IN THE

Supreme Court of Virginia

RECORD NO. 110523

E. C.,

Appellant,

v.

VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Appellee.

OPENING BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Petitioner E.C. is innocent. On August 22, 2007, at the age of sixteen and at the insistence of a court-appointed defense lawyer who had done virtually no investigation in his case, E.C. pled guilty in juvenile court to charges of rape and breaking and entering. JA 108; JA 49. Had the defense attorney conducted even a modest investigation, she would have known that these crimes had never happened. Two months after E.C. entered his guilty pleas, the alleged victim fully recanted and admitted that she had invited E.C. into her home, engaged in consensual sexual activity with him, and then lied to protect herself after being caught by her mother. JA 42; JA 43. On August 18, 2009, E.C. petitioned the Circuit Court for the County of Stafford, Virginia, for a writ of habeas corpus pursuant to section 8.01-654 of the Virginia Code. JA 1. In his habeas petition, E.C. alleged that his trial attorney's performance had been constitutionally deficient and that he had been prejudiced by her failure to investigate his case and provide him competent counsel.[1]

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[1] E.C.'s habeas petition alleged, *inter alia*, that his court-appointed trial attorney did not provide him with adequate notice of the critical elements of the offenses to which he was pleading guilty, the constitutional rights he waived by pleading guilty, or the direct consequences of pleading guilty; that she failed to investigate the charges against him; and that she also failed to interview E.C. or any of the investigating officers and witnesses effectively. JA 7-35.

It is undisputed that E.C was detained at the time that he filed his habeas petition. Although he was subsequently released from parole, he continues to be listed on the Virginia Sex Offender and Crimes Against Minors Registry. JA 180; JA 119. Nonetheless, the trial court refused to consider E.C.'s claims of ineffective assistance of counsel, finding that it was stripped of jurisdiction as soon as E.C. was released from parole and, alternatively, that the case had become moot when E.C.'s parole was terminated. JA 332.

STATEMENT OF FACTS

On the afternoon of June 4, 2007, E.G., a 14-year-old girl, invited her neighbor, the petitioner E.C., a 15-year-old boy, into her home in Stafford, Virginia.[2] JA 42; JA 46; JA 50. They engaged in consensual sexual activity in her bedroom. JA 42; JA 46; JA 51. When her mother returned home and found E.C. in the house, E.G. falsely told her mother that E.C. had broken in and forced her to have sex with him. JA 43; JA 44. E.G.'s mother called 911. JA 43.

E.C. was interviewed and later arrested and charged with breaking and entering and forcible rape in the Juvenile and Domestic Relations District Court of Stafford County (hereinafter "JDR Court"). JA 51; JA 52;

[2] The record shows that both E.G. and E.C. have IQs that fall in the bottom fifth to tenth percentiles of the population. JA 2; JA 93.

JA 106; JA 107. The Commonwealth moved to transfer E.C.'s case to circuit court and try him as an adult, but offered to waive transfer if E.C. pled guilty in JDR Court. JA 114; JA 108; JA 218. E.C.'s court-appointed defense counsel, Denise Rafferty, never investigated the merits of the charges against E.C. Instead, Rafferty advised E.C.'s parents that because there was nothing she could do to defend E.C., he should plead guilty to avoid a lengthy sentence in adult prison. JA 56; JA 65. She did not advise E.C. or his parents that, as a consequence of his guilty plea, he would be required to register as a sex offender for the rest of his life. JA 53; JA 56; JA 65. Nor did she inform E.C. of the possible defenses he could pursue, because she had not conducted any investigation. JA 52; JA 53. Based upon Rafferty's insistence that he had no defense, E.C. pled guilty to avoid the lengthy adult sentence that Rafferty improperly represented as the certain outcome of proceeding to trial in circuit court. JA 53.

E.C. entered his guilty plea on August 22, 2007, and the JDR Court found him to be delinquent. JA 108. On August 29, 2007, the Commonwealth moved the JDR Court to order E.C. to register as a sex offender. JA 116. On September 19, 2007, E.C. was sentenced to the custody of the Department of Juvenile Justice (hereinafter "DJJ") and was

ordered to register as a sex offender on the Virginia Sex Offender and Crimes Against Minors Registry. JA 118.

Approximately two months later, E.G. admitted to her mother, Michelle Sousa, that she had fabricated the incident. JA 46. E.G. told her mother that she had invited E.C. into her home for a snack and then engaged in consensual sexual activity with him. JA 46. From that moment on, E.G. and her mother have worked with E.C.'s family and counsel to try to reverse E.C.'s wrongful convictions. Sousa informed Rafferty of the recantation after a meeting with independent counsel in late November, 2007. JA 47-48. After significant delay, Rafferty filed a motion to set aside the verdict and for a new trial, which was denied as untimely.[3] JA 120; JA-123.

E.C. was held in Hanover Juvenile Correctional Center for approximately seventeen months. JA 179. On February 29, 2009, DJJ released E.C. from Hanover and placed him on parole. JA 179. On August 18, 2009, JustChildren, The Innocence Project at University of Virginia School of Law, and the law firm of McGuireWoods, all appearing *pro bono*, filed a petition for a writ of habeas corpus on E.C.'s behalf. JA 1. On

[3] On June 27, 2008, E.C.'s parents retained new counsel, Joseph T. Brown, who also fought to overturn E.C.'s conviction. Both his petition for writ of *coram nobis* and its appeal were dismissed for lack of jurisdiction. JA 126; JA 130; JA 141.

August 24, 2009, less than one week after he filed his petition, E.C.'s parole supervision was terminated earlier than contemplated under established DJJ policies. JA 180; JA 314; JA 315; JA 318. E.C. is still registered as a sex offender, and must continue to register for the rest of his life.

On November 3, 2009, the Respondent moved to dismiss the petition on procedural and substantive grounds. JA 147. After full briefing on the motion to dismiss, the circuit court heard oral argument on the procedural issues on October 28, 2010. JA 343. Relying on *Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009), the court concluded that it lacked jurisdiction to hear the case because it could award no remedy that would "directly impact the duration of [the Petitioner's] confinement." JA 337. Alternatively, the court held that even if it had jurisdiction, the case was moot because "the petitioner is under no form of confinement or detention" and therefore "the Court has no capacity to grant the relief contemplated by the statute." JA 337A. The court did not address the merits of E.C.'s petition. The notice of appeal was timely filed following the entry of the circuit court's order and final judgment. JA 339.

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. (Preserved at JA 238-43; JA 247; JA 305-07; JA 338; JA 358-60; JA 363-65).

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. (Preserved at JA 243-46; JA 338).

3. The circuit court erred in dismissing E.C.'s petition for a writ of habeas corpus as moot. (Preserved at JA 247-49; JA 307-08; JA 360-65; JA 370-72; JA 338).

AUTHORITIES AND ARGUMENT

I. AOE 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.

This claim involves questions of law and this Court should apply a *de novo* standard of review. *Uninsured Employer's Fund v. Gabriel,* 272 Va. 659, 662–63, 636 S.E.2d 408, 411 (2006).

The circuit court erred in dismissing E.C.'s habeas petition for lack of jurisdiction. The jurisdictional issue presented in this appeal is a narrow but

important one: Whether Virginia courts lose jurisdiction over properly filed and pending habeas petitions when the petitioner is released from detention before the matter is fully adjudicated. On this question, E.C.'s case appears to be the first to deviate from otherwise consistent treatment in Virginia courts. In this case, it is undisputed that E.C. was detained at the time that he filed his habeas petition.[4] However, the lower court erred by holding that it lost jurisdiction over E.C.'s case when he was subsequently released.

A. Under Virginia law, habeas jurisdiction is established if the petitioner was detained at the time of filing the petition, and is not affected by the petitioner's subsequent release.

Two of this Court's decisions are directly relevant to the jurisdictional issue presented in this case. In *Moore v. Peyton*, 211 Va. 119, 120, 176 S.E.2d 427, 427 (1970), this Court held that Virginia's habeas statute does not "permit a determination of the validity of a sentence fully served *before the proceeding for a writ of Habeas corpus is instituted*." (Emphasis

[4] E.C. was on parole when he filed his habeas petition. *See supra* at 4-5. Throughout these proceedings, the Respondent has correctly conceded that parole constitutes detention for purposes of filing a petition for a writ of habeas corpus. *See*, *e.g*., JA 351 (Respondent informs the circuit court that "[t]he Virginia habeas statute was amended in 1968 to allow a petitioner to attack a sentence if he was on parole and thus might be subject to custody in the future or if he had future sentence to deal with, which, indeed, was the case in *Carroll*.").

added). And in *Laing v. Commonwealth*, 205 Va. 511, 514, 137 S.E.2d 896, 899 (1964), this Court held 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." Taken together, these cases establish two fundamental rules that are inconsistent with the lower court's holding that it lacked jurisdiction to consider E.C.'s petition: (1) jurisdiction attaches at the time of filing a habeas petition, and (2) if the petition is properly filed, the court retains jurisdiction until the matter has been fully adjudicated.

Several Virginia circuit courts addressing precisely the same jurisdictional question presented here have correctly applied these cases and reached the opposite conclusion than the lower court reached in this case. *See Ibrahim v. Superintendent of the Rappahannock Regional Jail*, No. CL-2010-16601, 2011 Va. Cir. LEXIS 81 (May 16, 2011); *Kline v. Commonwealth*, No. CL00057841, 2010 Va. Cir. LEXIS 70 (June 21, 2010); *Haley v. Angelone*, 60 Va. Cir. 429 (2002). In *Ibrahim*, *Kline*, and *Haley*, the petitioners were released from detention after filing habeas petitions but before the circuit courts could fully adjudicate their petitions. In each of these cases, the circuit courts correctly analyzed the jurisdictional question by asking whether jurisdiction existed when the

petitioner *filed* the habeas petition. *Ibrahim*, 2011 Va. Cir. LEXIS 81, at *9; *Kline*, 2010 Va. Cir. LEXIS 70, at *9-10; *Haley*, 60 Va. Cir. at 430. Furthermore, these courts correctly held that, once a habeas petition had been filed, the subsequent release of the petitioner did not strip jurisdiction from the court. *Ibrahim*, 2011 Va. Cir. LEXIS 81, at *8-9; *Kline*, 2010 Va. Cir. LEXIS 70, at *12-13; *Haley*, 60 Va. Cir. at 430.

With respect to the jurisdictional issue, the *Ibrahim*, *Kline*, and *Haley* decisions are consistent this Court's decision in *Moore*. The circuit courts correctly equated the <u>institution</u> of habeas proceedings with the <u>filing</u> of a habeas petition, thus holding that because the petitioners were being detained at the time that their petitions were filed, the courts properly attained jurisdiction. *Ibrahim*, 2011 Va. Cir. LEXIS 81, at *9; *Kline*, 2010 Va. Cir. LEXIS 70, at *12-13; *Haley*, 60 Va. Cir. at 430. Invoking *Laing*, the *Ibrahim* and *Kline* courts correctly held that they retained jurisdiction over the petitioners' cases even after they were subsequently released from detention. *Ibrahim*, 2011 Va. Cir. LEXIS 81, at *8-9 (stating "[o]n the jurisdictional question, it is well-established that, if a Court properly assumes jurisdiction at the outset of the proceedings, in other words, if the petition was properly and timely filed, the Court retains jurisdiction to decide the matter"); *Kline*, 2010 Va. Cir. LEXIS 70, at *12-13. Although it did not

cite *Laing*, the circuit court in *Haley* also reached this conclusion and proceeded to the merits of the petitioner's habeas claims after finding that the petitioner had been detained at the time of filing his petition. 60 Va. Cir. at 429.

The lower court's ruling in the present case represents a radical deviation from this otherwise consistent line of cases, and should be reversed. This Court should find in E.C.'s favor to bring his case in line with *Kline*, *Haley*, *Ibrahim*, *Moore*, and *Laing*, and to clarify that these rules apply in any habeas case in which the petitioner properly files while being detained but is released from detention while his petition is pending.

Further, Virginia is not alone in recognizing that a court retains jurisdiction over a properly filed petition for writ of habeas corpus even if the petitioner is released before the matter has been fully adjudicated. Courts in Connecticut, Florida, Illinois, Montana, Tennessee, Texas, Utah, and West Virginia have all ruled on habeas corpus petitions when the petitioner was released from custody before the petition could be heard on its merits. *See Herbert v. Manson*, 506 A.2d 98, 99 n.1 (Conn. 1986) (retaining jurisdiction where petitioner was in custody at time he filed his petition but discharged from parole before adjudication by finding that his claim survived his release from incarceration and parole); *Kelley v. Rice*, 800 So.

2d 247, 250 (Fla. Dist. Ct. App. 2001) (finding that although petitioner was released from custody, technical mootness does not defeat a court's jurisdiction if the question raised is of great public importance or is likely to recur, or if the error is capable of repetition yet evading review); *Barney v. Prisoner Review Bd.*, 704 N.E.2d 350, 350-51 (Ill. 1998) (retaining jurisdiction post-release but pre-adjudication where petitioner's claim involved substantial public interest); *Sebastian v. Mahoney*, 25 P.3d 163, 159-164 (Mont. 2001) (retaining jurisdiction where petitioner released from prison within one month of filing petition); *State ex rel. Dillehay v. White*, 398 S.W.2d 737, 738 (Tenn. 1966) (retaining jurisdiction to hear appeal although petitioner was not being held in jail at time of adjudication); *Ex parte Legg*, 571 S.W.2d 930, 931 (Tex. Crim. App. 1978) (retaining jurisdiction where petitioner properly filed petition but served the sentence imposed before adjudication); *Larsen v. Jorgensen*, 862 P.2d 1382, 1383-84 (Utah Ct. App. 1993) (retaining jurisdiction although petitioner released from prison before the court could rule on the petition); *State ex. rel. Titus v. Hayes*, 144 S.E.2d 502, 508 (W. Va. 1965) (voiding a commitment order and cancelling the subsequent bond even though the petitioner was released on bail after instituting habeas proceedings).

Virginia's current jurisdictional rule as applied by the circuit courts in *Ibrahim*, *Kline*, and *Haley* is also consistent with the jurisdictional rule in the federal system, which unequivocally states that "a habeas petition should be considered so long as the Petitioner was 'in custody' at the time the petition was filed." *Maleng v. Cook*, 490 U.S. 488, 490-92 (1989); *Carafas v. LaVallee,* 391 U.S. 234, 238 (1968). Thus, a court's jurisdiction to adjudicate a petition for a writ of habeas corpus does not depend upon the state's continued confinement of the petitioner, but upon the petitioner's custodial circumstances at time his petition is filed.

B. The circuit court misinterpreted this Court's decision in *Carroll v. Johnson* to require the petitioner not only to file his petition, but also to adjudicate it fully, before his release.

In ruling that it had lost jurisdiction over this case, the circuit court appeared to misinterpret this Court's recent decision in *Carroll v. Johnson*, 278 Va. 683, 685 S.E.2d 647 (2009). JA 336-37. *Carroll* addressed jurisdiction in habeas cases by overturning Virginia's former "immediate release" rule, but its holding is not relevant to this case. Prior to the *Carroll* decision, the immediate release rule provided that "habeas corpus jurisdiction lies only where the release of the petitioner from his immediate detention will follow as a result of a judgment in his favor." *Carroll*, 278 Va. at 689-90, 685 S.E.2d at 649-50. In place of the immediate release rule,

Carroll established a new, slightly broader rule that Virginia courts have jurisdiction in habeas cases "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. Thus, the effect of *Carroll* is to extend habeas jurisdiction to a small group of potential petitioners to whom it was previously unavailable: those whose sentences would be directly shortened by an order in their favor, even if those orders would not result in their immediate release. *Id*. at 693-95, 685 S.E.2d at 651-652.[5]

Instead, the lower court misread *Carroll* as creating a new limitation on habeas jurisdiction. In the lower court's view, *Carroll* required it to ask whether an order entered at the time of the adjudication could affect the duration of the petitioner's confinement and, if not, to dismiss for lack of

[5] For example, in *Carroll*, the petitioner was serving two consecutive sentences and was asserting that he should be credited for time served prior to trial. Previously, the immediate release rule would have precluded habeas jurisdiction because even if an order entered in the petitioner's favor would have shortened the time he was required to serve on his second consecutive sentence by crediting him with time served, the petitioner would have remained in detention on the initial sentence. However, *Carroll* rejected the immediate release rule and held that the court did have habeas jurisdiction because an order entered in the petitioner's favor would affect the duration of his confinement.

jurisdiction. This is incorrect.[6] *Carroll* left intact Virginia's long-standing habeas rules (1) that jurisdiction is determined at the time of the institution (i.e. filing) of the petition and (2) that once a petition is properly filed, the court retains jurisdiction until the case is fully adjudicated. Prior to *Carroll*, the court would have had jurisdiction under the immediate release rule because a favorable order entered at the time that E.C. instituted his proceeding for a writ of habeas corpus would have resulted in his immediate release. Post-*Carroll*, the court *still* has jurisdiction because a favorable order entered at the time that E.C. instituted his proceeding for a writ of habeas corpus would have affected the duration of his confinement. Thus, this Court should find in favor of E.C. to confirm that *Carroll* does not upset existing precedent regarding jurisdiction in habeas cases, beyond abrogating the immediate release requirement.

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[6] Throughout its analysis, the lower court appears to have conflated the issues of jurisdiction (which is determined at the time of filing) and mootness (which can arise at any time during adjudication). In effect, the court appears to have treated jurisdiction as an ongoing test, requiring dismissal if, at any time, it becomes apparent that an order entered in the petitioner's favor can no longer affect the duration of his detention. But as Virginia precedents make clear, once jurisdiction attaches at the time of filing (because an order entered <u>at that time</u> could affect the duration of the petitioner's detention), the court retains jurisdiction through adjudication. Unlike jurisdiction, the test for mootness *is* ongoing, but has a lower threshold than the test to establish jurisdiction, requiring only a showing of collateral consequences and not detention. *See infra* at Part III(A) (AOE 3).

C. If upheld, the lower court's ruling would dramatically curtail—if not eliminate—habeas review in juvenile cases.

Finally, the Court should reverse the lower court because its ruling, if adopted as the law in Virginia, will have a disproportionately harsh impact on juveniles who seek to file habeas petitions. The United States Supreme Court has frequently recognized that juvenile defendants are uniquely vulnerable and much less capable of protecting their legal rights than adult defendants. For example, in the recently decided *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), the Court held that a child's age should inform the *Miranda* custody analysis. *Id*. at 2396. In so doing, the Court noted that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *Id.* at 2403-04; *see also Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010) (recognizing juveniles' "lack of maturity," "underdeveloped sense of responsibility," and that the "fundamental differences between juvenile and adult minds" makes them "less likely than adults to work effectively with their lawyers and to aid in their defense").

Despite the fact that juvenile defendants are the most immature and least sophisticated defendants in Virginia and lack the capacity to protect their own legal rights, there is a high risk of ineffective representation in juvenile cases. Virginia juveniles charged with delinquent acts are

represented by the lowest-paid court appointed attorneys in the state—if not the country. *See generally* Brief for National Juvenile Defender Center, et al. as *Amici Curiae*. As a result of Virginia's nominal compensation rate, court-appointed juvenile counsel may be required to take on more clients than they can adequately represent in order to earn sufficient compensation to maintain their practice. They may also lack the time, resources, or financial incentives to investigate potential defenses vigorously, to file necessary motions, to go to trial, or to even file appeals in circuit court. *Id*.; *see also* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark Rev. 771 (2010).

Notwithstanding these risks, juveniles seeking post-conviction relief face significant and unique barriers to meaningful review, including a lack of transcripts of their juvenile court proceedings (because JDR courts are not courts of record), the unavailability of post-conviction counsel,[7] lack of

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[7] Unlike some other states, Virginia denies juvenile defendants the right to post-conviction counsel unless they are pursuing an appeal or being represented as a serious juvenile offender. *See* Va. Code §§ 16.1-266 and 16.1-285.2 (2010), *but cf.* Cal. R. Ct. R. 5.663 (2006); Idaho Code § 19-852 (2007); Ky. Rev. Stat. § 31.110 (2006) (statutes from other states that specifically provide juveniles with access to post-dispositional counsel).

access to law libraries, and the inability to file *pro se* habeas petitions.[8] *See generally* Brief for National Juvenile Defender Center, et al. as *Amici Curiae*. If upheld, the new jurisdictional rule promulgated by the lower court would create even more barriers for juveniles who seek habeas relief. Indeed, in many cases, seeking habeas relief would become impossible for detained juveniles. Like E.C. in the instant case, many juveniles are sentenced indeterminately. *Id*. Their sentences are unpredictable and typically much shorter than those of adult defendants. A rule that would require juveniles not only to file, but also to adjudicate their petitions fully before they are released, would render habeas review illusory in many cases.[9] *See generally Salvatierra v. City of Falls Church*, 35 Va. App. 453, 456, 546 S.E.2d 214, 215 (2001) (recognizing that a youth's commitment to the Department of Juvenile Justice "was too short to fully litigate the issues through an appeal").

Lastly, there is an additional risk to juvenile petitioners inherent in the lower court's ruling. Under the new jurisdictional rule created and applied

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[8] Juveniles (under the age of 18) in Virginia lack standing to file *pro se* habeas petitions under Va. Code § 8.01-8 (2007), which requires them to sue by their "next friend."

[9] Likely due to many of these barriers, it is already rare for juveniles to file habeas petitions. Undersigned counsel have found no reported decisions involving juvenile habeas petitioners challenging their delinquency adjudications. This Court should not now create additional barriers.

by the lower court, which would replace *Laing*'s axiomatic rule that a court retains jurisdiction until a matter has been fully adjudicated, the DJJ would have the unilateral ability to deprive the Virginia courts of jurisdiction over habeas petitions by simply releasing juvenile detainees before the courts could adjudicate their claims. Or, the ruling below could invite litigants opposing the writ to drag their feet in order to extend the litigation until after such release is granted. Thus, the lower court's erroneous jurisdictional rule would potentially allow the Commonwealth to evade review in cases it did not wish to litigate. *See, e.g., State ex rel. Wohlfahrt v. Bodette*, 289 N.W.2d 366, 368 (Wisc. Ct. App. 1980) (rejecting the state's argument that releasing the prisoner should divest the court of habeas jurisdiction because such a holding "could result in a trial court depriving a reviewing court of jurisdiction merely by reconsidering the bail of a defendant and allowing a personal recognizance").

II. AOE 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.

This claim involves questions of law and this Court should apply a *de novo* standard of review. *Uninsured Employer's Fund,* 272 Va. at 662–63, 636 S.E.2d at 411.

As a secondary argument only, E.C. maintains that the requirement of lifetime sex offender registry constitutes detention, confinement, or custody for purposes of filing a petition for a writ of habeas corpus. It is unnecessary to reach this question because jurisdiction is established by virtue of the fact that E.C. was on parole at the time that he filed his habeas petition. *See supra* at Part I (AEO 1). However, if the Court is inclined to uphold the lower court's new rule that release of the petitioner from parole extinguishes jurisdiction over a pending habeas case, E.C. asserts that the requirement of lifetime sex offender registry, particularly as applied to a juvenile, is a sentence that necessarily constitutes detention for purposes of creating habeas jurisdiction.

There appears to be no clear Virginia precedent addressing this question. The lower court and the Respondent's Brief In Opposition to E.C.'s Petition for Appeal relied upon cases that categorize sex offender registration as a remedial, rather than a penal, requirement. JA 337 (citing *Kitze v. Commonwealth*, 23 Va. App. 213, 217, 475 S.E.2d 830, 832 (1996); *McCabe v. Commonwealth*, 274 Va. 558, 567, 659 S.E.2d 508, 512 (2007)). The Respondent argues—and the lower court held—that E.C.'s registration cannot be detention, because the registration regime is administrative in nature. It should be noted that the cases relied upon in

the lower court did not involve petitions for writs of habeas corpus; instead, this Court and the Court of Appeals rejected challenges to the requirement of sex offender registration on ex post facto, due process, and equal protection grounds.[10] Neither *Kitze* nor *McCabe* addressed the degree of restraint inherent in Virginia's sex offender registry statutes. Whether the registry's purpose is characterized as penal or administrative does not change its effect on a petitioner's liberty. "It is not relevant that conditions and restrictions such as these may be desirable and important parts of the

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[10] For juveniles, the order to register as a sex offender is a part of the trial court sentencing process, and is not consistent with a civil, administrative process. In Virginia, juveniles are ordered to register after a court weighs a variety of traditional sentencing factors, including:

> (i) the degree to which the delinquent act was committed with the use of force, threat or intimidation, (ii) the age and maturity of the complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the complaining witness and the offender, (v) the nature of the relationship between the complaining witness and the offender, (vi) the offender's prior criminal history, and (vii) any other aggravating or mitigating factors relevant to the case.

Va. Code § 9.1-902 (G). Moreover, the disposition of E.C.'s case clearly indicates that he was ordered to be listed on the registry in the same manner and time that he was ordered to commitment in DJJ. JA 101. Thus, juvenile registry is fundamentally different than adult registry, which is automatic for most offenses. Va. Code § 9.1-902.

rehabilitative process; what matters is that they significantly restrain petitioner's liberty." *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963).[11]

Regardless of whether the registry is characterized as penal or administrative, it is a sentence that creates conditions of confinement, custody, and detention. The lower court failed to consider the possibility that even an administrative measure can create sufficiently restrictive conditions to constitute detention for the purposes of seeking a writ of habeas corpus. While Virginia has yet to address this issue, the United States Supreme Court has held in the federal context that conditions that "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do . . . are enough to invoke the help of the Great Writ." *Jones*, 371 U.S. at 242 (holding that parole imposes sufficiently restrictive conditions to constitute custody).

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[11] It is also noteworthy that the registry statute was much less restrictive at the time of the *Kitze* decision. The statutory scheme described in *Kitze* differs from the one with which E.C. must comply: penalties for failure to comply have been increased from a class one misdemeanor to a class 6 felony, Va. Code § 18.20472.1(B); registrants convicted of sexually violent offenses are now required to register for life without the potential for expungement, Va. Code § 9.1-908-910; full offender information including pictures was not accessible to the public in 1996, whereas now it is readily accessible and reproducible on the internet, Va. Code § 9.1-913. *See also* JA 244 (describing fully the differences between the two codes).

The sex offender registry statutes restrict E.C.'s freedom of movement by imposing affirmative obligations, under threat of prosecution, to register, re-register, disclose private information including photographs and DNA, and update personal information as soon as thirty minutes after a change. Va. Code § 9.1-903. As a result of his registry and felon status E.C. will face numerous restrictions on his liberty from access to housing, to choice of school, to gun ownership. Much like parolees, who are considered to have restraints on their liberty, E.C. is required to have regular verifications of his home and place of employment at will. Unlike parolees however, E.C. will be subject to heightened surveillance by *all* State Police Officers, relevant college chiefs of police, local law enforcement, and his neighbors for his entire life. Va. Code § 9.1-906-913; *see also infra* at Part III(B) (discussing restrictions imposed by requirement of sex offender registration in Virginia).[12]

Furthermore, other jurisdictions throughout the United States have found various restrictions on petitioner's liberties to be sufficiently custodial to invoke the writ of habeas corpus, even when these measures are not as

[12] "The widespread epidemic of vigilante violence is an additional form of punishment for many offenders." Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from "Megan's Law"*, 33 St. Mary's L.J. 101, 118 (2001).

restrictive as those required by Virginia sex offender registry. These include bail, parole, and probation.[13] Analogous to the restrictions and requirements of the Virginia sex offender registry, courts have found that:

> restrictions, limitations, and conditions attached to the usual parole status constitute a form of "custody" falling within the reach of habeas corpus relief...because a parolee, unlike the ordinary citizen, is subject to supervision by his parole officer, limited in his mode, manner, and place of living and travel…and subject to reincarceration in the event of a breach of any conditions of his parole. Thus, he is not a free man in the commonly accepted sense.

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[13] Courts have found that bail constitutes custody for purposes of habeas standing. *See U. S. ex rel. Grundset v. Franzen*, 675 F.2d 870 (7th Cir. 1982); *Madsen v. McFaul*, 643 F. Supp. 2d 962 (N.D. Ohio 2009); *Hutson v. Justices of Wareham Dist. Court*, 552 F. Supp. 974 (D. Mass. 1982); *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001); *In re Catalano*, 623 P.2d 228 (Cal. 1981); *Henderson v. Schenk*, 631 P.2d 246 (Kan. App.1981); *Soviero v. State*, 137 S.E.2d 471 (Ga. 1964); *Franklin v. State*, 513 P.2d 1252 (Nev. 1973); *Com. v. Hess*, 414 A.2d 1043 (Pa. 1980); *Mello v. Superior Court*, 370 A.2d 1262 (R.I. 1977); *State ex rel. Wohlfahrt v. Bodette*, 289 N.W.2d 366 (Wisc. Ct. App. 1980). Courts have found that parole constitutes custody for purposes of habeas standing. *See In re Sturm*, 521 P.2d 97 (Cal. 1974); *Schooley v. Wilson*, 374 P.2d 353 (Colo. 1962); *Banks v. Gonzales*, 496 F. Supp. 2d 146, 149 (D.D.C. 2007) (finding custody based on defendant's parole, probation, bail, and supervised release); *In re Horst*, 14 P.3d 1162 (Kan. 2000); *Staples v. State*, 274 A.2d 715 (Me. 1971) (finding custody on parole, probation, or non-payment of fine); *State ex rel. Atkinson v. Tahash*, 142 N.W.2d 294 (Minn. 1966); *State v. Gray*, 406 S.W.2d 580, 582 (Mo. 1966); *Com. ex rel. Ensor v. Cummings*, 215 A.2d 651 (Pa. 1966); *Hoang v. State*, 872 S.W.2d 694 (Tex. Crim. App. 1993); *Monohan v. Burdman*, 530 P.2d 334 (Wash. 1975). Courts have found probation constitutes custody for purposes of habeas standing. *See In re Osslo*, 334 P.2d 1 (Cal. 1958); *Ex parte Bosso*, 41 So. 2d 322 (Fla. 1949); *Nicholson v. State*, 524 S.W.2d 106 (Mo. 1975); *Garnick v. Miller*, 403 P.2d 850, 852 (Nev. 1965); *Ex parte Duncan*, 796 S.W.2d 562, 564 (Tex. App. 1990).

Monohan v. Burdman, 530 P.2d 334, 336-37 (Wash. 1975).

These courts have correctly looked beyond whether or not the petitioner is imprisoned and focused instead upon whether or not the state has imposed conditions that substantially restrict the petitioner's freedom. For instance, the Court of Criminal Appeals of Texas concluded that the adverse consequences resulting from a felony driving while intoxicated conviction rendered the petitioner "confined" for purposes of the state's post-conviction habeas corpus statue. *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010). The consequences the court referenced included "the loss of [petitioner's] job and other suitable employment opportunities; loss of his right to run for public office; loss of his right to possess firearms; enhanced penalties for any future convictions; and potential impeachment of his credibility in future judicial hearings." *Id*.; *see also Ex parte Davis*, 748 S.W.2d 555, 557 (Tex. App. 1988) (denial of entry into the military service recognized as detention); *Hardison v. Martin*, 334 S.E.2d 161, 164 (Ga. 1985) (revocation of driver's license constitutes a constraint on liberty sufficient to constitute custody). Courts have even found sentences that never require detention can nevertheless give rise to relief by habeas corpus. *See In re Catalano*, 623 P.2d 228, 230 (Ca. 1981)

(holding that a sentence of a monetary fine gives rise to relief "by habeas corpus").

The writ of habeas corpus is to be "guided by the principle of statutory construction that remedial statutes are to be construed liberally." *Carroll*, 278 Va. at 693. Unquestionably, Virginia's sex offender registry imposes harsher restrictions than those contemplated by the aforementioned cases. *See infra* at Part III(B) (discussing restrictions imposed by requirement of sex offender registration in Virginia). Therefore, even if the Court finds that jurisdiction does not exist in this case by virtue of the fact that E.C. was on parole at the time he filed his petition, the Court should nonetheless hold that inclusion on Virginia's sex offender registry is a severe enough limitation on E.C.'s liberties to constitute detention for the purposes of section 8.01-654.

III. AOE 3: THE CIRCUIT COURT ERRED IN DISMISSING E.C.'S PETITION FOR A WRIT OF HABEAS CORPUS AS MOOT.

This claim involves questions of law and this Court should apply a *de novo* standard of review. *Uninsured Employer's Fund,* 272 Va. at 662–63, 636 S.E.2d at 411.

A favorable order entered on E.C.'s habeas petition would result in his conviction being vacated. E.C. would be removed from the sex offender registry and would be relieved of other collateral consequences of

conviction. *See* Va. Code § 9.1-915; 19 Va. Admin. Code § 30-170-30. Because the circuit court can enter an order granting E.C. the remedy he seeks, his case presents a live controversy and is not moot.

A. A petition for a writ of habeas corpus is not moot when the petitioner can establish that he suffers ongoing injury from the collateral consequences of his conviction.

Like many states,[14] Virginia's jurisprudence on the question of mootness mirrors and relies exclusively on the federal case or controversy requirement of Article III of the United States Constitution. This Court has held that a Virginia court's duty is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 225, 181 S.E. 521, 533 (1935) *(quoting Mills v. Green*, 159 U.S. 651, 653 (1895)). *Potts* expressly based

[14] While this Court has not specifically discussed mootness in the context of habeas proceedings, several states have explicitly applied the federal standard of mootness in habeas cases. *See, e.g., State v. Fletcher*, 288 A.2d 92, 95 (Me. 1972) ("Although Defendant had fully completed his sentence he was entitled under his already pending petition for the writ of statutory post-conviction habeas corpus to seek an appeal for the purpose of removing the conviction from his record.") (citing *Carafas*, 391 U.S. at 234); *Tharpe v. Head*, 533 S.E.2d 368, 369 (Ga. 2000) (citing *Carafas*, 391 U.S. at 234); *Calkins v. May*, 545 P.2d 1008, 1009 (Id. 1976) (citing *Sibron*, 392 U.S. at 40); *Ex Parte Burt*, 499 S.W.2d 109, 110 (Tex. Crim. App. 1973).

its holding upon the United States Supreme Court decision in *Mills*. Virginia has consistently applied the federal Article III standard for determining whether a case presents an active controversy, and has never articulated any other test of mootness.[15]

Under the federal standard of mootness, a habeas case does not cease to present an actual controversy merely because the petitioner has been released prior to the complete adjudication of his petition. *See Carafas*, at 237-38; *see also United States v. Hamdi*, 432 F.3d 115, 118 (2d Cir. 2005) (finding appeal not moot despite release from confinement if reversal "would relieve [the petitioner] of some concrete and identifiable collateral effect of that sentence"). In fact, a case satisfies the case and controversy requirement as long as the petitioner has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Carafas*, 391 U.S. at 237 (quoting *Fiswick* v.

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[15] Many of this Court's decisions have invoked the actual controversy requirement originally articulated in *Mills*. *See Cartwright v. Commonwealth Transp. Com'r of Virginia*, 270 Va. 58, 63, 613 S.E.2d 449, 451 (2005); *RF&P Corp. v. Little*, 247 Va. 309, 315, 440 S.E.2d 908, 912 (1994); *Hankins v. Town of Virginia Beach*, 182 Va. 642, 643-44, 29 S.E.2d 831, 832 (1944); *Franklin v. Peers*, 95 Va. 602, 602, 29 S.E. 321, 321 (1898). Other decisions of this Court have also invoked federal cases in establishing the actual controversy requirement. *See Thomas, Andrews & Co. v. Norton*, 110 Va. 147, 147, 65 S.E. 466, 467 (1909) (citing *Little* v. *Bowers*, 134 U.S. 547, 557 (1890)).

United States, 329 U.S. 211, 222 (1946)). In other words, a petitioner's case is not moot if he has "some concrete and continuing injury other than the now-ended incarceration (or parole) - some 'collateral consequence' of the conviction." *Spencer v. Kemna*, 523 U.S. 1, 1-2 (1998) *(*quoting *Sibron v. New York,* 392 U.S. 40, 55-56 (1968)).

A case is only rendered moot when a favorable outcome will not result in any form of relief for the petitioner. *See United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) ("the case is not moot because we have the power to grant a legally cognizable remedy requested by a party–namely, voiding the plea agreement"). Indeed, the United States Supreme Court has stated that "even the availability of a partial remedy is sufficient to prevent a case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (internal quotations omitted).

Many collateral consequences have been found sufficient to preserve an actual controversy by virtue of the burdens on the petitioner that a favorable judgment could relieve. One such consequence is the circumscription of civil rights or liberties. In *Carafas*, for example, the petitioner had completed his parole and was therefore unconditionally released from custody. *Carafas*, 391 U.S. at 236. As a result of his status as a convicted felon, however, he could not vote in any election held in

New York, serve as a juror, serve as an official of a labor union, or engage in certain businesses. *Id.* at 238. The Supreme Court held that "[b]ecause of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction'" and the case was therefore not moot. *Id.* at 237.[16]

A collateral consequence sufficient to avoid mootness has also been found where the existence of the petitioner's challenged sentence could be used to impeach future testimony or to enhance future criminal sentences. For example, in *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985), the Supreme Court concluded that the petitioner's case was not moot despite the fact that he had been released prior to adjudication. The Court explained:

> [S]ome collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent

[16] *See also Felton v. Dillard Univ.*, 122 F. App'x 726, 728 (5th Cir. 2004) (unpublished) (finding a collateral consequence where a conviction affected the petitioner's "ability to attract clients and represent them effectively"); *Gentry v. Deuth*, 456 F.3d 687, 694-95 (6th Cir. 2006) (finding collateral consequences sufficient to defeat mootness where the petitioner's conviction would deprive her of certain rights and privileges, such as owning a firearm and voting, and where she would be subject to restricted driving privileges); *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995) (petitioner under supervised release had a justiciable claim because the supervised release involved "some restrictions upon his liberty"); *Richter v. Bartee,* 938 F. Supp. 572, 574 (D. Neb. 1996) (case was not moot because petitioner's conviction restricted his right to carry a firearm).

> felony offender prosecution if he should go to trial on any other felony charges in the future. This case is thus not moot.

Id.[17] Similarly, the Seventh Circuit has held that a juvenile's habeas petition was not moot because a juvenile delinquency adjudication "will, like an adult criminal conviction, increase his potential punishment in the future." *A.M. v. Butler*, 360 F.3d 787, 790 (7th Cir. 2004).

Courts that have specifically addressed whether the burdens resulting from sex offender registration amount to collateral consequences sufficient to sustain an active controversy have answered the question affirmatively. For example, the Ninth Circuit has held that the obligations and consequences that attend the requirement to register as a sexually violent predator created a "concrete and continuing injury sufficient to satisfy Article III's case or controversy requirement." *Carty v. Nelson*, 426 F.3d

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[17] *See also Sibron v. New York*, 392 U.S. 40, 55-56 (1968) (finding that the case was not moot because the petitioner's challenged conviction could be used to impeach his testimony or to enhance his sentence in a future criminal proceeding against him); *Ridgway v. Baker*, 720 F.2d 1409, 1411 n.2 (5th Cir. 1983) (finding that father's challenge to conviction for failure to pay child support was not moot because the contempt order could have been used against him in a separate family court proceeding); *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994) (finding that petitioner's case was not moot because "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state laws that either already have been or may eventually be passed").

1064, 1071 (9th Cir. 2005); *see also Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1033 n.5 (9th Cir. 2005); *Christian v. Commandant, U.S. Disciplinary Board*, No. 11-3079, 2011 WL 3625063 at *2 n.2 (10th Cir., Aug. 18, 2011) (unpublished) (concluding that a habeas petition was not moot because the petitioner "continues to suffer collateral consequences of his conviction, including sex offender registration requirements").

Correctly applying these standards, two Virginia circuit courts have proceeded to reach the merits of properly filed habeas petitions even though the petitioners were released before the courts could fully adjudicate their claims. First, in *Ibrahim*, the Fairfax County Circuit Court held that a habeas case was not moot even though the petitioner was no longer at risk of additional state incarceration. *Ibrahim*, 2011 Va. Cir. LEXIS 81. Applying traditional mootness principles, the court found that the case continued to present an active controversy because the petitioner was being held in federal custody and facing deportation solely as a consequence of the challenged state conviction. *Id*. at *10. The court suggested that the petitioner's case would not be considered moot even if he were not in federal custody because of the severity of the immigration consequences that flowed from his state conviction. *Id*. at *12 n.2.

Second, in *Haley v. Angelone*, the Richmond Circuit Court held that a habeas petition filed while a petitioner is detained is properly before the court and can be adjudicated on the merits even if the petitioner is released from detention before the culmination of the proceedings. *Haley*, 60 Va. Cir. at 429 By adjudicating the case on the merits, the *Haley* court implicitly and correctly applied the rule that a petition for writ of habeas corpus is not deemed moot merely because the petitioner is released.

In contrast to *Haley* and *Ibrahim*, the Circuit Court of Loudoun County in *Kline v. Commonwealth* found a habeas petition to be moot when the petitioner was no longer detained. Like the present case, the lower court in *Kline* appears to have concluded that the only way a habeas petition can avoid being moot is for the petitioner to remain incarcerated throughout the adjudication of his petition. *Kline* at *12-13 (dismissing habeas petition as moot because the petitioner is not "presently under restraint"); *cf.* JA 337A ("Because the petitioner is under no form of confinement or detention," habeas relief is "unavailable."). But, as discussed previously, the question of restraint is a jurisdictional question that must be asked at the institution of habeas proceedings. *See supra* at Part I(A). This Court has never suggested, and should take this opportunity explicitly to reject, a rule that automatically equates release from detention with mootness.

Instead, this Court should now clarify that once jurisdiction attaches at the time of filing (which does require a showing that the petitioner is detained), a habeas case is not moot so long as there are sufficient ongoing "collateral consequences" to establish an active controversy. Of course, this determination will require case-by-case analysis. For example, although the *Kline* court appeared to apply an incorrect legal standard in its mootness analysis, it is nonetheless possible that the outcome of *Kline* was correct and the case actually was moot. Unlike the present case, the petitioner in *Kline* pled guilty to only a misdemeanor, which does not carry nearly as much risk of future criminal liability and circumscription of rights as a felony. Thus, *Kline* can be distinguished in that it did not appear to involve any assertion of substantial collateral consequences. *See Kline*, 2010 Va. Cir. LEXIS 70 at *5 (noting that the implications of petitioner's Virginia misdemeanor conviction with respect to her sentencing for a subsequent New Jersey offense were "uncertain").

E.C.'s case, however, is far different. Unlike in *Kline*, where the petitioner faced only potential or possible ramifications from her misdemeanor conviction, E.C. bears the burden of wrongful felony convictions for both forcible rape and breaking and entering, as well as the attending loss of civil rights and liberties. *See infra* at Section B. In this

case, the collateral consequences are much more obvious and severe, particularly because E.C., unlike the petitioners in *Ibrahim*, *Kline*, and *Haley*, is subject to sex offender registration as a direct consequence of his adjudications.

B. E.C. continues to suffer real and substantial injuries that would be remedied by a court order vacating his conviction.

E.C.'s ongoing injuries are far from hypothetical or academic. Under the federal standard that has been adopted and applied by the Virginia courts, E.C. faces sufficient "collateral consequences" to avoid dismissal for mootness. As a result of E.C.'s challenged adjudication, he will suffer lifelong significant restrictions on his civil liberties and rights, as well as an increased risk of future criminal liability. Courts can count a delinquency adjudication as a "prior conviction" sufficient to deliver an enhanced punishment. Va. Code § 17.1-805. Virginia courts can also count adjudications toward Virginia's "three-strike rule," where a third felony conviction of certain sex offenses automatically sentences the individual to life imprisonment with no suspended sentence. Va. Code § 18.2-67.5:3.

Moreover, E.C. faces onerous restrictions on his civil liberties as a result of having to register as a sex offender for the rest of his life. *See* Va. Code § 9.1-908, *et seq.* Because E.C.'s offense is classified as a "sexually

violent offense," (Va. Code § 9.1-902(E)(2)), he must re-register every ninety days for at least three years, and then annually for the remainder of his life. Va. Code §§ 9.1-908; 9.1-909(A). E.C. has no right to petition for removal from the registry. Va. Code § 9.1-910. If E.C. knowingly fails to re-register on the Sex Offender and Crimes Against Minors Registry, he will be guilty of a Class 6 felony. Va. Code § 18.2-472.1. Additionally, E.C. must agree to be photographed every two years. These photographs contain his full name and are forwarded to the state police and the sex offender registry. Va. Code § 9.1-904(C). E.C. has no choice but to follow these procedures for the remainder of his life.

Because he was "adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of . . . rape in violation of § 18.2-61," E.C. is also forever prohibited from possessing or transporting a firearm or ammunition. Va. Code § 18.2-308.2(A). This infringement has specifically been invoked as a sufficient collateral consequence to constitute an actual controversy. *Richter v. Bartee,* 938 F. Supp. 572, 574 (D. Neb. 1996).

Under the Virginia Code, E.C. faces even more restrictions on his liberty than the petitioners whose cases were deemed active controversies by federal courts. For instance, E.C. is prohibited from serving as an adoptive or foster parent. Va. Code § 63.2-1721; § 63.2-1719. He and his

family may be ineligible for federally assisted housing as a result of his registration as a sex offender. 24 C.F.R. § 960.204(a)(4); 24 C.F.R. § 5.856. E.C. is also restricted in his choice of schooling and employment. In addition to the general difficulties of trying to procure employment with a delinquency adjudication on his record, E.C. may be denied the privilege of serving in the military. 50 U.S.C. § 435c(c); 10 U.S.C. § 504(a). He is also barred from obtaining employment in home health care and nursing positions. Va. Code § 32.1-162.9:1.

Perhaps the consequences currently affecting E.C. most severely are those related to schooling. His adjudication has been and will continue to be reported to school officials every time he enrolls in, transfers to, or secures employment at any public school or institution of higher learning. Va. Code § 9.1-906. This is a particularly burdensome requirement for E.C., who is of age to seek admission to college or vocational school.

Finally, E.C. also suffers the reputational harm and stigma that come from being on the registry for the rest of his life. Any viewer who accesses E.C.'s entry on the registry will view the following webpage (redacted for purposes of this brief):

Photo Date : March 05, 2011

Print Tips Map Subscription

Registration ID : [redacted]
Name : C[redacted], E[redacted]
Sex : Male
Race : Black
Age : 20
Height : 6 Feet 01 Inches
Weight : 185 lbs
Hair Color : Black
Eye Color : Brown
Palm Print : On File
Finger Print : On File
Violent : Yes

Alias Name(s)

[redacted]

Address Information

Home : [redacted]
Work : NOT EMPLOYED

Registration Information

Initial Registration : Oct 31, 2008
Reg. Renewed : Jul 12, 2011

Sex Offender Conviction Record

Case Number	Sentencing Court	Code Section	Statute	Date of Conviction	State Convicted	Victim Age
JJ0372210002	STAFFORD JDR CT	18.2-90	BREAKING AND ENTERING WITH INTENT TO RAPE	Nov 19, 2007	VA	Unknown
	STAFFORD JDR CT	18.2-61	RAPE	Sep 19, 2007	VA	Minor

Virginia State Police, Sex Offender and Crimes against Minors Registry (2011), *available at* http://sex-offender.vsp.virginia.gov/sor/ (last accessed Sept. 26, 2011). The registry also includes a map indicating the precise location of E.C.'s home. *Id*. Viewers of the registry will falsely read that E.C. is "violent," and that he has been convicted of both breaking and entering with intent to rape, and rape. E.C.'s full name, nicknames, and home address are also displayed. *Id*. The damage and harm that these false disclosures will inflict on E.C. is severe and beyond question. As the Virginia Court of Appeals has noted,"[I]n today's society there is no more deplorable badge of infamy a person can wear than that of being a child

abuser." *Jackson v. Marshall*, 19 Va. App. 628, 454 S.E.2d 23 (1995) (holding that appeal of Fairfax County Department of Youth Services determination was not moot because the Court could provide "effectual relief" by ordering the modification of petitioner's entry in central registry). Technology and reporting requirements make access to this damaging information all too easy, and the reputational harm even greater for E.C. than the plaintiff in *Jackson*.[18]

A case is not moot when the court can issue an order that "can be carried into effect." *Hankins*, 182 Va. at 644 (quoting *Mills*, 159 U.S. at 653). In this case, the result of granting a petition for writ of habeas corpus would be for E.C.'s convictions to be set aside. *See*, *e.g., West v. Director of Dept. of Corr.*, 273 Va. 56, 66, 639 S.E.2d 190, 197 (2007) (vacating involuntary manslaughter conviction); *Moreno v. Baskerville*, 249 Va. 16, 20, 452 S.E.2d 653, 655 (1995) (setting aside petitioner's drug distribution convictions). A reversal of E.C.'s conviction would lift the collateral legal

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[18] Modern technology has made his registration information instantaneously available on the internet and through cell phone apps. The "Sex Offender Tracker" application is available for only $0.99 on iTunes and allows users to download a list of all the sex offenders close to the user's GPS location. *See* Ki Mae Heussner et al, *Top-Selling iPhone App: Sex Offender Locator*, ABC News (July 28, 2009), http://abcnews.go.com/Technology/AheadoftheCurve/story?id=8187394&page=1 (last accessed Sept. 26, 2011).

consequences that flow from his conviction, including requiring the Department of the State Police to remove his name from the sex offender registry.[19] *See* Va. Code § 9.1-915; 19 Va. Admin. Code § 30-170-30.

It is clear, then, that E.C. has a "'substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.'" *Carafas*, 391 U.S. at 237 (quoting *Fiswick*, 329 U.S. at 222). Now twenty years old, E.C suffers and will continue to suffer adverse collateral consequences for the remainder of his life for a crime he did not commit. That he is no longer detained does not change the fact that E.C. is a young adult restricted in all aspects of his life: schooling, employment and housing, in addition to the abrogation of basic rights and liberties that free American citizens enjoy. Were the court to grant his habeas petition, E.C.'s conviction would be vacated, and he would be relieved from these consequences and restrictions on his rights; most significantly, he would be removed from the sex offender registry. For this reason, and those stated above, E.C.'s case is not moot.

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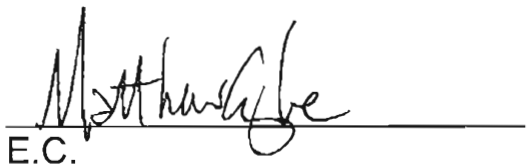
[19] There are only three ways for a person convicted of a violent sexual offense to be removed from the Virginia Sex Offender and Crimes Against Minors Registry: (1) reversal of conviction, (2) absolute pardon from the Governor, and (3) death. *See* Va. Code § 9.1-915; 19 Va. Admin. Code § 30-170-30.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Plaintiff-Petitioner E.C. respectfully requests that this Court reverse the ruling of the lower court and remand this case for further proceedings addressing the merits of his petition for a writ of habeas corpus.

Respectfully submitted,



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RULE 5:26(h) CERTIFICATE

I certify that this Opening Brief complies with the requirements of Rule 5:26, is presented in Arial size 14 font, and does not exceed 50 pages. I further certify that a true copy of the foregoing Opening Brief was served via hand-delivery to

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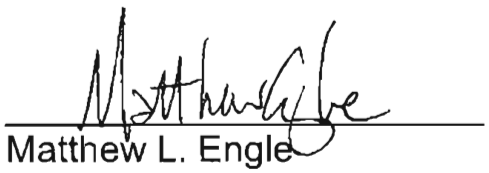

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