NOTE

Williamson v. Gregoire: How Much Is Enough? The Custody Requirement in the Context of Sex Offender Registration and Notification Statutes

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I. INTRODUCTION

A. Williamson v. Gregoire

Elbert Williamson was convicted of first degree child molestation in Spokane County Superior Court in 1990.[1] He was sentenced to twenty-seven months of confinement and one year of community placement. In August 1994 Mr. Williamson was discharged after serving the required term of community placement.[2] However, this apparent resolution did not end Mr. Williamson's tribulations. Unlike many other convicted criminals, Mr. Williamson's punishment continued even after the completion of his sentence, when he became subject to the registration and notification provisions of Washington's sex offender laws.[3]

The sex offender laws in Washington resemble laws recently enacted in many other states. Collectively they are known as "Megan's Laws," and they represent an unparalleled legislative

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1. Williamson v. Gregoire, 151 F.3d 1180, 1181 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 824 (1999).

2. *Id. See also* Brief of Respondent-Appellee, Williamson v. Gregoire, 151 F.3d 1180 (9th Cir. 1998) (No. 97-35699).

3. *Williamson*, 151 F.3d at 1181. *See also* WASH. REV. CODE 9A.44.130 (1998); WASH. REV. CODE 4.24.550 (1998).

response to an emotionally charged issue: high rates of recidivism among convicted sex offenders.

In Washington, as in other jurisdictions, the legislature has responded to the fears of its electorate over the high recidivism rate of convicted sex offenders by enacting laws that require convicted sex offenders to register with local authorities, thereby making their presence in the community known.[4] Under the Washington sex offender statute, local law enforcement officials must forward the registration information to the state's central registry of sex offenders.[5] Additionally, if the state's central registry determines that an offender presents a risk to the residents of a community, the law authorizes public agencies to release information to the public about the registered offender.[6] While the nature and extent of public disclosure vary based on the offender's risk of reoffense, community notification generally includes, at a minimum, the offender's name, address, and crime for which he or she was convicted.[7]

In August 1995, one year after completing his sentence and becoming subject to the registration and notification provisions of Washington's sex offender laws, Mr. Williamson filed a petition for habeas corpus in the United States District Court for the Eastern District of Washington, in which he challenged the validity of his conviction.[8] According to the federal statute pertaining to habeas corpus, the District Court was required to find that Mr. Williamson was "in custody" before it could assert subject matter jurisdiction.[9]

The District Court held that the state registration requirement effectively placed Mr. Williamson "in custody" for purposes of federal habeas corpus relief, but found that he had not properly raised his constitutional claims in the state courts.[10] Consequently, the court denied the writ on grounds of procedural default. Mr. Williamson appealed to the United States Court of Appeals for the Ninth Circuit.[11]

In a case of first impression, the Ninth Circuit held that the registration provisions of Washington's sex offender registration law did not place Mr. Williamson "in custody" for purposes of federal habeas corpus, and, therefore, the district court lacked jurisdiction to hear

4. WASH. REV. CODE 9A.44.130 (1998).
5. WASH. REV. CODE 43.43.540 (1998).
6. *Id.*
7. WASH. REV. CODE 4.24.550 (1998).
8. *Williamson*, 151 F.3d at 1182.
9. 28 U.S.C. § 2254(a) (1994).
10. *Williamson*, 151 F.3d at 1182.
11. *Id.*

Mr. Williamson's petition.[12] In its opinion, the court reviewed the long line of precedent interpreting the "in custody" provision, and determined that the registration and notification provisions of Washington's law were more accurately described as a collateral consequence of his crime rather than a restraint on his liberty.[13] Absent such a restraint on Mr. Williamson's liberty, the court held, he could not be considered "in custody." Accordingly, Mr. Williamson's petition was denied.[14]

This Note argues that the Ninth Circuit was wrong. The registration and notification provisions operate to constructively restrain the liberty of a convicted sex offender and, therefore, Mr. Williamson is "in custody" for purposes of habeas corpus relief. To support this proposition, this Note will first discuss the federal statute pertaining to habeas corpus and review the case law interpreting the jurisdictional requirement that the petitioner be "in custody"; second, review and discuss Washington State's sex offender registration and notification statutes; and finally, analyze the relevant statute and analogous case law in the context of Washington's sex offender laws in order to demonstrate that Mr. Williamson is "in custody" and is, therefore, entitled to file a petition for habeas corpus relief.

II. THE FEDERAL HABEAS CORPUS STATUTE - 28 U.S.C. § 2241

The writ of habeas corpus[15] is a procedural device whereby an individual may seek judicial review of the validity of executive, judicial, or private restraints on personal liberty.[16] The writ is not meant to affect the ultimate determination of a person's guilt or innocence. Rather, it is a civil postconviction remedy that allows a federal court to collaterally review the legality of the restraint imposed on a person who has been lawfully convicted.[17] If an individual challenges his or her restraint and the court finds the restraint to be illegal, the court may order the immediate release of the challenger.[18]

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12. *Williamson*, 151 F.3d at 1184-85.

13. *Id.* at 1183.

14. *Id.* at 1185.

15. *See* 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 1 (1999). "Habeas corpus" is a general term which referred to several different types of writs under English common law. As used in modern American law, the term "habeas corpus" refers to the writ of habeas corpus ad subjiciendum.

16. *Id.*

17. *Id.*

18. *Id.*

The roots of the modern writ of habeas corpus are found in English statutory and common law.[19] It is often referred to as the "Great Writ," and, historically, it has been recognized as "the greatest of the safeguards of personal liberty . . . ."[20] Recognizing the importance of the writ and the extraordinary remedy it provides, the framers of the Constitution provided a federal guarantee for habeas corpus relief: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in cases of rebellion or invasion the public safety may require it."[21]

Additionally, the Judiciary Act of 1789 authorized the federal courts to issue writs of habeas corpus according to the "usages and principles of law."[22]

Although the federal writ of habeas corpus was originally based on its common law usage, over the last two hundred years its scope has been expanded and it has developed a uniquely American flavor. This novel American development is primarily due to two important factors: reconstruction and federalism.

Originally, the constitutional guarantee of habeas corpus and the Judiciary Act of 1789 provided habeas corpus relief only to federal prisoners. This limitation, however, changed when, in 1867, Congress expanded the applicability of the writ to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[23] The reordering of the relationship between states and the federal government in the wake of the Civil War "established the federal courts' special role in the protection of individual liberty against state power . . ."[24] Expansion of the writ's applicability was due, in large part, to the federal government's anticipated difficulty in enforcing new and, in some cases, unpopular substantive individual rights.[25] Additionally, lawmakers recognized that the primary focus in state courts is the administration of substantive criminal law, specifically the determination of guilt or innocence. While the state courts are bound to protect a defendant's constitutionally guaranteed rights,

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19. *Id.* *See also* Emmanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 563 (1994).

20. Margolis, *supra* note 19, at 563; *see also* Cooper v. Taylor, 70 F.3d 1454 (4th Cir. 1995), *reh'g en banc granted, opinion vacated on other grounds on reh'g en banc*, 103 F.3d 366 (4th Cir. 1996), *cert. denied*, 522 U.S. 824 (1997).

21. U.S. CONST., art. 1, § 9, cl. 2.

22. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

23. *See* Note, *Federal Habeas Corpus: The Concept of Custody and Access to Federal Court*, 53 J. URB. L. 61, 62 (1975) (citing WRIGHT, LAW OF FEDERAL COURTS, § 53 (2d ed. 1970)).

24. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N. Y. U. L. REV. 991, 1027 (1985).

25. *See* Note, *supra* note 23, at 62.

"their chief duty is to enforce the law with respect to individuals the police and prosecutors honestly believe to have violated the law."[26]

Consistent with this assessment of the role of state courts, Professor Larry W. Yackle, a leading scholar on habeas corpus, contends that the overriding responsibility of state courts to enforce state law "deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the fourteenth amendment."[27] Consequently, the expansion of the writ of habeas corpus provided state prisoners with the opportunity to relitigate their federal claims in the federal court system, so long as certain procedural and jurisdictional requirements were met.

The American system of federalism has also shaped the development of the writ. In the American judicial system, state and federal courts operate in a delicately balanced world of overlapping jurisdiction. With the expansion of the writ in 1867, federal courts were authorized to collaterally review the actions of state courts. In the interests of comity, the federal government, particularly the judiciary, has proceeded carefully, so as to maintain traditional notions of state sovereignty and to preserve the balance between state and federal courts.

Although habeas corpus in the United States was originally fashioned after habeas corpus in England, the expanding protection of individual substantive rights pursuant to the Fourteenth Amendment and the unique concerns raised by the American federalist system have combined to transform the writ of habeas corpus over the last century.

The federal statutes governing the writ of habeas corpus are contained in sections 2241-2255 of the United States Code.[28] Section

26. Yackle, *supra* note 24, at 1031.

27. *Id.* at 1032.

28. 28 U.S.C. § 2241 (1994) provides:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

2241 gives the federal courts power to grant a writ of habeas corpus, and section 2254 provides the framework for federal habeas corpus relief in state cases. According to section 2254, a petitioner seeking a federal writ of habeas corpus in a state case must meet three threshold requirements: (1) the petitioner must be in custody pursuant to the judgment of a state court; (2) the petitioner must allege a violation of the Constitution or laws or treaties of the United States; and (3) the petitioner must have raised the constitutional claims and exhausted the remedies available in the state courts.[29] The federal courts' power to grant writs of habeas corpus under section 2241 has remained unchanged since 1867, but the courts' interpretation of the requirements imposed by section 2254 on a petitioner seeking federal habeas corpus relief reflect the changing notions of individual substantive rights and the influence of federalism.

The most significant change, and the most relevant to Mr. Williamson's petition, has come in the area of the custody requirement. Neither the constitutional guarantee of habeas corpus nor the subsequent statutory developments has sought to define the custody requirement. Consequently, the interpretation of the requirement has been left to the federal judiciary, which has increasingly liberalized application of the custody requirement.

Given this trend of increased liberalization, the Ninth Circuit's holding that Mr. Williamson was not in custody by virtue of the sex offender registration and notification laws is misguided. In order to understand the nature of the custody requirement and the argument for holding that the burdens placed on an individual by virtue of the sex offender laws qualify as custody for federal habeas corpus purposes, it is important to review the courts' evolving notion of what constitutes custody.

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(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

29. 28 U.S.C. § 2254 (1994).

At common law, because custody "began as the very essence of habeas relief,"[30] the courts considered a petitioner to be in custody only if he was physically confined.[31] The writ acted upon the "body," and such a writ could not lie in the absence of actual physical confinement. However, as the application of federal habeas corpus evolved in terms of the prerequisite exhaustion of state remedies, the scope of reviewable issues, and the tedious federalist jurisdictional balance, federal courts commensurately liberalized the custody requirement to reflect these new demands.[32]

The first case to raise the interpretive issue of custody in section 2254 came in 1885 with *Wales v. Whitney*.[33] There, the petitioner, a naval officer, petitioned the court for a writ of habeas corpus in order to challenge his confinement to the city of Washington D.C. pending the outcome of court-martial proceedings initiated against him by the Secretary of the Navy.[34]

In its opinion, the Supreme Court adhered to the common law notion of custody, because it was unable to envision a serious deprivation of liberty short of physical confinement.[35] Consequently, the court held that "actual confinement, or the present means of enforcing it, was necessary to constitute custody."[36] Because Mr. Wales was only instructed not to leave the city, and was not confined to a cell or building, the court found that he was not in custody for purposes of federal habeas corpus jurisdiction.[37]

However, the court left room for the later expansion of the custody requirement when it acknowledged that "the extent and character of the restraint which justifies the writ, must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."[38] The court's characterization of restraint seemingly indicated a willingness to make a contextual determination wherein some sort of restraint short of physical confinement may suffice to render a petitioner in custody for purposes of federal habeas corpus relief. Despite this potentially expansive language, however, the court continued to define the custody requirement in terms of physical confinement for the next eighty-five years.

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30. *See* Note, *supra* note 23, at 61.
31. *Id.* at 68.
32. *Id.*
33. 114 U.S. 564 (1885). *See* WILLIAM F. DUKE, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 288 (1980).
34. *Wales*, 114 U.S. at 565-68.
35. *See* Note, *supra* note 23, at 68.
36. *Wales*, 114 U.S. 564, 572.
37. *Id.* at 575.
38. *Id.* at 571.

Although the custody requirement remained fairly constant for many years following *Wales v. Whitney*, the requirement that the petitioner exhaust the remedies available at the state level and the scope of issues reviewable under the writ underwent significant change.[39] Then, in 1963, the Warren Court took the first step in the gradual expansion of the custody requirement beyond actual physical confinement.[40]

In *Jones v. Cunningham*, the Supreme Court held, for the first time, that a person who was not physically restrained was in custody for purposes of habeas corpus. In *Jones*, the petitioner, who was serving a ten year sentence in a Virginia state penitentiary, filed a petition for habeas corpus in the United States District Court for the Eastern District of Virginia.[41] The District Court dismissed the petition, but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal in forma pauperis.[42]

Before oral arguments were heard, the petitioner was paroled and released "into the custody of the Parole Board."[43] Once the petitioner was placed on parole, the Superintendent of the Virginia State Penitentiary, the original respondent listed on the writ, moved to dismiss the case as moot.[44] The petitioner opposed the dismissal and, alternatively, sought to add the members of the parole board as respondents.

The Court of Appeals dismissed the petition against the Superintendent and refused to allow the petitioner to add the parole board members as respondents to the writ.[45] Subsequently the Supreme Court of the Untied States granted certiorari to decide whether a person placed on parole was in custody within the meaning of the federal habeas corpus statute.[46]

The court first noted that the federal statute fails to "mark the boundaries of 'custody'" in that it neither provides a definition of that term nor limits its use in any other way.[47] The court then reviewed "common law usages and the history of habeas corpus both in England and in this country,"[48] to determine whether habeas corpus could be used in the context of a defendant who has been paroled.

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39. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953).
40. *See* Jones v. Cunningham, 371 U.S. 236 (1963).
41. *Id.* at 236-37.
42. *Id.*
43. *Id.* at 241.
44. *Jones*, 371 U.S. at 237.
45. *Id.* at 238.
46. Jones v. Cunningham, 369 U.S 809 (1962).
47. *Jones*, 371 U.S. at 238.
48. *Id.*

Although the court initially conceded that the primary use of habeas corpus has been to secure the release of defendants "held in actual, physical custody in prison or jail,"[49] it went on to assert that "English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement."[50] Similarly, the court asserted that in the United States the use of federal habeas corpus relief has not been restricted to defendants who are in actual, physical custody. As support for this proposition, the court noted that habeas corpus is available to aliens seeking entry into the United States, even though they are not in physical confinement.[51]

After clearly establishing that actual, physical confinement was not the only means by which a petitioner could be in custody pursuant to section 2254, the court determined that the restraints placed on the petitioner's liberty by the terms of his parole effectively placed him in custody for purposes of federal habeas corpus relief. Among the conditions of his parole that effectively restrained his liberty, the court noted that the petitioner: (1) was confined to a particular community, house, and job; (2) could not drive a car without permission; (3) must periodically report to his parole officer; (4) must permit his parole officer to visit him at home as well as at his job; and (5) must follow the parole officer's advice to keep good company, good hours, work regularly and keep away from undesirable places.[52] Furthermore, the court stated that "a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claimed was imposed upon him in violation of the United States Constitution."[53]

In total, the Court found that the terms of the petitioner's parole "significantly restrain[ed] petitioner's liberty to do those things which in this country free men are entitled to do"[54] and that "such restraints are enough to invoke the help of the great writ."[55]

In an apparent attempt to defend its radical expansion of the custody requirement, the court asserted that the writ could do more than "reach behind prison walls and iron bars."[56] The court elaborated that the writ "is not now and never has been a static, narrow, formalistic

49. *Id.*
50. *Id.*
51. *Jones*, 371 U. S. at 239.
52. *Id.* at 242.
53. *Id.*
54. *Id.* at 243.
55. *Id.*
56. *Id.*

remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[57] Accordingly, it held that petitioner's parole significantly restrained his freedom and, therefore, he was in custody for purposes of federal habeas corpus relief.

The Court's decision in *Jones v. Cunningham* signified a major departure from the court's previous interpretation of the custody requirement. Through its decision, the Court accomplished two major tasks: (1) it held that physical confinement was not a necessary requirement for fulfillment of the custody requirement, and (2) it established the writ as a dynamic process whereby protection against illegal restraint was the primary concern. After the court's decision in *Jones*, it was clear that legal restraint short of physical custody could be properly characterized as custody, and the issue really became one of line drawing—how much restraint was enough to satisfy the custody requirement?

Five years after the Court's decision in *Jones v. Cunningham*, the issue of custody was again addressed and again expanded in two cases: *Carafas v. La Valle*[58] and *Peyton v. Rowe*.[59] In *Carafas*, the Court considered the effect of postconviction disabilities in the context of the custody requirement. The petitioner, Mr. Carafas, was released before his writ was heard, but the court held that despite his release from confinement, there were certain consequences of his previous conviction that rendered the petitioner in custody. Among the consequences determined to restrain the petitioner's liberty were the restrictions on the types of business the petitioner could engage in, his disqualification from voting, and his inability to serve as a juror.[60] The Court held that due to the "disabilities or burdens [which] may flow from" the petitioner's conviction, he had "a substantial stake in judgment of conviction which survives the satisfaction of the sentence imposed on him."[61] Due to these "collateral consequences," the case did not become moot by virtue of the fact that the petitioner had completed his sentence of confinement.[62]

The Court's holding, however, was not based exclusively on the collateral consequences flowing from the conviction. In order to limit its holding, the court justified its finding that Mr. Carafas was in custody by construing the federal statute to require that the petitioner be

57. *Id.*
58. 391 U.S. 234 (1968).
59. 391 U.S. 54 (1968).
60. *Carafas*, 391 U.S. at 237.
61. *Carafas*, 391 U.S. at 237-38.
62. *Id.*

in custody at the time the petition is filed.[63] Because Mr. Carafas filed his petition while he was still confined to the state penitentiary, the court held that he was in custody for purposes of federal habeas corpus relief.[64]

In *Peyton v. Rowe*, decided the same year as *Carafas*, the Court expanded the custody requirement a little further. It held that where a petitioner is serving consecutive sentences, he may properly file a petition for a writ of habeas corpus, even though he is not yet in confinement for the specific conviction he is challenging.[65] According to the decision, the fact-finding function of the court may be affected if the petitioner were required to wait until he was serving the second of two consecutive sentences, because memories would surely have faded, and important witnesses would be missing or dead.[66] Such a postponement would make it difficult, if not impossible, for the petitioner to satisfy his burden of proof. Further, if the petitioner were successful, the state would have an equally difficult task if it chose to retry him.[67] In its holding, the Court relied upon *Jones* for the proposition that the writ was a dynamic remedy that adapted to the exigencies of the time.[68] Again, the Court's holding was premised on the underlying function of federal habeas corpus as a protector of individual rights.

The next major step in the Court's consistent expansion of the custody requirement came in 1973 in *Hensley v. Municipal Court, San Jose Milpitas Judicial District*.[69] There, the Court was required to determine whether a petitioner who was released on his own recognizance pending execution of his sentence was in custody within the meaning of section 2254.[70] The *Hensley* Court began with an acknowledgment, for the first time, that "the functions of the writ [had] undergone dramatic change."[71] The Court asserted that during this period of dramatic change it had "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."[72]

63. *Id.* at 238.
64. *Id.*
65. Peyton v. Rowe, 391 U.S. 54, 64 (1968).
66. *Id.* at 62.
67. *Id.*
68. *Id.* at 66.
69. 411 U.S. 345 (1973).
70. *Id.*
71. *Id.* at 349.
72. *Hensley*, 411 U.S. at 350.

Drawing on the content and spirit of previous Supreme Court decisions regarding the writ of habeas corpus, the Court asserted that "the demand for speed, flexibility, and simplicity" was a theme "indelibly marked [upon] construction of the custody requirement" as well as other requirements of the writ.[73] Accordingly, it held that the petitioner was in custody for purposes of the habeas corpus statute.

The Court based its holding on a finding that the petitioner was subject to restraints "not shared by the public generally."[74] Namely, the petitioner was required to appear "at all times and places as ordered by any court or magistrate of competent jurisdiction."[75] Consequently, the petitioner was not free to come and go as he pleased. "His freedom of movement rest[ed] in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice."[76] Furthermore, the Court noted that failure to comply with the terms of his release was in itself a criminal offense for which he could be imprisoned.[77]

In an attempt to limit its holding, the Court made clear that a state defendant would still be required to exhaust state remedies. Consequently, a petitioner released on bail or on his own recognizance pending trial or appeal could not seek federal habeas corpus because such a petitioner has not exhausted available state remedies.[78]

In a concurring opinion, Justice Blackmun acknowledged that "the Court has wandered a long way down the road in expanding traditional notions of habeas corpus" and that the "present case [was] yet another step."[79] Justice Blackmun further stated that "the Court seems now to equate custody with almost any restraint, however, tenuous."[80] The Court's decision in *Hensley* is significant, because it acknowledged the continued expansion of the custody requirement and affirmed the Court's reasoning that the writ should be applied flexibly and expediently to protect unlawful restraints on individual freedom.

Sixteen years after the decision in *Hensley*, the Court was again faced with the interpretation of the custody requirement of section 2254 in *Maleng v. Cook*.[81] There, the Court held that a petitioner does not remain in custody under a conviction where the sentence imposed

73. *Id.*
74. *Hensley*, 411 U.S. at 351 (citing Jones v. Cunningham, 371 U.S. 236, 240 (1963)).
75. *Id.* (citing CAL. PENAL CODE §§ 1318.4(a), 1318.4(c) (1973)).
76. *Hensley*, 411 U.S. at 351.
77. *Id.*
78. *Id.* at 353.
79. *Id.* (Blackmun, J., concurring).
80. *Id.*
81. 490 U.S. 488 (1989).

has expired, merely because of the possibility that the prior conviction will be used to enhance sentences imposed for subsequent state crimes.[82]

The Court distinguished its holding from *Carafas*, where it held that the collateral consequences of the petitioner's sentence—inability to vote, engage in certain business activities, hold public office, or serve as a juror—prevented the case from becoming moot when the petitioner was released from confinement after he filed his petition but before the petition was heard by the court.[83] The Court noted that the holding in *Carafas*, while discussing the collateral consequences in regard to the determination whether the petitioner was in custody, rested on the fact that the petitioner was in actual physical custody at the time the petition was filed. Consequently, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it."[84]

Following *Maleng*, the last case in which the Supreme Court addressed the interpretation of the custody requirement, the courts have continued to apply the test announced in *Jones v. Cunningham*: whether, as a result of a state court conviction, the petitioner is "significantly restrained . . . to do those things which in this country free men are entitled to do."[85] The line of Supreme Court opinions since *Jones* makes clear that the custody requirement should be liberally construed in order to protect a petitioner's individual liberty against unlawful restraint.[86] The issue remains one of line drawing. As the Court noted in *Wales v. Whitney*, "the extent and character of the restraint which justifies the writ, must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."[87] The writ is a dynamic tool and its procedural requirements must adapt in accordance with the exigencies of the time in which it is exercised. In this spirit, the Court has continually expanded the writ and the custody requirement in order to protect individual liberties.

Due to this continuing expansion and to the absence of a bright line test designed to determine when a petitioner is in custody for purposes of federal habeas corpus relief, lower courts are forced to engage in ad hoc determinations guided by the Court's vague references to the

82. *Id.* at 492.
83. *Id.* at 491-92.
84. *Id.* at 492.
85. Jones v. Cunningham, 371 U.S. 236, 243 (1963).
86. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345, 350 (1973).
87. Wales v. Whitney, 114 U.S. 564, 571 (1885).

dynamic nature of the writ and the need to apply it flexibly. This has led some lower courts to further expand the writ's applicability.

For example, in 1993, the Court of Appeals for the Ninth Circuit, the same court that determined Mr. Williamson was not in custody by operation of Washington State's sex offender laws, held that a petitioner sentenced to fourteen hours of attendance at an alcohol rehabilitation program was in custody within the meaning of section 2254.[88] The holding was based on the court's determination that the sentence "significantly restrain[ed] appellant's liberty to do those things which free persons in the United States are entitled to do."[89] The court reasoned that, like the petitioner in *Hensley*, the petitioner in *Dow* was not free "to come and go as he pleases."[90] The Ninth Circuit found the sentence to attend alcohol rehabilitation classes so severe that it went so far as to assert that the petitioner "suffer[ed] a greater restraint upon his liberty . . . than the restraint suffered by a person who is released upon his own recognizance."[91]

Similarly, the Court of Appeals for the Third Circuit expanded the custody requirement when it held, in a case of apparent first impression, that a sentence requiring the petitioner to perform 500 hours of community service effectively placed him in custody for purposes of a federal writ of habeas corpus.[92] In its opinion, the Third Circuit cited the Ninth Circuit's holding in *Dow v. Circuit Court of the First Circuit*, and noted that it found "the *Dow* decision quite compelling and analogous to this matter."[93]

The holdings by the Ninth Circuit in *Dow* and the Third Circuit in *Barry* both rest on the fact that due to the sentences imposed (alcohol rehabilitation and community service), the petitioners were required to be at a certain place at some point in the future. Such a sentence, according to the courts, placed "restraints on [the petitioner's] liberty not shared by the public generally.[94]

This language appears to serve as the basis for modern federal habeas corpus determinations as to whether a petitioner is in custody within the meaning of section 2254. Nevertheless, the trend is one toward liberalization of the requirement. Such a trend is at odds with the Ninth Circuit's holding in *Williamson v. Gregoire* that the regis-

88. Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993).
89. *Id.* at 923.
90. *Id.*
91. *Id.*
92. Barry v. Bergen County Probation Department, 128 F.3d 152, 162 (3d Cir. 1997).
93. *Id.* at 160.
94. Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (1993); *see also* Barry v. Bergen County Probation Dept., 128 F.3d 152, 161 (both citing Jones v. Cunningham, 371 U.S. 236 (1963)).

tration and notification provisions of the Washington sex offender law failed to place Mr. Williamson in custody pursuant to section 2254.

III. WASHINGTON STATE SEX OFFENDER LAWS

In 1990, Washington's state legislature joined the growing ranks of state legislatures that responded to the fears of their constituents regarding the high risk of recidivism among convicted sex offenders. It passed a statute that now requires "any adult or juvenile residing, or who is a student, is employed, or carries on a vocation in [the] state who has been found to have committed or has been convicted of any sex offense . . or who has been found not guilty by reason of insanity . . . of committing any sex offense . . ."[95] to register with the county sheriff for the county in which the person resides, attends school, or works.

Each individual who is required to register under the statute must provide the sheriff with his or her name, address, date and place of birth, place of employment, crime for which convicted, date and place of conviction, aliases used, social security number, photograph, and fingerprints.[96] In turn, the sheriff is required to forward such information to the Washington State Patrol within five working days, where a statewide central registry of sex offenders is maintained.[97]

If a person required to register under section 9A.44.130 changes his or her residence within the same county, written notice of the change of address must be sent to the county sheriff within seventy-two hours of moving.[98] If such a person moves to a new county within the state, that person must send written notice of the change of address to the county sheriff in the new county fourteen days prior to moving and must register with that county's sheriff within twenty-four hours of moving.[99] In addition, the registrant must send written notice within ten days of the move to a new county within the state to the county sheriff with whom the person last registered.[100]

If a person required to register moves out of the state of Washington, that person must send notice within ten days of moving to the new state to the county sheriff with whom he or she last registered.[101]

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95. WASH. REV. CODE § 9A.44.130(1) (1998). The statute also refers to persons convicted or found not guilty by reason of insanity of a kidnapping offense. For the purposes of this Note, the discussion will be limited to the statute's treatment of sex offenders.

96. WASH. REV. CODE § 9A.44.130(3) (1998)

97. WASH. REV. CODE § 43.43.540 (1998).

98. WASH. REV. CODE § 9A.44.130(5)(a) (1998).

99. *Id.*

100. *Id.*

101. *Id.*

Upon receipt of such information, the county sheriff must promptly forward the information regarding the change of address to the agency designated by the new state as the state's sex offender registration agency.[102] Failure to register as required is a class C felony if the crime for which the person was convicted was a felony. If the crime for which the person was convicted was not a felony, failure to register is a gross misdemeanor.[103]

Each year, the county sheriff must verify the addresses of registered sex offenders by sending, via certified mail with return receipt requested, a nonforwardable verification form to the last registered address of each offender.[104] Each registrant must then sign the verification form and return it to the county sheriff within ten days of receipt.[105] If a registrant does not sign and return the verification form, the county sheriff must make reasonable attempts to locate him or her.[106] If the registrant fails to return the verification form or is not at the last registered address, the county sheriff must forward such information to the Washington State Patrol for inclusion in the state's central registry.[107]

The duty to register continues for a period ranging from ten years to life, depending on the seriousness of the registrant's crime and on the number of prior convictions for which the registrant was convicted. If the registrant was convicted of a class C felony and does not have one or more prior convictions for a sex offense, the duty to register lasts for ten years from release or entry of judgment and sentence.[108] If the registrant is convicted of a class B felony and does not have one or more prior convictions for a sex offense, the duty to register lasts for fifteen years. However, when a registrant is convicted of a class A felony or has one or more prior convictions for sex offenses, the duty to register continues indefinitely unless the registrant petitions the Superior Court to be relieved of that duty. A registrant can bring such a petition only after spending ten consecutive years in the community without being convicted on any new offenses.[109]

In determining whether a registrant should be prematurely relieved of the duty to register, the court considers the nature of the offense which resulted in the registrant's duty to register, the criminal

102. *Id.*
103. WASH. REV. CODE § 9A.44.130(9) (1998).
104. WASH. REV. CODE § 9A.44.135(1) (1998).
105. *Id.*
106. WASH. REV. CODE § 9A.44.135(2) (1998).
107. *Id.*
108. WASH. REV. CODE § 9A.44.140(1) (1998).
109. WASH. REV. CODE § 9A.44.140 (1)-(3) (1998).

and relevant noncriminal behavior of the registrant before and after the conviction, and any other factors it deems relevant.[110] The court may only relieve a registrant of his or her duty to register if the registrant can demonstrate, by clear and convincing evidence, that future registration will not serve the purposes of the sex offender registration statutes.[111]

In addition to the registration requirements discussed above, Washington's state legislature also enacted a statute authorizing the release of information obtained through registration to the public.[112] The extent of the public disclosure varies depending on the level of risk posed by the offender to the community and the "needs of the affected community members for information to enhance their individual and collective safety."[113] For purposes of determining the extent of public disclosure, the county sheriff assigns a risk level to each registered offender in the county.[114] A level one offender poses the lowest risk to the community, and where a level one assessment is made, the county sheriff is authorized to share all "relevant, necessary and accurate" registration information with other "appropriate law enforcement agencies" and any victim, witness to the offense, or individual who lives near the registrant upon request.[115]

A level two offender poses a moderate risk to the community. In addition to the information which may be released for a level one offender, a county sheriff may release "relevant, necessary, and accurate" information to "public and private schools, child day care centers, family day care providers, businesses and organizations that serve primarily children, women, or vulnerable adults, and neighbors and community groups" near the place where the registrant resides, plans to reside, or is regularly found.[116]

Finally, when a registrant is categorized as a level three offender, the classification is based on an assessment that the registrant poses a high risk of reoffense within the community.[117] Upon such a determination, the county sheriff is authorized to release, in addition to the information authorized to be released regarding level one and two offenders, "relevant, necessary, and accurate" information to the public at large.[118]

110. WASH. REV. CODE § 9A.44.140(3) (1998).
111. *Id.*
112. WASH. REV. CODE § 4.24.550 (1998).
113. WASH. REV. CODE § 4.24.550(2) (1998).
114. WASH. REV. CODE § 4.24.550(3) (1998).
115. *Id.*
116. WASH. REV. CODE § 9A.4.24.550(3) (1998).
117. WASH. REV. CODE § 9.95.145(3) (1998).
118. *Id.*

The legislature believed that a statute requiring convicted sex offenders to register with local law enforcement was necessary based on its finding that

> sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction.[119]

The legislature believed that "sex offender registration has assisted law enforcement agencies in protecting their community."[120] However, these seemingly well-guided efforts to protect the community have often led to volatile confrontations and increased acts of vigilantism.

While it is clear that the statutory scheme of registration and notification places serious burdens on both local law enforcement authorities and registrants, an honest analysis about sex offender registration and notification must include a discussion of the operative effect of such a statute. In many instances, the notification provisions exacerbate the problems the legislature intended to remedy.

Perhaps the most notorious example of community notification leading to vigilantism in Washington is that of Peter Gallardo. On July 12, 1993, thirty-five year old Gallardo was released from Twin Rivers Corrections Center in Monroe, where he served eighteen months for first degree statutory rape.[121] One week before his release, the Snohomish County Sheriff's office distributed fliers in the Alderwood Manor area of Lynnwood, Washington. Gallardo's parents lived in the neighborhood, and he planned on returning to live with them upon his release. The fliers distributed by the Sheriff's office, which resembled a 'wanted' poster, included a photograph of Gallardo and warned that he had a very high probability of reoffending.[122] The flier said that Gallardo had "sadistic and deviant sexual fantasies which include torture, sexual assault, human sacrifice, bondage, and the murder of small children."[123]

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119. 1990 Wash. Laws ch. 3, § 402 (included in notes following WASH. REV. CODE § 9A.44.130 (1998)).

120. 1991 Wash. Laws ch. 274 (included in notes following WASH. REV. CODE § 9A.44.130 (1998)).

121. *Fire at Sex Offender's Home Brings Cheers, New Fears*, TACOMA NEWS TRIBUNE, July 13, 1993, at A1.

122. Editorial, *Notify to Inform, Not to Inflame*, TACOMA NEWS TRIBUNE, July 26, 1993, at A6.

123. *Id.*

In response to the notification of Gallardo's plans to move into the neighborhood, a community safety rally was organized and about three hundred community members attended. Hours after the rally, the home that Gallardo intended to move into was burned to the ground. The cause of the fire was arson.

One year before Gallardo's home was burned, Jonathan Tampico attempted to resettle in Tacoma after serving a prison term in California for child molestation. However, after residents in the neighborhood were informed of Tampico's intention to move into the community, neighbors began protesting his presence. The resultant uproar drove Tampico to return to California.[124]

Similarly, in Issaquah, Washington, local residents picketed a Texaco station during rush hour traffic and tried to dissuade drivers from patronizing the station after they were notified that Victor Newman, a convicted sex offender, was working there.[125] Newman had been recently released after serving ten years in prison after being convicted of indecent liberties and robbery when, during the course of a burglary, he fondled a woman as she slept.[126] Newman clearly stated on his application that he was a convicted sex offender, but the owner of the gas station, who described Newman as an honest, loyal and dedicated employee, hired him anyway. Residents of Issaquah became aware of Newman's past when the school district sent a notice home with all students.[127]

The potential for violent community response has only increased in recent months with the advent of web sites dedicated to the dissemination of sex offender registration information. In King County, the sheriff's office includes names, descriptions, addresses, and conviction information.[128] In other counties around Washington, similar web sites include the registrant's photograph.[129]

Such broad public notification and the resultant community reaction have become part of the sex offender registration regime, and must be considered in assessing the restraints placed on registrants' individual liberty in the context of the custody requirement for a federal writ of habeas corpus.

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124. *Fire at Sex Offender's Home Brings Cheers, supra* note 121, at A1.

125. Katherine Long, *Gas Station Picketed Over Ex-Con's Hiring; Boss Stands by Choice*, SEATTLE TIMES, February 2, 1995, at B5.

126. *Id.*

127. *Id.*

128. *See* <http://www.metrokc.gov/sheriff/sosch.htm> (last modified Sept. 22, 1999).

129. *See, e.g.*, <http://www.co.clark.wa.us/sheriff/inter/sex%20offender/sex.htm> (last modified Oct. 11, 1999); <http://www.cowlitzcounty.org/sheriff/rso> (last modified Dec. 7, 1999).

IV. THE ARGUMENT FOR CUSTODY

In *Williamson v. Gregoire*, the issue presented to the court was whether "a convicted child molester who has completed his sentence, but who is required to register as a sex offender under state law, is 'in custody' for purposes of federal habeas corpus."[130] In determining that the petitioner, Mr. Williamson, was not in custody by virtue of the sex offender laws, the Ninth Circuit wrongly based its holding on a finding that the registration and notification requirements were collateral consequences of the crime, rather than restraints on the petitioner's liberty. The decision is contrary to the trend of expansion and liberalization of the custody requirement by the Supreme Court. Rather than applying the requirement flexibly, the Ninth Circuit approached the issue in a formalistic fashion; a fashion that has been abandoned by the Supreme Court since *Jones v. Cunningham*.

The Ninth Circuit opinion in *Gregoire* cites *Maleng v. Cook* for the proposition that "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of habeas attack upon it."[131] Based on this holding, the Ninth Circuit asserted that "the boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence' of a conviction."[132] That assertion is an oversimplification of the court's holding in *Maleng*.

The *Maleng* Court held that collateral consequences alone were not enough to place a person in custody.[133] It did not hold that collateral consequences and restraints on liberty are mutually exclusive. The test for determining when a petitioner is in custody is the same after *Maleng* as it was before *Maleng*. Simply put, if a petitioner's liberty is restrained in a way that the general public's is not, then the petitioner is in custody for purposes of federal habeas corpus.

Collateral consequences have traditionally included such restrictions as the inability to vote, hold public office, or serve as a juror. Similarly, imposition of fines or revocation of licenses are often characterized as collateral consequences.

In *Maleng*, the collateral consequence of the petitioner's crime was the possibility that a previous conviction may increase the sentence for a subsequent conviction. The question faced by the

130. Williamson v. Gregoire, 151 F.3d 1180, 1182 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 824 (1999).

131. *Williamson*, 151 F.3d at 1183 (citing Maleng v. Cook, 490 U.S. 488, 492 (1989)).

132. *Williamson*, 151 F.3d at 1183.

133. *Maleng*, 490 U.S. at 492.

Court in *Maleng* was "whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted."[134] While the Court acknowledged the tradition of liberal construction that it had afforded the custody requirement, it went on to state that it had "never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction."[135] Thus, even though the Court discussed the possibility of future sentence enhancement as a collateral consequence of the petitioner's crime, it did not base its holding on that distinction. The foundation of the analysis is restraint, and, thus, the court should rather determine whether the petitioner's liberty is restrained in a way that the general public's is not.

Furthermore, the Court in *Maleng* went on to hold that the petitioner was in custody for purposes of federal habeas corpus.[136] The petitioner in *Maleng* was, in fact, convicted on a subsequent charge and was serving a federal sentence at the time the Court heard his case. Drawing on its holding in *Peyton v. Rowe* that a petitioner who was serving two consecutive sentences could challenge the second sentence which he had not yet begun to serve, the Court again took a very liberal approach to the custody requirement and construed the petition in such a way that it was possible to argue that the petitioner was in custody for the state conviction.[137] The Court's willingness to extend the custody requirement to the petitioner in *Maleng* may be the most liberal expansion by the Court thus far. It is ironic that the Ninth Circuit would use the *Maleng* case to justify such a narrow and formalistic approach to the custody requirement.

The sex offender registration and notification requirements may be characterized as collateral consequences, but that determination does not properly end the analysis. The court still must consider whether the requirements and restrictions placed on the petitioner, whether characterized as collateral consequences or not, operate to restrict the petitioner's liberty.

The Ninth Circuit held that the registration and notification provisions did not significantly restrain Mr. Williamson's physical liberty, because it believed that the provisions did not impede his physical movement or demand his physical presence at any particular

134. *Id.*
135. *Id.*
136. *Id.* at 493.
137. *Id.*

time or place. This reading of the provisions in the context of custody is extremely narrow and contrary to the liberal interpretive tradition afforded such cases by the Supreme Court.

On its face, the statute requiring Mr. Williamson to register restrains his liberty. He is required to register annually, register before he moves, and register after he moves. He must provide the local sheriff with a broad range of personal information that will be used to track his movement. These are not restraints shared by the public generally.

Even his physical movement is restrained by the provisions. For example, Mr. Williamson cannot move without knowing his destination at least fourteen days in advance. He must always have an address where the sheriff can reach him. Such a restraint is not shared by the public generally.

The court acknowledged that the registration and notification provisions "might create some kind of subjective chill on Williamson's desire to travel," but, because the chill was purely subjective, the court held that the disincentive to move did not amount to custody.[138] While it is true that Williamson can move as long as he complies with the registration requirements, the experiences of Peter Gallardo and Victor Newman illustrate that the "chill" on the petitioner's desire to travel is not subjective. Peter Gallardo could not live in a house that was burned down. Because of the notification provisions and the hysteria they caused in the community, Mr. Gallardo could not move to Lynnwood.

Stories like Mr. Gallardo's are not rare. Registered sex offenders face ostracism and stigmatization whenever and wherever they move, and, as a result of the requirements, registered sex offenders are often unable to move. Such restraint is not based purely on a "subjective chill."

Like a petitioner who is on parole and in custody for purposes of federal habeas corpus relief, a registered sex offender cannot move freely and is subject to rearrest. The primary difference between the restraints imposed on parolees and registered sex offenders is that parole ends, whereas the sex offender registration requirement can continue for life. In many ways, mandatory registration and notification resembles a lifetime parole.

From a policy perspective, the sex offender registration and notification requirements demand the protection of the "Great Writ." Serious and enduring branding results from these statutes. It is truly

138. Williamson v. Gregoire, 151 F.3d 1180, 1184 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 824 (1999).

the scarlet letter of modern criminal law. Given the serious consequences associated with sex offender registration statutes, it is difficult to imagine a situation where the need to protect a petitioner's individual constitutional liberties is more critical.

The Supreme Court has denied Mr. Williamson's writ of certiorari in this case.[139] Due to the novel questions raised when applying the custody requirement of the writ of habeas corpus in the context of sex offender registration and notification statutes, it is only a matter of time until another circuit confronts the same situation and, applying the writ liberally as required by the Supreme Court's holdings, determines that the petitioner is in custody. Once a split occurs among the circuits, the Supreme Court should review the issue to clarify whether or not a convicted sex offender is in custody by virtue of the sex offender registration and notification statutes that are springing up throughout the country. If the Court continues to follow the liberal trend that has developed in the last sixty years, it should hold that such a petitioner is indeed in custody for purposes of federal habeas corpus.

139. Williamson v. Gregoire, 119 S. Ct. 824 (1999).