this case."); *infra* Part III.A–B.

153. *See Wilson*, 689 F.3d at 341 (Wynn, J., dissenting); *infra* Part III.A. Of course, no state official or tribunal has officially declared Wilson's conviction "wrongful," but the overwhelming evidence certainly seems to indicate that he never committed his alleged crimes. *See supra* Part II.A.

154. *See infra* Part III.B.

be 'in custody' under a conviction" when the petitioner filed for habeas relief after the sentence of such conviction had expired.[155] The opinion, however, proceeds to proclaim that "*Maleng* unambiguously rules out" such an interpretation.[156] But does it? The *Wilson* majority fails to acknowledge that although the *Maleng* Court interpreted prior case law to "strongly impl[y]" such a result,[157] the *Maleng* opinion did not completely preclude it.

The collateral consequences involved in *Maleng* and *Wilson* differ radically. In *Maleng*, the petitioner argued that the potential sentence-enhancing effects of a fully served state conviction rendered him in custody under that conviction.[158] Practically, the collateral consequences of the *Maleng* conviction could adversely affect the petitioner only if he was found guilty of another offense—which, unfortunately for Mr. Maleng, happened.[159] In stark contrast, Eric Wilson need not fulfill some future contingency for the collateral consequences of his rape conviction to apply: the sex offender registration requirements impose a substantial burden on him regardless of any actions he takes in the future.[160]

Further, under the standard of *Jones v. Cunningham*, a case that *Maleng* relies upon,[161] petitioners need not be in physical custody for federal habeas purposes: other types of restraints—"restraints not shared by the public generally"—may fulfill the habeas custody requirement.[162] Surely the general public does not suffer from the restraints imposed on Wilson by the sex offender registration requirements. Even if pre-*Maleng* case law "strongly implies" that collateral consequences presumptively fall short of the *Jones* restraint threshold, Supreme Court habeas jurisprudence does not categorically preclude every type of collateral consequence from satisfying § 2254's custody requirement.[163]

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155. *Wilson*, 689 F.3d at 336 (quoting Maleng v. Cook, 490 U.S. 488, 491 (1989) (per curiam)) (internal quotation marks omitted).

156. *Id.* at 337.

157. Maleng v. Cook, 490 U.S. 488, 491 (1989) (per curiam).

158. *See id.* at 490.

159. *See id.* at 489. Mr. Maleng challenged a 1958 robbery conviction in 1985, approximately seven years after the robbery sentence expired. *See id.* When he filed his habeas petition, Mr. Maleng was serving "two life terms and one 10-year term" for two 1976 charges of assault and one of "aiding a prisoner to escape," the sentences that the 1958 conviction enhanced. *See id.* at 489–90.

160. *See Wilson*, 689 F.3d at 335 (noting briefly the requirements of the sex offender registration system); *supra* Part II.B (summarizing the burdens placed on Wilson).

161. *See Maleng*, 490 U.S. at 491 (citing Jones v. Cunningham, 371 U.S. 236 (1963)).

162. *See* Jones v. Cunningham, 371 U.S. 236, 240 (1963).

163. *See Maleng*, 490 U.S. at 491–92.

Indeed, as Judge Wynn noted in dissent, cases after *Maleng* "recognize[] an exception for a petitioner with compelling evidence of actual innocence and no available forums for redress."[164] In support of his "innocence and redressability" exception, Judge Wynn quoted *Daniels v. United States*,[165] which posited that in "rare circumstances" a petitioner could challenge a conviction despite already having finished serving his sentence.[166] The *Daniels* Court "recognize[d] that there may be rare cases in which no channel of review [is] actually available to a defendant with respect to a prior conviction, due to no fault of his own."[167] In fact, *Daniels* quoted the language of 28 U.S.C. § 2255 (another federal habeas statute) to explain that "rare circumstances" could include a situation where a court " 'discovered [new] evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the [petitioner] guilty of' " the challenged conviction.[168] If anything, Eric Wilson would seemingly make a fitting poster-child for this rare category.[169] Furthermore, although *Daniels* certainly reinforced the notion that the collateral consequences of a sentence enhancement do not rise to the level of restraint mandated by the custody requirement, the Court explicitly restricted the holding to the facts presented therein.[170]

To support his argument that the majority misapplied the *Maleng* ruling, Judge Wynn also referenced the Supreme Court's *Lackawanna County District Attorney v. Coss*[171] opinion. *Coss*, like *Daniels*, involved a petitioner challenging a prior conviction based upon the fact that it enhanced a subsequent conviction.[172] As Judge Wynn aptly pointed out,[173] *Coss* reinforced the notion that if a

164. *Wilson*, 689 F.3d at 341 (Wynn, J., dissenting).

165. 532 U.S. 374 (2001).

166. *Wilson*, 689 F.3d at 341–42 (Wynn, J., dissenting) (quoting *Daniels*, 532 U.S. at 376).

167. *Daniels*, 532 U.S. at 383.

168. *Id.* at 383–84 (quoting 28 U.S.C. § 2255 (Supp. V 1994)).

169. *See supra* Part II.A (discussing the exculpatory evidence in the "Norfolk Four" case); *see also supra* note 144 (arguing that Wilson fulfills § 2254's exhaustion requirement).

170. *See Daniels*, 532 U.S. at 383–84 ("The circumstances of this case do not require us to determine whether a defendant could use a motion under § 2255 to challenge a federal sentence based on . . . a conviction [for which the defendant has no channel of review].").

171. 532 U.S. 394 (2001)

172. *See id.* at 394.

173. *See* Wilson v. Flaherty, 689 F.3d 332, 344 (4th Cir. 2012) (Wynn, J., dissenting) (referencing the exception expressed in *Coss*).

defendant "obtain[s] compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner," then a habeas petition may be the defendant's "only forum available for review."[174] DNA evidence implicating another man who would eventually plead guilty to Wilson's alleged crime very likely falls into this narrow category.[175]

B. Non-Binding Precedent

In addition to the *Wilson* majority's narrow interpretation of federal case law, Judge Wynn also took exception to the majority's reliance on non-binding precedent from other circuits.[176] The majority cited four cases from other circuits that each ruled sex offender registration requirements alone do not render a petitioner in custody for habeas purposes.[177] Although the majority's description of these cases as a "unanimous body of law" is problematic in itself, a closer look at the four cases reveals that—as Judge Wynn posits—even if the cases were binding on the Fourth Circuit, *Wilson* is easily distinguishable from them.[178]

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174. *Coss*, 532 U.S. at 405–06 (citations omitted). Judge Wynn also described the majority's suggestion that Wilson could start a *coram nobis* action in state court as an untenable solution. *See Wilson*, 689 F.3d at 345 n.4 (Wynn, J., dissenting) ("Virginia has limited the reach of this writ to the correction of clerical errors." (citations omitted)); *see also supra* notes 141–44 and accompanying text (explaining Virginia's restriction on the writ of *coram nobis*). The *Wilson* majority conceded that Judge Wynn "may be correct." *See Wilson*, 689 F.3d at 339 n.3 (majority opinion).

175. *See supra* Part II.A.

176. *See Wilson*, 689 F.3d at 348 (Wynn, J., dissenting) ("[T]he majority opinion has instead decided to follow the non-binding authority issued by a single panel of the Ninth Circuit . . . .").

177. *See id.* at 337–38 (majority opinion) (citing Virsnieks v. Smith, 521 F.3d 707 (7th Cir. 2008); Leslie v. Randle, 296 F.3d 518 (6th Cir. 2002); Henry v. Lungren, 164 F.3d 1240 (9th Cir. 1999); Williamson v. Gregoire, 151 F.3d 1180 (9th Cir. 1998)).

178. *See id.* at 347–48 (Wynn, J., dissenting). Judge Wynn actually notes that only three of the cases—*Virsnieks v. Smith*, 521 F.3d 707 (7th Cir. 2008); *Leslie v. Randle*, 296 F.3d 518 (6th Cir. 2002); and *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998)—are "materially different" than *Wilson*. *Id.* Judge Wynn primarily only criticized the fourth case—*Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999)—as being a "summary decision." *See id.* at 348. Upon closer examination though, the petitioner's basis for a habeas petition in *Henry* is, in fact, much different than that in *Wilson*; the *Henry* petitioner premised his habeas petition on the erroneous admission of an uncharged, separate crime into evidence during his trial for child molestation. *See* Henry v. Estelle, 33 F.3d 1037, 1038 (9th Cir. 1993), *vacated*, 52 F.3d 809 (9th Cir. 1995). In contrast, Wilson based his habeas petition on the discovery of new, exculpatory evidence. *See Wilson*, 689 F.3d at 334 (majority opinion) ("Wilson filed this petition for a writ of habeas corpus . . . alleging that he is actually innocent; that the Commonwealth of Virginia suppressed exculpatory evidence; and that he was the victim of a corrupt investigative process.").

The first problematic case the majority relied on was from the Ninth Circuit, *Williamson v. Gregoire*,[179] which involved a habeas petitioner subject to sex offender registration requirements after completion of his sentence for child molestation—registration requirements that he could satisfy by mail.[180] In *Williamson*, the Ninth Circuit distinguished the defendant's situation from other cases that held petitioners to be in custody for habeas purposes.[181] One such case held that the imposition of 500 hours of community service fulfilled the custody requirement,[182] while another case held a petitioner to be in custody despite only requiring him to attend *fourteen hours* of alcohol rehabilitation classes.[183] In distinguishing *Williamson* and ruling that the sex offender registration requirements did not satisfy the habeas custody requirement, the Ninth Circuit reasoned that while the consequences considered in the prior cases "somehow limit[ed] the putative habeas petitioner's movement," the consequences in *Williamson* did not affect the petitioner so adversely.[184] Thus, the consequences in *Williamson* were merely collateral.[185] Moreover, while holding that sex offender registration requirements did not meet the habeas custody threshold, the Ninth Circuit noted that an obligation forcing a petitioner to be physically present in a specific place could, in itself, fulfill the custody requirement.[186] Though the petitioner in *Williamson* only had to register by mail,[187] Wilson himself is required to register and reregister in person with law enforcement.[188] So, while the consequences of the *Williamson* petitioner's conviction did not

179. 151 F.3d 1180 (9th Cir. 1998). Notably, *Williamson* explicitly held that collateral consequences never sufficiently restrain liberty enough to render an individual in custody for habeas purposes. *See id.* at 1183 ("But if application of the sex offender law is merely a collateral consequence of Williamson's conviction, the federal courts are without habeas jurisdiction in this case.").

180. *See id.* at 1181.

181. *See id.* at 1182–84.

182. *See id.* at 1183 (citing Barry v. Bergen Cnty. Prob. Dep't, 128 F.3d 152, 161 (3d Cir. 1997)).

183. *See id.* at 1182 (citing Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam)).

184. *Id.* at 1183–84.

185. *See id.*

186. *See id.* at 1182–83 (citing Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) ("[A]ppellant suffers a greater restraint upon his liberty—mandatory class attendance—than the restraint suffered by a person who is released upon his own recognizance.")).

187. *See id.* at 1184.

188. *See* Wilson v. Flaherty, 689 F.3d 332, 335 (4th Cir. 2012) (stating that Wilson had to "reregister every 90 days because his offense was a sexually violent offense" (internal quotation marks omitted)); Petition for Writ of Certiorari, *supra* note 3, at 9.

obligate him to be physically present in a specific place, Wilson's conviction plainly does so—a fact the *Wilson* majority declined to mention in its opinion.[189] Therefore, even if *Williamson* were binding precedent for the Fourth Circuit, its genuine-restraint-of-physical-liberty-equals-custody standard would command a different outcome for Wilson.

The second suspect precedent on which the majority relied came from the Sixth Circuit in *Leslie v. Randle*.[190] The habeas petitioner in *Leslie* pleaded guilty to state charges of rape and felonious assault in 1986.[191] In 1997, while Leslie was still serving his sentence, the Ohio legislature amended the state's sexual-predator statute, which, if applied to Leslie, would force him to comply with new, more severe reporting requirements.[192] Subsequently, Leslie mounted a habeas challenge to the *future* imposition of the registration requirements.[193] In holding that the future sex offender registration requirements did not place Leslie in custody, the Sixth Circuit relied heavily on the Ninth Circuit's rationale in *Williamson*.[194] Therefore, outside of providing another circuit to add to its sources, the *Wilson* majority's reliance on *Leslie* does little more than duplicate the questionable support provided by *Williamson* itself. Moreover, the *Wilson* majority neglected to mention that the *Leslie* petitioner did not mount a habeas challenge to his rape conviction; rather, the *Leslie* petitioner challenged the constitutionality of the *consequences* themselves.[195] Thus, unlike Wilson, who obtained exonerating evidence after being convicted of rape,[196] the petitioner in *Leslie* was inarguably guilty of the underlying rape charge.[197]

The third questionable case, *Virsnieks v. Smith*,[198] another proceeding with a petitioner registered as a sex-offender, also used a

189. *See Wilson*, 689 F.3d at 332–39.

190. 296 F.3d 518 (6th Cir. 2002).

191. *See id.* at 519.

192. *See id.* at 519–21 (stating that the new registration requirements require the petitioner to (1) register his home and work address with the sheriff; (2) register each of his vehicles' license plate numbers with the sheriff; and (3) "verify his current home address every 90 days"). The amended Ohio statute also contained a new "community notification provision." *Id.* at 521.

193. *See id.* at 522.

194. *See id.*

195. *See id.*

196. *See supra* Part II.A.

197. *See Leslie*, 296 F.3d at 519 (noting that the petitioner pleaded guilty to rape); *id.* at 522 ("Although Leslie is currently incarcerated, he is not seeking relief from the conviction or sentence upon which his confinement is based.").

198. 521 F.3d 707 (7th Cir. 2008).

rationale similar to the Ninth Circuit's *Williamson* decision in holding that the petitioner failed to meet the custody requirement. The *Virsnieks* court reasoned that "habeas petitioners must establish that they are subject to conditions that 'significantly restrain . . . [their] liberty.' "[199] Ultimately, the court ruled that the petitioner's registration requirements imposed only "minimal restrictions on [his] physical liberty of movement."[200] He could update his information with authorities through a "telephonic registration system" and, like the petitioner in *Williamson*, he could reregister by mail.[201] In contrast, Wilson's in-person registration requirements actually require him to be physically present at a specific place each year.[202] Thus, the "minimal restrictions"[203] placed on the *Virsnieks* petitioner are clearly distinguishable from the in-person registration requirements imposed upon Wilson.

The fourth case the *Wilson* majority relied on, *Henry v. Lungren*,[204] proves to be the most problematic.[205] *Henry*, another Ninth Circuit case, explicitly relied on the *Williamson* rationale in refusing to consider sex offender registration requirements as sufficient to place a petitioner in custody for habeas purposes.[206] The major fault of the *Wilson* majority's reliance on *Henry* stems primarily from *Henry*'s lack of independent analysis and its summary conclusion 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."[207] Instead

199. *Id.* at 717–18 (alteration in original) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)).

200. *Id.* at 720.

201. *See id.* at 719–20.

202. *See* Reply Brief for Appellant at 3, Wilson v. Flaherty, 689 F.3d 332 (4th Cir. 2012) (No. 11-6919), 2011 WL 5006455, at *3 ("Eric Wilson is required to 'report to the local law enforcement authority designated as [his] primary registration authority . . . once each year not earlier than the 30th day before and not later than the 30th day after the anniversary of [his] date of birth.' " (alterations in original) (quoting TEX. CODE CRIM. PROC. ANN. art. 62.058(a) (West 2006))).

203. *Virsnieks*, 521 F.3d at 720.

204. 164 F.3d 1240 (9th Cir. 1999).

205. *See Wilson*, 689 F.3d at 348 (Wynn, J., dissenting) ("[T]he majority opinion has . . . decided to follow the non-binding authority issued by a single panel of the Ninth Circuit . . . . I question the majority opinion's decision to follow the Ninth Circuit's decade-old summary decision in *Henry*." (citations omitted)).

206. *Henry*, 164 F.3d at 1242. In fact, the oral arguments for *Henry* and *Williamson* were heard on the same day, albeit in front of different panels. *Id.*

207. *See Wilson*, 689 F.3d at 348 (Wynn, J., dissenting) (quoting *Henry*, 164 F.3d at 1242).

of discussing the relationship between registration requirements and the habeas custody requirement, approximately half of the three-page *Henry* opinion analyzes the "relation back" provision contained in Rule 15(c) of the Federal Rules of Civil Procedure.[208] The *Henry* court's lack of independent analysis provides minimal, if any, support for the *Wilson* majority's holding.

Upon closer analysis, the four non-binding sister circuit cases on which the *Wilson* majority relied fail to convincingly support the ultimate conclusion that Wilson was not in custody under § 2254. As Judge Wynn indicated, three of the cases—*Williamson*, *Leslie*, and *Virsnieks*—contained facts that are "materially distinguishable from" *Wilson*.[209] Furthermore, the fourth case, *Henry*, neglects to even include any independent analysis of the pertinent issue.[210] Thus, as Judge Wynn posited, it would be a stretch to consider the four cases a "unanimous" body of law.[211]

Instead of depending on non-binding authorities[212] and adopting a narrow interpretation of Supreme Court precedent[213] to further promote the direct versus collateral consequence dichotomy, the Fourth Circuit should have used *Wilson* to establish a new exception to the custody requirement. Judge Wynn's proposed "innocence and redressability" exception represents an attractive option. As discussed below, this exception would provide for a more accurate reading of binding precedent and a more practical approach to the custody requirement.

IV. THE "INNOCENCE AND REDRESSABILITY" EXCEPTION: A FAIR APPROACH

As Judge Wynn noted, the consequences of Wilson's rape conviction substantially restrict his "liberty to do those things which in this country free [people] are entitled to do."[214] In addition to the in-person reporting requirements, various municipal sex offender ordinances physically restrict Wilson's ability to travel to certain

208. *See Henry*, 164 F.3d at 1241; *see also* FED. R. CIV. P. 15(c) (describing the situations in which an amendment to a pleading relates back to the original pleading).

209. *See Wilson*, 689 F.3d at 347–48 (Wynn, J., dissenting); *supra* notes 179–203 and accompanying text.

210. *See Wilson*, 689 F.3d at 348; *supra* notes 205–08 and accompanying text.

211. *See Wilson*, 689 F.3d at 348.

212. *See supra* notes 176–208 and accompanying text.

213. *See supra* Part III.A.

214. *Wilson*, 689 F.3d at 348 (Wynn, J., dissenting) (alteration in original) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)) (internal quotation marks omitted).

areas.[215] As previously mentioned, Wilson can only visit his stepson at school after passing a "humiliating" background check, and he cannot work as an electrician at certain sites like government buildings, thus restricting his ability to engage in his occupation of choice.[216] Moreover, as a result of the various sex offender ordinances throughout the United States, should Wilson ever want to travel, he must first learn the zone restrictions imposed on sex offenders by the municipality of his destination, and then abide by them or face incarceration.[217] In other words, Wilson's "collateral consequences" prevent him from visiting various areas in certain cities and, in some cases, from entire cities altogether.[218] Certainly, these physical, movement-limiting restraints are "not shared by the public generally";[219] these restraints are not even experienced by felons generally.[220] If the "grand purpose" of the writ of habeas corpus is to "protect[] . . . individuals against erosion of their right to be free from wrongful restraints upon their liberty,"[221] should the Fourth Circuit have refused to grant the writ to a petitioner who has undeniably strong evidence indicating that he was wrongfully convicted of rape?

From the beginning, the *Wilson* majority's focus on the direct versus collateral consequence dichotomy created a virtually insurmountable obstacle for the petitioner to overcome.[222] When a court categorically rejects the proposition that collateral consequences could ever place a petitioner in custody, it risks creating

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215. *See id.* at 335 (majority opinion) (noting that Wilson was not allowed to visit Canada for his honeymoon and cannot "visit his stepson in school" without first passing a background test).

216. *Id.*

217. *See id.* at 348 n.8 (Wynn, J., dissenting) (citing various municipal ordinances that, when viewed in the aggregate, essentially exclude convicted sex offenders from the entire town).

218. *See id.*; *see also* Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1246 & n.88 (2009) (citing Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005)) ("[R]egistrants are effectively zoned out of Des Moines, Iowa, because overlapping distance markers cover almost the entire city.").

219. *See* Jones v. Cunningham, 371 U.S. 236, 240 (1963).

220. Although the *Wilson* majority accurately states that all convicted felons suffer from collateral consequences, doing so generalizes the various types of collateral consequences as falling conveniently into one broad category, thus placing minor consequences on the same level as severe consequences. *See Wilson*, 689 F.3d at 338–39.

221. *Id.* at 341 (Wynn, J., dissenting) (quoting *Jones*, 371 U.S. at 243).

222. As demonstrated in the *Wilson* majority opinion, simply categorizing sex offender registration requirements as collateral consequences essentially bars petitioners (at least those who have completed their sentences) from successfully arguing that they are in custody under § 2254, regardless of the severity of the registration requirements. *See id.* at 337 (majority opinion).

a perverse incentive for petitioners in Wilson's situation: potentially, these individuals may be forced to purposely violate their registration requirements simply to fulfill the custody requirement imposed by the habeas statutes.[223] Given that collateral consequences are increasing in frequency and severity, thus blurring the formerly clear distinction between them and direct consequences,[224] courts should dispense with the direct versus collateral consequence test as a means for determining whether an individual is in custody.[225] Instead, courts should apply a test that more aptly promotes the purpose of the writ of habeas corpus: to "examine and determine the right of any individual [unlawfully] restrained of his personal liberty to be discharged from such restraint."[226] Judge Wynn's "innocence and redressability" exception provides an attractive option for achieving this purpose.

First, to ensure that the courts do not "read the 'in custody' requirement out of the [habeas] statute," courts should still initially ask whether the consequences of the challenged conviction restrain a petitioner's liberty enough to invoke the Great Writ.[227] Though courts today already engage in this fact-based inquiry, this Recent Development suggests that courts refrain from labeling restraints as direct or collateral consequences, as this glosses over the actual encroachment of the petitioner's rights.[228] After determining that the petitioner's rights are adequately restrained—perhaps by

223. *See id.* at 341 n.2 (Wynn, J., dissenting).

224. *See* Roberts, *supra* note 25, at 680 ("It is thus far from clear exactly where the line between direct and collateral consequences falls. At a minimum, the actual term of jail or prison time imposed by the court, as well as any fines or term of probation, fall on the 'direct' side of the line. Beyond that, the convoluted jurisprudence of what constitutes a collateral consequence in each particular jurisdiction governs." (citation omitted)).

225. To avoid this complicated situation, attorneys could, of course, file a federal habeas petition while their client is still incarcerated and then move to stay and abey the petition to allow the exhaustion of state remedies (which is required by § 2254(b)(1)). This approach, however, ignores the practicalities of the already over-burdened legal system. First, this approach raises the possibility of increasing the already high cost of hiring an attorney. And second, this approach could possibly result in attorneys pre-emptively filing habeas petitions for *every* incarcerated client, perhaps only to avoid malpractice liability should exonerating evidence later appear. Filing habeas petitions in such a manner could overwhelm an already burdened court system and could ultimately diminish the integrity of the writ of habeas corpus itself.

226. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 295 (1904) (Brewer, J., concurring).

227. Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam).

228. *See supra* Part I.B. This Recent Development argues that sex offender registration requirements, at least those that require in-person registration, impose sufficient restraints on a petitioner's rights so as to make available the writ of habeas corpus (assuming the petitioner "passes" the two elements of the "innocence and redressability" test).

appropriately using the "genuine restraint on [physical] liberty" rationale in *Williamson*[229]—courts should then focus on the "redressability" aspect of Judge Wynn's "innocence and redressability" exception. Thus, courts should ask whether "a habeas petition" is the "only forum available for review of the ... conviction."[230] This inquiry would preserve the exhaustion requirement of § 2254 by forcing petitioners to seek all available state remedies before resorting to an application for a writ of habeas corpus.[231]

The next step of the "innocence and redressability" inquiry would ask whether the habeas petitioner has "obtain[ed] compelling evidence" of innocence for "the crime for which he was convicted."[232] Judge Wynn aptly concluded that post-*Maleng* Supreme Court decisions explicitly provided for such an exception to the apparently strict habeas in custody requirement.[233] Presumably, the purpose of the writ of habeas corpus is to free individuals whose liberty is unlawfully restrained.[234] Asking the basic question of whether a petitioner is innocent of the crime that restrains his or her liberty would promote the rationale of the Great Writ far more effectively than disposing of a habeas application simply because the petitioner's conviction only imposes "collateral" consequences.

CONCLUSION

The *Wilson* majority's focus on the direct versus collateral consequence dichotomy in habeas jurisprudence fails to adequately promote the central purpose of the Great Writ. Especially in the case of sex offenders, the "collateral" consequences of a conviction can

229. *See* Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) ("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.").

230. *See* Wilson v. Flaherty, 689 F.3d 332, 343 (4th Cir. 2012) (Wynn, J., dissenting) (quoting Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 406 (2001)).

231. *See* 28 U.S.C. § 2254(b)–(c) (2012) (exhaustion requirement); *see also supra* note 144 (discussing the "exhaustion doctrine").

232. *See Wilson*, 689 F.3d at 344 (Wynn, J., dissenting) (quoting Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 405 (2001)). This question would only apply after the window for any direct or collateral challenge to the conviction had already passed. *See* Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 405 (2001). This condition, however, is appropriately addressed by the "redressability" requirement of the test. *See supra* notes 230–31 and accompanying text.

233. *See Wilson*, 689 F.3d at 343–44 (citing Daniels v. United States, 532 U.S. 374, 384 (2001); *Coss*, 532 U.S. at 405); *supra* Part III.A.

234. *See* SOKOL, *supra* note 8, at 30.

adversely affect an individual far longer than the "direct" consequences of the sentence itself.[235] Thus, under contemporary jurisprudence, individuals such as Eric Wilson—who is "almost certainly innocent of the sex offense[]" conviction[236]—face the possibility of being labeled a sex offender without having any means by which to challenge the conviction.[237]

Instead of focusing its § 2254 custody requirement analysis on the direct versus collateral consequence dichotomy, the *Wilson* majority should have adopted Judge Wynn's "innocence and redressability" exception. This exception does not diminish courts' necessary fact-based exploration of whether the consequences of a conviction sufficiently restrain a petitioner's personal liberty. Rather, by promoting the "innocence and redressability" exception, this Recent Development seeks to underscore the fact that the *Wilson* majority's—and many other courts'—narrow focus on the *category* of consequence a petitioner experiences fails to adequately promote the central purpose of the writ of habeas corpus—to "protect[] ... individuals against erosion of their right to be free from wrongful restraints upon their liberty."[238] At the very least, the "innocence and redressability" exception would allow Eric Wilson an opportunity to challenge his rape conviction; the simple notion of justice compels as much.[239]

J. CLAY DOUGLAS**

235. *See Wilson*, 689 F.3d at 341 ("For the duration of his life ... Wilson will be required to regularly report ... to the police and [be] prevented from being present in any location generally frequented by children—even though he is almost certainly innocent of the sex offenses that would normally require such measures.").

236. *Id.*

237. As already acknowledged *supra* note 174, although the *Wilson* majority claims that Wilson could invoke a state claim of *coram nobis*, Judge Wynn pointed out that "Virginia has limited the reach of this writ to the correction of clerical errors." *See Wilson*, 689 F.3d at 345 n.4.

238. Jones v. Cunningham, 371 U.S. 236, 243 (1963). Moreover, adoption of Judge Wynn's test could help avoid one commentator's suggestion that Congress amend the habeas statutes. *See* Moyer, *supra* note 13, at 802.

239. The Supreme Court denied Wilson's petition for writ of certiorari on June 24, 2013. Wilson v. Flaherty, 133 S. Ct. 2853 (2013).

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