IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 110523

E.C.,

Appellant,

v.

VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Appellee.

BRIEF OF APPELLEE

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VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from a December 18, 2010, judgment of the Circuit Court of Stafford County denying E.C.'s petition for a writ of habeas corpus. E.C., upon his guilty pleas, was found guilty of rape and burglary in the Juvenile and Domestic Relations Court of Stafford County on September

19, 2007. He was committed to the Department of Juvenile Justice for an indeterminate time, and spent approximately 17 months in the department's custody before being paroled on February 25, 2009. He filed a habeas corpus petition in the circuit court on August 18, 2009. He was discharged from parole on August 24, 2009. The circuit court entered an order on December 18, 2010, granting the respondent's motion to dismiss. This Court on June 27, 2011 granted an appeal on the assignments of error below.

E.C.'S ASSIGNMENTS OF ERROR

1. **The circuit court erred in holding that it lacked jurisdiction to consider E.C.s properly filed petition for a writ of habeas corpus.**

2. **The circuit court erred in holding that the requirement of sex offender registration does not constitute detention, confinement or custody for purposes of filing a petition for a writ of habeas corpus.**

3. **The circuit court erred in dismissing E.C.'s petition for a writ of habeas corpus as moot.**

STATEMENT OF FACTS

The issues before the Court in this case are defined by the order of the circuit court, which dismissed the petition for a writ of habeas corpus on two grounds. The circuit court hearing on October 28, 2010 "was limited to the

questions whether this Court has jurisdiction to entertain the case, and whether the case is moot." (A 332).

Responding to the victim's complaint on June 4, 2007, police arrived shortly after the offenses and arrested E.C. (hereinafter, "petitioner") for rape, breaking and entering, and abduction. (A 107). The Commonwealth moved to transfer the case to the circuit court on June 18, 2007. (A 114-115). At the adjudication hearing on August 22, 2007, the petitioner appeared with appointed counsel and entered guilty pleas to rape and burglary; the Commonwealth then waived transfer to the circuit court and moved to *nolle prosequi* the abduction charge. (A 108-110). [1]

At the disposition hearing held on September 19, 2007, the court sentenced the petitioner to be committed to the Department of Juvenile Justice (hereinafter "DJJ"), with a review hearing set for November 19, 2007.

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[1]The petitioner begins his brief with the assertion that he "is innocent" (Def. Br. 1), and goes on, in his statement of facts, to set out a self-serving narrative in support of that claim, which he repeats at intervals throughout the brief. He has also included in his brief various allegations against trial counsel. These claims are wholly unrelated to his current assignments of error and thus entirely out of place. However, to avoid any misimpression they might create, it must be pointed out that police charged petitioner based upon their contemporaneous interviews with him and the victim (A 150), the petitioner admitted the commission of the offenses to counsel (166-167), and the purported "recantation" by the victim appears to have been orchestrated by her mother. (A 40-41). Moreover, claims of innocence are not cognizable on habeas review. *Lovitt v. Warden*, 266 Va. 216, 259, 585 S.E.2d 801, 822 (2003).

(A 117-119). At the November 19, 2007 hearing, the court reaffirmed the petitioner's indeterminate commitment to DJJ. (A 125). The petitioner was paroled to the court services unit for Orange County on February 25, 2009. (A 179).

The petitioner, by counsel, filed his petition for a writ of habeas corpus on August 18, 2009. Petitioner was discharged from parole on August 24, 2009, and thereafter was no longer subject to any form of custody or detention on the underlying adjudications. (A 180). The court services unit actually had been prepared to discharge the petitioner from parole before he filed the habeas petition, but was contacted by phone by one of petitioner's attorneys "who requested that we delay his release to allow them the opportunity to file a document." Consequently his release was delayed, "no more than two weeks," until it was confirmed that the filing had occurred. (A 296, Affidavit of Martha D. Carroll). [2]

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[2]The nature of the petitioner's "confinement" at the time of filing itself is in issue, as it appears he manipulated the timing of his release from parole in an attempt to maintain the court's jurisdiction. Following a second call from petitioner's counsel indicating they had made the filing, the director signed the parole release on August 24, 2009. (A 296). Thus, the petitioner's "detention" at the time the petition was filed was *by his own request*. *Compare White v. Commonwealth*, 37 Va. App. 658, 666-667, 561 S.E.2d 12, 16 (2002), holding that a defendant was barred from invoking speedy trial protections where he remained in "custody" only because he refused to endorse a standard recognizance bond.

After the initial petition and motion to dismiss, the parties filed several additional pleadings, and the issues narrowed to the threshold determinations of (1) whether the trial court had jurisdiction, and (2) if so, whether the case was moot.[3] The trial court's rulings on those matters are now before this Court.

ARGUMENT

1. The trial court correctly dismissed the petition for a writ of habeas corpus upon the ground that it was without jurisdiction to entertain the petition where the petitioner was not under any form of detention or custody.

Standard of Review

This Court review questions of law *de novo*, including those situations where there is a mixed question of law and fact. *Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011). Issues of statutory interpretation are reviewed *de novo*, and the Court is bound by the plain meaning of the statute when the language of the statute is plain and unambiguous. *Id., citing Conyers v. Martial Arts World of Richmond, Inc*., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) .

[3]Following the initial pleadings, the petitioner filed his "Memorandum in Opposition to the Motion to Dismiss," respondent filed his "Response to the Petitioner's Memorandum in Opposition to the Motion to Dismiss" and petitioner filed "Petitioner's Surrereply in Opposition to the Motion to Dismiss."

Analysis

This underlying proceeding was controlled by Virginia Code § 8.01-654, et seq., which sets out the Virginia statutory scheme pertaining to habeas corpus. These Code sections provide that relief may be granted upon a showing by the petitioner "that he is *detained* without lawful authority," Code § 8.01-654(A)(1) (emphasis added), and apply to "a petitioner *held* under criminal process." Code § 8.01-654(B)(1) (emphasis added). The statute, after the 1968 amendments, provided that a petitioner also may "allege *detention* without lawful authority" "although the sentence imposed for such conviction is *suspended* or is to be served *subsequently*." Code § 8.01-654(B)(3) (emphasis added). Virginia case law interpreting the statutes has consistently shown that courts have no jurisdiction to consider a writ of habeas corpus, absent either current incarceration, or the threat of future incarceration inherent in parole, or a suspended or future sentence.

Most recently, in *Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009), this Court stated that

> Code § 8.01-654(A)(1) allows a petitioner to challenge the lawfulness of the entire duration of his or her *detention* so long as an order entered in the petitioner's favor will result in a court order that, on its face and standing alone, will directly impact the *duration of the petitioner's* ***confinement*.**

Id. at 693, 685 S.E.2d at 652 (emphasis added). While the *Carroll* decision dispensed with the former requirement that an order in the petitioner's favor must result in his "immediate release" from detention, it also forcefully reaffirmed the statutory requirement that a prisoner must be able to show he "*is detained* without lawful authority" in order to maintain the suit. *Carroll*, 278 Va. at 693, 685 S.E.2d at 652; Code § 8.01-654(A)(1). The *Carroll* opinion stated:

> Our holding does not extend ***habeas corpus jurisdiction*** to cases in which an order entered in the petitioner's favor will only give rise to a *possibility* of reducing the ***petitioner's term of imprisonment***. Thus, disputes which only tangentially affect an inmate's confinement . . . are not proper matters for ***habeas corpus jurisdiction*** because an order entered in the petitioner's favor in those cases will not result in an order interpreting convictions or sentences that, on its face and standing alone, will directly impact ***the duration of the petitioner's sentence***.

Carroll, 278 Va. at 694, 685 S.E.2d at 652, citing *Virginia Parole Board v. Wilkins*, 255 Va. 419, 420-21, 498 S.E.2d 695, 695 (1998). *Carroll* thus makes clear that under the Virginia statute, habeas corpus ***jurisdiction*** is dependent upon the existence of a sentence of **imprisonment**. To put it another way, although the possibility of a petitioner's "immediate release" is not required for habeas corpus jurisdiction, "detention" recognized by the statute is. "[T]he purpose and scope of the writ of habeas corpus . . . is to

test the legality of the ***prisoner's detention***." *West v. Director, Dep't of Corrs*., 273 Va. 56, 66, 639 S.E.2d 190, 197 (2007). "The office of the writ of *habeas corpus* is not to determine the guilt or innocence of the prisoner. The ***only issue*** which it presents is whether or not the prisoner is restrained of his liberty by due process of law." *Lacey v. Palmer, Sheriff,* 93 Va. 159, 163, 24 S.E. 930, 931 (1896) (emphasis added).

At the time the trial court entered the order contested by the petitioner, he was not a prisoner, and was under **no** form of detention. This lack of custody rendered the trial court without jurisdiction.

Relying on *Laing v. Commonwealth*, 205 Va. 511, 137 S.E.2d 896 (1964), the petitioner contends that because the trial court had jurisdiction at the time the petition was filed, its jurisdiction survived the termination of his confinement. *Laing* states that "it is axiomatic that when a court acquires jurisdiction of the subject matter and the person, it retains jurisdiction until the matter before it has been fully adjudicated." Id. at 514, 137 S.E.2d at 899. *Laing*, however, as not a habeas corpus proceeding, and this Court has long held that in habeas litigation, statutory custody is necessary to the *jurisdiction* of the court; when confinement ceases, habeas jurisdiction is extinguished. In such cases, dismissal for lack of jurisdiction results in the case being "fully adjudicated."

In *Blair v. Peyton*, 210 Va. 416, 171 S.E.2d 690 (1970), this Court ruled the release of the habeas petitioner from custody during the pendency of the case extinguished its jurisdiction in the matter. Blair had been convicted of offenses committed in Norfolk and Culpeper County. This Court stated that when he filed his petition, Blair had served the sentences on the Norfolk convictions, but he remained in custody on the Culpeper sentences, which he began serving after the Norfolk sentences. *Id.* at 416-417, 171 S.E.2d 690. However, prior to argument in this Court, Blair was released from custody altogether. *Id.*

This Court's ruling in *Blair* indicates that it considered the petitioner's continuing custody on either of the sentences sufficient to support its jurisdiction over his claim. This holding under the Virginia statute accorded with the decision 18 months earlier in *Peyton v. Rowe*, 391 U.S. 54 (1968) in which "the Supreme Court held that a petitioner serving *consecutive* sentences is 'in custody' under *any of the sentences* for the purposes of the federal habeas corpus statute." C*arroll*, 278 Va. at 694, 685 S.E.2d at 652 (emphasis added), citing *Rowe* at 67. This Court held, however, that Blair's unconditional release ended its jurisdiction.

> The petitioner completed serving the Culpeper sentences and was *released from custody prior to the time his case was argued before this court*. He says, however, that we should

> retain jurisdiction and void the Norfolk convictions so that he will not suffer the civil disabilities resulting therefrom.
>
> Our habeas corpus statutes are designed to provide relief in the form of the "discharge" (Code § 8-603) from the "person in whose custody" (Code § 8-598) a petitioner is "detained without lawful authority" (Code § 8-596). Thus, our statutes are unlike the Federal statute applied in *Carafas v. LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968), upon which the petitioner relies, and the case is not controlling here.
>
> The petitioner is **no longer detained** and there is no custody from which to discharge him. To pass upon the merits of his claims would be to render an advisory opinion — a function our habeas corpus statutes neither provide for nor permit. This court, therefore, is **without jurisdiction further to entertain** the case, and the appeal will be dismissed.

Blair, 210 Va. at 417, 171 S.E.2d at 691 (emphasis added). Although the ruling indicated the Court would have considered the merits of the claim so long as Blair was in custody on either sentence, it held that his unconditional release while the argument was pending divested it of habeas jurisdiction. *Id.*

As this Court stated in *Ghameshlouy v. Commonwealth*, 279 Va. 379, 689 S.E.2d 698 (2010), "subject matter jurisdiction, perhaps best understood as the 'potential' jurisdiction of a court, is the authority granted to it by constitution or statute over a specified class of cases or controversies, and becomes 'active' jurisdiction, the power *to adjudicate* a particular case upon the merits, only when various elements are present." *Id.* at 388-89, 689

S.E.2d at 702-703 (emphasis added), quoting *Board of Supervisors v. Board of Zoning Appeals*, 271 Va. 336, 343-44 & n.2, 626 S.E.2d 374, 379 & n.2 (2006). To exercise active jurisdiction "*conditions of fact* must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court *to proceed to judgment or decree*." *Id.* *Blair* stands for the proposition that a requisite condition of fact to proceed to judgment in a habeas proceeding is the respondent's custody of the petitioner. To put it another way, because the legality of custody is the subject matter of Virginia habeas review, when custody no longer exists, the only adjudication available to a court is dismissal.

Because in the case at bar, as in *Blair*, the petitioner was no longer detained, "there [was] no custody from which to discharge him" and the trial court was "without ***jurisdiction*** to ***further*** entertain the case." *Id.* at 417, 171 S.E.2d at 691 (emphasis added).

While he has not addressed the holding of *Blair* at all on brief, the petitioner asserts that this Court's subsequent ruling in *Moore v. Peyton*, 211 Va. 119, 176 S.E.2d 427 (1970) supports his claim that habeas jurisdiction survives the termination of custody. The petitioner discounts the language in *Moore* that "[a] court does not have jurisdiction to determine the validity of a sentence under which the prisoner *is not being detained*." Id. (emphasis

added). Rather, he points to a later passage in *Moore* stating the Virginia habeas corpus statute "does not extend jurisdiction to the courts of Virginia to permit a determination of the validity of a sentence *fully served before the proceeding for a writ of habeas corpus is instituted*." Id. at 120, 176 S.E.2d 427 (emphasis added).

From the latter passage, the petitioner argues that *Moore* also stands for the *variant* proposition that Virginia courts do have jurisdiction to determine the validity of a sentence that has been completed, if a petition was filed prior to its completion. It is certainly clear from *Moore,* and a host of other cases, that if a sentence is fully served before the *institution* of the suit, there is no jurisdiction. However, the *Moore* Court was not called upon determine the jurisdictional effect of the petitioner's unconditional release *after* a petition was filed, but *before* it was adjudicated. That scenario was not present in *Moore*, and determination of that issue was not required to decide the case. There was no need to do so because that issue had been decided in *Blair* less than eight months earlier. If this Court had intended for its holding in *Moore* to overrule *Blair,* it would have done so explicitly. It did

not, and *Blair* remains the controlling law.[4]

In addition to *Blair*'s holding, the Virginia statute and this Court's longstanding jurisprudence construing it make clear that habeas corpus litigation is restricted solely to the determination of the lawfulness of the petitioner's detention, and that the legality of detention is the sole subject matter of Virginia habeas review. The *jurisdiction* of our courts to entertain such litigation is dependent upon their capacity to enter an order that, standing alone, will impact the duration of a petitioner's imprisonment. *Carroll*, 278 Va. at 694, 685 S.E.2d at 652. Because an order achieving that result was not possible after the petitioner's unconditional release, the trial court correctly held it lacked jurisdiction.

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[4] The circuit court cases relied upon by the petitioner are unpersuasive upon the issue of jurisdiction. *Haley v. Angelone*, 60 Va. Cir. 429 (2002) found jurisdiction was proper under *Moore* without addressing this Court's holding in *Blair. Kline v. Commonwealth, No. CL00057841, 2010 Va.Cir. LEXIS 70 (June 21, 2010)* found jurisdiction was proper under *Laing*, but similarly did not address this Court's holding in *Blair*. *Ibrahim* v. *Superintendent* (2011 Va. Cir. 81 (May 16, 2011) found the petitioner was "in custody, albeit ***federal*** *custody*, as a result of his conviction" and that this custody supported jurisdiction. *Id.* at 11 (emphasis added). The *Ibrahim* court wholly misconstrued *Blair*, stating that "***mootness*** was raised" in the case, and that this "Court determined the matter was moot," despite the fact that mootness was never mentioned in the opinion, and this Court ruled that Blair's release left it without ***jurisdiction*** to entertain the case.

2. The trial court correctly ruled the requirement of sex offender registration does not constitute detention, confinement, or custody such as to permit Virginia habeas corpus review.

Standard of Review

This Court review questions of law *de novo*, including those situations where there is a mixed question of law and fact. *Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011). Issues of statutory interpretation are reviewed *de novo*, and the Court is bound by the plain meaning of the statute when the language of the statute is plain and unambiguous. *Id., citing Conyers v. Martial Arts World of Richmond, Inc*., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) .

Analysis

To avoid dismissal due to the lack of custody, the petitioner next contends that the requirement that he comply with the regulations of the Virginia Sex Offender and Crimes Against Minors Registry, Code § 9.1-900 *et seq.*, <u>itself</u> constitutes "detention, confinement, or custody." Thus, he argues, compliance with sex offender registration alone is sufficient to support habeas corpus review. (Def. Br. 18-19). As noted above, however, the plain language of the statute requires ***custody*** to support habeas corpus review. In *Carroll,* this Court noted that the statutory phrase "detained

without lawful authority" only allows a challenge that could "directly impact the duration of the petitioner's ***confinement.*** " *Id.* at 693, 685 S.E.2d at 652. *Carroll* requires that the court be able to enter an order that will "give rise to a *possibility* of reducing the petitioner's term of ***imprisonment.*** *" Id.* at 693, 685 S.E.2d at 652 (emphasis added).

Althought by statute the imprisonment may be suspended or future incarceration, it is nevertheless evident the statute refers a form of detention pursuant to a sentence of *imprisonment*, rather than a collateral, post-release requirement to comply with a civil, regulatory scheme. The civil registration requirement obviously does not equate to actual detention; it has been held "not penal" in nature, but "solely remedial." *Kitze v. Commonwealth*, 23 Va. App. 213, 217, 475 S.E.2d 830, 832 (1996) (decided under predecessor statute § 19.2-298.1). *See also McCabe v. Commonwealth*, 274 Va. 558, 567, 650 S.E.2d 508, 512 (2007) (referring to Code § 9.1-902 as part of "a civil registry scheme"). The petitioner's desperate attempt to equate sex offender registration with physical imprisonment flies in the face of reality.

This Court has long held that mere collateral consequences of a conviction will not provide jurisdiction for habeas corpus review. Indeed, in *Blair* the petitioner specifically invited this Court to graft onto our statute the broader scope of the ***federal*** habeas statute discussed by the United

States Supreme Court in *Carafas*. *Blair*, 210 Va. at 417, 171 S.E.2d 691. Recognizing that the Supreme Court was construing a completely different statute in *Carafas*, this Court pointedly declined, holding that "[o]ur habeas corpus statutes are designed to provide relief in the form of the 'discharge.'" *Blair,* 210 Va. at 417, 171 S.E.2d at 691. This Court rejected the petitioner's request to *retain* jurisdiction because "our statutes ***are unlike*** the Federal statute applied in *Carafas*" and thus "the case is not controlling here." *Id.*

Blair had argued that this Court "should retain jurisdiction" "so that he will not suffer the civil disabilities" resulting from the conviction even though he had been released from custody. *Id. Carafas* specifically relied upon language present only in the *federal* habeas statute referring to "release from custody ***or other remedy***." *Carafas* at 239. Our statute provides *only* for discharge from custody, and provides for no "*other remedy.*" Code § 8.01-654. Consequently, the petitioner's extensive reliance upon *Carafas* in the case at bar is misplaced.

An illustration is provided by *McClenny v. Murray*, 246 Va. 132, 431 S.E.2d 330 (1993), where this Court considered a case in which the petitioner had been sentenced to $7500 in fines, three years *supervised* probation, 180 hours of community service, and DNA screening, but received no active or suspended incarceration. *McClenny* at 133, 431 S.E.2d at 331.

This Court rejected his claims that "actual physical restraint" was no longer a requirement for habeas jurisdiction, and that the collateral consequences of his conviction would suffice. *Id.* The *McClenny* opinion held that the petitioner's

> writ of habeas corpus could not test the legality of any ***incarceration*** because he was not sentenced to any term of incarceration, but only fined and placed on supervised probation. Thus, he **cannot show** that he is ***"detained" within the intendment of Code § 8.01-654(A).***

Id. (emphasis added).

McClenny is of importance to the issues in the instant case in several respects. Obviously, it confirms that detention is a requirement of habeas jurisdiction, and also that *confinement* equates to *incarceration*. Significant to the issue of whether sex offender registration could be a substitute for actual custody, *McClenny* held that a term of *supervised* probation, even in conjunction with fines, DNA testing and 180 hours of community service, ***did not*** constitute custody supporting habeas review.[5] Given that ruling,

[5] If McClenny had violated his probation, the sanction would have been to impose the suspended fines; there was no suspended incarcertation.

certainly the periodic self-reporting requirements for sex offender registration are similarly insufficient.[6]

While Virginia appellate courts have not specifically addressed whether the requirement to register as sex offender equates to detention under Code § 8.01-654, the Virginia case law just discussed amply demonstrates that it does not. In addition, many other jurisdictions have explicitly addressed the issue under similar statutes, and have uniformly held that habeas review does not lie.

Sex offender registration is a relatively new development. Congress in 1994 passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, "which conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith v. Doe*, 538 U.S. 84, 89 (2003). By 1996, every state, the federal government, and the District of Columbia all had enacted some form of "Megan's Law," which was so named in remembrance of a 7-year-old New Jersey girl who was sexually assaulted and murdered by a neighbor who had prior convictions for sex offenses that were unknown to her family. *Id.* Though it has not addressed the specific

[6] The requirements include re-registration every 90 days for three years, followed by annual registration, and being photographed every two years. Registrants are not under supervision.

issue of whether sex offender registration amounts to custody for federal habeas corpus jurisdiction, in *Smith* the Supreme Court held that the Alaska Sex Offender Registration Act was not a retroactive punishment as applied to persons convicted of sex crimes *prior* to its enactment because "the intent of the Alaska Legislature was to create a civil, nonpunitive scheme," and the reporting requirements "do not impose punitive restraints." *Id.* at 96, 101-102.

Numerous federal circuit court cases have explicitly addressed the issue of whether sex offender registration constitutes custody for habeas corpus jurisdiction, and uniformly have found it does not. In *Leslie v. Randle*, 296 F.3d 518 (6th Cir. 2002), the Sixth Circuit noted that the Ohio Supreme Court had held Ohio's registration statute was remedial rather than punitive in nature. *Id.* at 522, citing *State v. Cook*, 83 Ohio St. 3d 404, 700 N.E.2d 570, 585 (Ohio 1998). The court found that the very stringent requirements of the statute were properly categorized as collateral effects of the conviction, rather than a restraint on liberty that would support habeas jurisdiction. *Id.* at 522-523. Consequently, the court held the petitioner's obligation to comply with sex offender registration did not satisfy the custody requirement for habeas corpus review. *Id.*

In *Williamson v. Gregoire*, 151 F.3d 1180, 1184-1185 (9th Cir. 1999) the Ninth Circuit held that Washington's sex offender registration law,

despite the fact that any violation could result in incarceration, did not by itself "place Williamson 'in custody' for purposes of federal habeas corpus"); s*ee also, Henry v. Lundgren*, 164 F.3d 1240, 1241-1242 (9th Cir. 1999) (where petitioner had been released and discharged from parole, registration requirements under California's sex offender registration law did not render him in custody for habeas corpus); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (same holding in regard to Oregon's sex offender registration law).

In *Virsnieks v. Smith*, 521 F.3d 707 (7th Cir. 2008) the Seventh Circuit ruled that registration, including the threat of imprisonment for non-compliance, does not constitute custody for habeas review, noting that "courts have rejected uniformly the argument that a challenge to a sentence of registration under a sexual offender statute is cognizable in habeas." *See also Mitchell v. United States*, 977 A.2d 959, 967 (D.C. App. 2009) (sex offender registration "amounts to a collateral consequence of conviction that is not in itself sufficient to render an individual in custody.").

In recent years, numerous federal district courts also have addressed the issue of whether compliance with sex offender registration statutes constitutes custody for purposes of federal habeas corpus, and they also uniformly have determined that it does not. In *Rodriguez v. Attorney*

General, Civil Action No. 10 Civ. 3868, 2011 U.S. Dist. LEXIS 16911 (S.D.N.Y. Feb. 15, 2011), the magistrate judge determined the petitioner did not demonstrate he was in custody for purposes of federal habeas corpus review based on the requirement that he comply with New York's sex offender statute.[7] *See id.* at * 27. The magistrate judge in *Rodriguez*, included an extensive survey of the federal district courts and concluded:

> It appears that every federal district court that has considered the issue has reached the same conclusion—that the requirements of state sex offender laws, many more severe than the requirements of the Washington State law at issue in *Williamson* [*v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998)], constitute mere collateral consequences of a conviction and not restraints on a petitioner's liberty sufficient to render a petitioner "in custody" under Section 2254(a).

Id. at * 21.[8]

In *Frazier v. Colorado*, Civil Action No. 08-cv-02427, 2010 U.S. Dist. LEXIS 84957 (D. Colo. July 16, 2010), *appeal dismissed*, 405 Fed. Appx. 276 (10th Cir. 2010), the district judge stated that "all of the circuit courts to consider the issue have determined that the burdens imposed by a state sex offender registration statute do not meet the custody requirement of the

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[7] Because Rodriguez was a level 3 offender, he was required to personally verify his address with local law enforcement every 90 days.

[8] The district judge adopted the magistrate judge's report and recommendation. *See Rodriguez v. Attorney General*, Civil Action No. 10 Civ. 3868, 2011 U.S. Dist. LEXIS 99490 (S.D.N.Y. Sept. 2, 2011).

habeas corpus statutes. . . . Federal district court decisions are in accord." *Id.* at * 9.

In *Williams v. District Attorney of Allegheny County, et. al*, Civil Action No. 10-353, 2010 U.S. Dist. LEXIS 115505 (W.D. Pa. Oct. 29, 2010), the magistrate judge noted she had not found "a single case in which a court found that a habeas petitioner satisfied the § 2254 'in custody' requirement, simply because he was subject to the requirements of a sex offender registration law." *Id.* at * 25. *See also Davis v. Nassau County*, 524 F. Supp 2d 182, 188 (E.D.N.Y. 2007); *Ruvalcaba v. Cal. Supreme Court*, Case No. 10-551, 2010 U.S. Dist. LEXIS 48764 (C.D.Ca. 2010); *Lannet v. Frank*, 2004 U.S. Dist. 15566 (constraints of Wisconsin's sex offender registration program do not satisfy the "in custody" requirement for habeas jurisdiction); *Hurley v. Quarterman*, Civil Action No. 3:08-CV-968-L, 2008 U.S. Dist. LEXIS 123193 (N.D. Tex. Oct. 29, 2008), at * 5 ("The requirements imposed on sex offenders under Texas law are not sufficiently restrictive to constitute a form of custody").

In the case of *In Re Stier*, 152 Cal. App. 4th 63, 82-83 (2007) the California Court of Appeal stated:

> Although respondent asserted in his petition that "his liberty is unlawfully restrained in violation of the laws of the State of California," for purposes of proving entitlement to habeas

> corpus relief in the present case, he is not. Respondent's allegation that he is "under the constructive custody of the State of California because if he fails to register, he is subject to criminal prosecution" does not "satisfy the habeas corpus jurisdictional requirements under California law." (*In re Azurin, supra*, 87 Cal. App. 4th 20, 25.) Since respondent "is not in prison or on probation or parole or otherwise in constructive custody, the remedy of habeas corpus is not available to him—and it is immaterial that lingering noncustodial collateral consequences are still attached to his conviction." (*Mendez v. Superior Court* (2001) 87 Cal. App. 4th 791, 796 [104 Cal. Rptr. 2d 839].) Neither the prospect of the loss of respondent's medical license nor the speculative risk of future custody in the event he fails to register as a sex offender proves constructive custody as required in a habeas corpus action. (See *id.* at p. 801; *In re Azurin, supra*, at pp. 25–26; *Williams v. Department of Motor Vehicles, supra*, 2 Cal. App. 3d 949, 951–952.) The "states' sexual offender registration laws do not render a habeas petitioner 'in custody' because they are a collateral consequence of conviction that do not impose a severe restraint on an individual's liberty. [Citations.]" (*Resendiz v. Kovensky* (9th Cir. 2005) 416 F.3d 952, 959.) "[T]he registration requirement is merely a collateral consequence of conviction that is 'not [itself] sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.' [Citation.]"

Id. at 82-83.

However burdensome civil sex offender registration requirements may be, it is obvious that such requirements are not the same thing as detention, incarceration, or confinement. To the contrary, registrants are permitted to self-report, and have freedom of movement both within and without the state. These facts, the above cited authorities, and the longstanding adherence of this Court to the rule that *detention* is necessary to support habeas corpus

make it evident that compliance with civil sex offender registration does not satisfy the custody requirement of Code § 8.01-654.

If the legislature had intended sex offender registration to satisfy the requirement for habeas review, it could have said so in the statute creating the registry, or could have amended the habeas statute as it did to provide habeas review for suspended and future sentences. The legislature did not do so, and it is not an appropriate function of this Court to rewrite the statute to achieve that end. The trial court's ruling that sex offender registration does not constitute custody for habeas corpus review should be upheld.

3. The trial court correctly dismissed the petition as moot.

Standard of Review

This Court review questions of law *de novo*, including those situations where there is a mixed question of law and fact. *Morris*, 281 Va. at 76, 705 S.E.2d at 505 (2011). Issues of statutory interpretation are reviewed *de novo*, and the Court is bound by the plain meaning of the statute when the language of the statute is plain and unambiguous. *Id.*

Analysis

As noted in arguments 1 and 2 above, the *sole* remedy under the Virginia statute is discharge from ***custody***. Code §§ 8.01-654, -662; *Carroll*,

278 Va. 694-695, 685 S.E.2d at 652-653; *West*, 273 Va. 56, 66, 639 S.E.2d 190, 197; *McClenny*, 246 Va. at 134-135, 431 S.E.2d 330-331; *Blair*, 210 Va. at 417, 171 S.E.2d at 691. It therefore is evident that where, as here, a petitioner is not in custody or detention, no relief is available under the Virginia habeas corpus statute.

This Court has held that when

> there is no actual controversy between the litigants, or that, if it once existed it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, *but to dismiss the case*. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and ***where no relief can be afforded*.** Only real controversies and existing rights are entitled to invoke the exercise of their powers.

Hankins v. Town of Virginia Beach, 182 Va. 642, 643-644, 29 S.E.2d 831, 832 (1944) (emphasis added). Pursuant to the plain language of the statute, the **only** matter that is properly the subject of controversy in habeas litigation is the legality of the *custody* of the petitioner. Code § 8.01-654; *McClenny* at 133, 431 S.E.2d at 331.

The only relief available to a habeas petitioner is the entry of an order that in itself would favorably affect the **duration of his confinement**. *Carroll* at 694, 685 S.E.2d at 652. The writ "cannot be used to modify or revise a judgment of conviction." *McClenny*, 246 Va. at 134, 431 S.E.2d at

331, quoting *McDorman v. Smyth*, 187 Va. 522, 525, 47 S.E.2d 441 (1948). Supposed controversies over the collateral incidents of a conviction may not be the subject of habeas review. *Carroll*, 278 Va. 683, 694, 685 S.E.2d; *McClenny*, 246 Va. at 134, 431 S.E.2d at 331.

Nevertheless, faced with the absence of custody, the petitioner seeks simply to disregard that requirement and to move on to the question of whether his conviction should be vacated, so that "he would be removed from the sex offender registry" and be relieved of "the *collateral legal consequences* that flow from his conviction." (Def. Br. 38-39, emphasis added). To this end, the petitioner argues that this Court should apply to his case what he characterizes as "the federal standard of mootness" applied by the United States Supreme Court in *Carafas,* which he says requires only a "*substantial stake* in the judgment of conviction which survives the satisfaction of the sentence imposed on him." (Def. Br. 27).

Under Virginia law, no habeas relief survives the satisfaction of the sentence imposed. The petitioner asks this Court to reverse or abandon a fundamental component of longstanding habeas jurisprudence and to adopt a new rule, contrary to the statute, that even in the absence of custody, the existence of "ongoing 'collateral consequences'" constitutes "an active

controversy" for which a court may grant habeas relief. (Def. Br. 33).[9] The petitioner's argument, in essence, asks this Court to disregard the plain language of the Virginia statute, and to adopt in its place the federal jurisprudence developed under a differently worded federal statute. The petitioner is asking this Court to do *exactly* what it refused to do in *Blair,* that is, to afford habeas relief to a freed petitioner so he can avoid the collateral civil disabilities of his conviction. Blair similarly attempted to invoke *Carafas* as authority, but this Court held instead that "our statutes are unlike the Federal statute applied in *Carafas . . .* and the case is not controlling here." *Blair*, 210 Va. at 417, 171 S.E.2d at 691.

Revisions of law and the adoption of new legal principles to govern the rights of the parties in habeas corpus litigation is appropriately left to the legislature. This Court is bound by the plain language of the statute. *Morris*, 281 Va. at 76, 705 S.E.2d at 505. The statute provides for relief from unlawful custody only, and does not provide for relief from collateral civil disabilities.

In the instant case, even if it were deemed that the trial court had had jurisdiction, it had no capacity to grant the only relief available in the statute,

[9] The petitioner admits that the determining whether any particular "collateral consequences" are sufficient "will require case-by-case analysis" by the reviewing court. (Def. Br. 33).

because the court could not relieve the petitioner of detention that no longer existed. "When . . . an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal." *Hankins* at 644, 29 S.E.2d at 832. In the instant case, when the petitioner was unconditionally released, it became impossible for the court to afford him any further relief whatever pursuant to the statute. Consequently the trial court's dismissal for mootness should be upheld.

Response to the Brief of Amici Curiae

The amicus brief does not address the assignments of error but points to a variety of alleged faults in the Virginia juvenile justice system believed to impact on habeas review in juvenile cases generally. Many of the problems it alleges to exist did not occur in the instant case, but are said to be potential impediments in other cases. These include the inability to assert ineffective assistance of counsel on appeal (there was no appeal here), lack of counsel for habeas proceedings (the petitioner here was represented), and juveniles' unfamiliarity with habeas proceedings. The brief also makes a general attack on the quality of legal representation available to juveniles, the low pay scale for appointed attorneys, and the failure to juvenile courts to make a record of

its proceedings. It contends that juvenile convictions are inherently unreliable because the structure of juvenile law system in Virginia denies effective representation at all levels, including post-conviction.

The brief argues that, despite the petitioner in this case having been in custody for nearly two years, the fact that juveniles in general may receive short sentences is detrimental to post-conviction collateral review. This ignores the fact that an adult with a similarly short sentence is in exactly the same position. It also ignores the fact that the creation of a separate habeas corpus procedure for juveniles is a legislative prerogative. The brief as a whole seeks to make a case for a general revision of Virginia's juvenile law and habeas corpus review, propositions which, even if they were deemed warranted, are for the legislature to address rather than the courts.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 24, 2011, the required number of copies of this brief of the appellee, paper and electronic, were hand-delivered to the Clerk of this Court and three copies were mailed to Matthew L. Engle, Esquire, 580 Massie Road, Charlottesville, Virginia 22903, counsel for the appellant.

The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 29 pages.

_____
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