Docket No. 16-4175

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JASON PIASECKI,

Petitioner-Appellant,

v.

COURT OF COMMON PLEAS, BUCKS COUNTY, PA., DISTRICT ATTORNEY OF BUCKS COUNTY; AND THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents-Appellees.

On Appeal from Order Dismissing Petition for Writ of Habeas Corpus
Dated and Entered October 26, 2016
Under Docket No. 2:14-cv-4007-LDD-MH (Davis, U.S.D.J.)
in the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR APPELLANT PIASECKI

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STATEMENT OF JURISDICTION

This appellant filed a petition for a writ of habeas corpus while in custody under the judgment of a state court, to wit, the SORNA registration obligation resulting from his conviction and sentence in the Court of Common Pleas of Bucks County, Pennsylvania, claiming violations of his rights under the Constitution of the United States. 2App. 28a.[1] He invoked the subject matter jurisdiction of the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. §§ 2241(c)(3) and 2254(a). Whether the lower court had such jurisdiction is the subject of this appeal.[2] In any event, the district court had jurisdiction to determine whether it enjoyed jurisdiction. *White-Squire v. U.S. Postal Service*, 592 F.3d 453, 456 (3d Cir. 2010), quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

This Court's jurisdiction rests upon 28 U.S.C. §§ 1291 and 2253. In particular, this Court has jurisdiction of the appeal under 28 U.S.C. § 2253(a),

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[1] "2App." refers to Volume II of the appendix filed with this brief. "1App." refers to the attached, required Volume I appendix. "Tr." refers to transcripts of proceedings in the state court. No hearing was held in federal court in this case.

[2] That his probation expired before the PCRA proceedings could conclude through the appellate process, and thus, under state law, the state appellate courts lost jurisdiction, does not mean that Mr. Piasecki "failed" to exhaust remedies. *Leyva v. Williams*, 504 F.3d 357, 368–69 (3d Cir. 2007). In any event, exhaustion of remedies is not a jurisdictional requirement, see *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir. 1995), and the respondents conceded exhaustion as to the *Miranda* issue and two others, at least. 2App. 52a.

because (a) the appeal challenges the "final order" in "a habeas corpus proceeding," *id.*, to wit, the district court's order (1App. 2a) of October 26, 2016; (b) the notice of appeal (1App. 1a) was timely filed on November 23, 2016, within 30 days of the entry of the final order (28 U.S.C. § 2107(a); Fed.R.App.P. 4(a)(1)(A)); *see* 2App. 26–27a (docket); and (c) the motions panel (Greenaway, J., with Ambro & Scirica, JJ.) on June 5, 2017, issued a Certificate of Appealability (as to one merits issue and the antecedent procedural issues); 1App. 18a. See *Gonzalez v. Thayer*, 565 U.S. 134, 140–41 (2012) (clarifying requisites of appellate jurisdiction in habeas corpus cases). By order dated September 20, 2017, the same panel (per Scirica, J.) denied the appellees' motion for summary dismissal and referred any question regarding appellate jurisdiction to the merits panel. 1App. 20a.

STATEMENT OF THE ISSUES
WITH STATEMENT OF PLACE RAISED AND RULED UPON

1. Did the District Court have habeas corpus jurisdiction under 28 U.S.C. § 2254(a), where the petitioner alleged, supported by state law and the record of his sentencing, that the obligations of his registration as a supposed Tier III sex offender under Pennsylvania's SORNA law placed him "in custody pursuant to the judgment" of the state sentencing court as of the date his federal petition was filed?

Where in the Record Raised and Ruled Upon

The appellant raised this issue in his petition for a writ of habeas corpus and briefed it in the Traverse he filed in reply to the respondents' Answer, 2App. 84a (DDE 14), and then in his Objections to the Report & Recommendation of the U.S. Magistrate Judge. 2App. 100a, 113a (DDE 17 & 20). The district court ruled on it in the Memorandum Order dismissing the petition, filed October 26, 2016. 1App. 2a (DDE 21). A motions panel of this Court referred any question of jurisdiction to the merits panel. 1App. 20a.

2. Did the district court abuse its discretion by refusing petitioner-appellant's request for an evidentiary hearing, based on a *prima facie* showing, to establish on the record that the obligations imposed upon him by his SORNA registration in fact were sufficiently restrictive of his physical liberty to constitute "custody" for purposes of habeas corpus jurisdiction?

Where in the Record Raised and Ruled Upon

The petitioner-appellant sought an evidentiary hearing in his Traverse, 2App. 84a, and again in his Objections to the Report & Recommendation. 2App. 100a. The request was ruled upon in the District Court's final order. 1App. 2a.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case is related to (and grows out of) the state court criminal prosecution of Mr. Piasecki, found at docket number CP-09-CR-5364-2009. *See* 2App. 116a (trial court docket). The state court appellate dockets are: 1397 EDA 2010 (Superior Ct., direct appeal), 608 MAL 2011 (Pa. Supreme Court, direct appeal allocatur), 1482 EDA 2013 (Super. Ct., PCRA appeal), 178 MAL 2014 (Pa.S.Ct., PCRA allocatur).

STATEMENT OF THE CASE

This appeal arises out of a district court order dismissing for lack of jurisdiction a petition for habeas corpus relief under 28 U.S.C. § 2254. Jason Piasecki, the petitioner-appellant, was convicted in the Bucks County Court of Common Pleas of knowingly possessing child pornography, in violation of 18 Pa.C.S. § 6312(d). 2App. 130a (docket). He was sentenced on April 26, 2010, to serve three years' probation, coupled with ten years' registration as a sex offender. 2App. 151–52a (transcript). Mr. Piasecki is a mentally disabled young adult (32 at the time of the alleged offenses) who lives with his parents. He has autism, as well as the IQ of an elementary school child. *See* Tr. 1/11/2010, at 174–75 (pretrial hearing). Mr. Piasecki's term of probation expired while his PCRA petition was awaiting decision at the state trial court level. 2App. 184a (opinion on PCRA) but his court-imposed obligations as a SORNA registrant continued.

1. Trial and Appeal. Following a two-day bench trial, petitioner Jason Piasecki was found guilty in the Court of Common Pleas of Bucks County, Pennsylvania, on January 13, 2010, on 15 counts of knowingly possessing a number of images of child pornography on a home computer. 2App. 154a (trial court opinion). The date of the alleged offense is April 1, 2009. 2App. 119a (state court docket). Each count reflected the presence on a computer in his parents' home of a short video of child pornography, all in the form of "preview" files (out of thousands of sexually explicit images saved on the hard drive of the computer). 2App. 177a (opinion on direct appeal).[3] The only evidence that he (as opposed to someone else in the home) had possessed these videos, or that the conduct in question was "knowing," as required, was in the form of oral statements he purportedly made to the police who came to the family home to execute a search warrant. 2App. 178a.

What the evidence showed, in the light most favorable to the Commonwealth, was that Mr. Piasecki may have been generally aware that among the thousands of adult pornographic images he accessed (and thus automatically saved in a couple of unsorted folders, Tr. 1/12/10, at 60) were a few that he was willing to agree, when prompted by a police officer, were "films involving children." Tr. 1/12/10, at 42. The police conceded that petitioner consistently

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[3] In other words, the evidence reflected that the videos had been viewed, at most, "on line" but not deliberately downloaded to be saved. *Id*.

maintained that he had "never searched for" videos depicting children. Tr. 1/12/10, at 43.

The uncontradicted evidence (given by his adoptive mother, who has a Masters in Social Work and has worked for 40 years as a professional with special needs children; Tr. 1/11/10, at 173) also showed that Jason has needed special education since before kindergarten. At the time of trial, at age 32, he was able to read at a Third Grade level and do math at a Second Grade level. Tr. 1/11, at 176.[4] His eight-year-old son had caught up with him in math. Tr. 183. "[H]e also has a difficult time with verbal information because it's hard for him to take it all in and understand the combination of the words and the social context." Tr. 1/11, at 176–77. He had tried and failed at 20 jobs. He could not make a hamburger at Burger King; he could not match hangers by size at a retail clothing shop; he could not follow directions as a restaurant busman to pick table cloths by color that indicated their size for different tables. He has to have it explained to him each week how to deposit all but $20 or $30 of a pay check. Tr. 1/11, at 181. He cannot spell words such as "today" or "summer," or remember the spellings of names of people whose numbers are saved on his phone. Tr. 1/11, at 182.

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[4] The trial court excluded (as hearsay; *but cf.* Pa.R.Evid. 803(4) (statements of medical diagnosis)) one aspect of the testimony of Marlene Piasecki at the pretrial hearing, that is, her statement of Jason's autism diagnosis and of his tested IQ. Tr. 1/11, at 174–75. The substance of that testimony was unchallenged, however.

The state court dismissed the more serious charges ("dissemination," under 18 Pa.C.S. § 6312(c)) when the Commonwealth rested its case, Tr. 1/12/2010, at 86, but convicted him of knowing possession of the 15 videos. Tr. 1/13/2010, at 83. The state courts held the evidence sufficient to prove knowing and intentional possession by Mr. Piasecki of each of 15 different videos found in the "preview" files of the family computer. 2App. 172–73a (post-trial opinion); 2App. 178a (direct appeal).

On April 26, 2010, the trial court (Hon. Rea B. Boylan, J.) placed Mr. Piasecki on three years' probation, which he completed on April 26, 2013. 2App. 190a (opinion on PCRA appeal). At sentencing, the court directed that Mr. Piasecki register for ten years as a sex offender.[5] 2App. 151–52a (sentencing transcript).

On direct appeal to the Pennsylvania Superior Court, Mr. Piasecki advanced three issues: (1) failure of the trial court to suppress his statements to police as involuntary and a result of custodial interrogation; (2) due process violation in mishandling computer evidence, resulting in alteration and destruction of favorable information; and (3) insufficiency of evidence to prove the element of knowing and intentional possession of contraband items. In a

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[5] The sentencing court announced this period of registration based upon Mr. Piaskecki's conviction of the lowest level (called "Tier I") of sex offense. As explained in more detail at footnote 7, *post*, the Pennsylvania State Police later took it upon themselves to reclassify him into Tier III, the highest level, and declare that his registration obligation would continue for life.

non-precedential decision filed July 25, 2011 (No. 1397 EDA 2010), the Superior Court affirmed. 2App. 183a; *see* 32 A.3d 280 (table). The Supreme Court of Pennsylvania refused allowance of appeal. *See* 614 Pa. 711, 38 A.3d 824 (Jan. 6, 2012) (No. 608 MAL 2011). No petition for certiorari was filed in the Supreme Court of the United States. Mr. Piasecki's conviction thus "became final" on April 5, 2012, which was 90 days after the denial of allocatur on direct appeal. See *Clay v. United States*, 537 U.S. 522 (2003).

2. PCRA Proceedings. On December 19, 2012, Mr. Piasecki filed a timely and otherwise proper, counseled petition (supplemented 3/28/13) in the Court of Common Pleas under the Post-Conviction Relief Act (PCRA). 2App. 133a (CCP docket). The PCRA claimed that trial counsel was ineffective in failing to move for suppression of his client's incriminating statements under Pennsylvania's "*corpus delicti*" rule, and in failing to seek suppression of the fruits of the search of the computer (under the Pennsylvania state wiretap law). Judge Boylan, the trial judge, conducted a two-day evidentiary hearing on April 10 and 16, 2013. 2App. 134a (docket). The petition was then denied by order dated April 23, 2013, and filed April 24, 2013. 2App. 134a. Mr. Piasecki's three-year term of probation expired, without having been extended or revoked, on April 26, 2013. An appeal of the PCRA denial was dismissed based on loss of PCRA jurisdiction (expiration of probation) (Pa. Super., No. 1482 EDA

2013), *noted at* 97 A.2d 810 (Feb. 21, 2014), 2App. 194a, *all. app. denied*, No. 178 MAL 2014 (Pa. S.Ct.), *noted at* 97 A.2d 744 (Aug. 19, 2014).[6]

3. Federal Petition for Habeas Corpus. On December 4, 2014, Mr. Piasecki, represented by counsel, filed a timely petition for habeas corpus relief under 28 U.S.C. § 2254. 2App. 24a. The petition articulated four federal issues: (1) admission at trial of incriminating statements that were given involuntarily and in violation of *Miranda*; (2) trial evidence insufficient to establish *mens rea*, that is, that the charged possession was knowing and intentional; (3) destruction of potentially favorable evidence through failure of the Commonwealth to preserve electronic data in its original form; and (4) ineffective assistance of counsel in the respects advanced in the PCRA. 2App. 29a (petition). The District Attorney's Office answered on behalf of all respondents. The respondents expressly conceded timeliness of the federal filing, 2App. 49a–50a, but argued that some of petitioner's claims were either unexhausted or procedurally defaulted in the state courts. 2App. 53a–55a. The respondents contended that the federal court lacked jurisdiction on the basis that Mr. Piasecki was no longer "in custody," 2App. 44a–45a, and also disputed his claims on the merits.

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[6] Pennsylvania's Post-Conviction Relief Act has been authoritatively construed to provide that subject matter jurisdiction is lost if the sentence terminates during the litigation, at any stage. *Commonwealth v. Turner*, 80 A.3d 754 (Pa. 2013). As addressed in the Argument portion of this Brief, federal habeas corpus jurisdiction is based on a different rule.

Mr. Piasecki filed a Traverse and Reply answering the respondents' contentions and requesting a hearing. He offered to demonstrate the precise manner in which Mr. Piasecki's ongoing SORNA registration, as imposed by the sentencing judge, continued to place him "in custody pursuant to the judgment" of the state trial court, notwithstanding the expiration of his term of probation. 2App. 84a.

The district court (Legrome D. Davis, J.) referred the matter to U.S. Magistrate Judge Marilyn Heffley, who on April 21, 2016, issued a report and recommendation suggesting dismissal without a hearing. 1App. 17a; DDE 15. The court rejected Mr. Piasecki's argument that his continuing SORNA registration obligations placed restrictions on his liberty sufficient under this Court's case law to constitute "custody." The Magistrate Judge also declined to convene an evidentiary hearing on the restrictions on his liberty occasioned by Mr. Piasecki's SORNA registration, on the stated basis that no hearing was needed where the court had determined that the petition should be dismissed for lack of jurisdiction. 1App. 14a (n.4).

Ruling on petitioner's timely objections, 2App. 100a, 113a, the district court held, in agreement with Judge Heffley, that Mr. Piasecki was not "in custody" under the challenged judgment of conviction at the time of filing, thus depriving the court of subject matter (habeas corpus) jurisdiction. 1App. 3a–4a; *also available at* 2016 WL 6246547 (filed Oct. 26, 2016). Judge Davis further opined that the Magistrate Judge's denial of a hearing was not an abuse of

discretion. 1App. 2a. The petitioner's Traverse-Reply and Objections had both described, in specific and general terms, what he sought to prove at the hearing, 2App. 86s–87a, 102a, but Judge Davis wrote that Mr. Piasecki had failed to "forecast" what evidence outside the record could have been presented at such a hearing to show that the conditions of his SORNA registration restricted his physical liberty so as to place him in "custody" for habeas purposes. 1App. 2a. Finally, the district court held that the SORNA registration requirement is merely a "collateral consequence" and is not part of the sentence for the offense. 2App. 3a–4a.

On November 23, 2016, Mr. Piasecki filed a timely notice of appeal to this Court. 1App. 1a. The district court refused to issue a certificate of appealability, 1App. 5a (10/26/16 order). On June 5, 2017, however, this Court's motions panel (Greenaway, J., with Ambro & Scirica, JJ.) granted a Certificate, finding, as required by 28 U.S.C. § 2253(c), that the *Miranda* issue articulated in the habeas petition presented a substantial constitutional question and that the jurisdictional issue was at least "debatable." 1App. 18a. In its order filed September 20, 2017, denying the appellees' motion for summary dismissal, the panel further explained the import of its COA order. 1App. 20a.

SUMMARY OF ARGUMENT

The district court had jurisdiction of appellant Piasecki's habeas corpus petition under 28 U.S.C. §§ 2241(c) and 2254(a) as of the date he filed it. At that time, he was "in custody pursuant to the judgment of a state court," as required by § 2254(a). Although his three-year term of probation had expired some 20 months earlier, he remained at that time subject to the onerous requirements of sex offender registration under Pennsylvania's SORNA statute. Several of those requirements placed restraints on his physical liberty, this is, his right to come and go as he pleased, which is the touchstone of "custody" for purposes of habeas jurisdiction. Moreover, those restrictions rested upon him "pursuant to the judgment" of sentence in his criminal case. This is so both as a matter of state law, as subsequently announced by the state's appellate courts (including the Supreme Court) and as a matter of particular fact, as reflected in the pronouncement of sentence in his case. The dismissal of the petition for lack of jurisdiction must therefore be reversed.

If for any reason this Court does not determine as a matter of law (from the state statutory scheme, case law and sentencing transcript) that Mr. Piasecki was "in custody" when he filed his federal habeas corpus petition, he was at least entitled to the evidentiary hearing he sought on this point, but was denied. Appellant Piasecki requested a hearing to show in detail how compliance with his SORNA registration obligations restrained his freedom of movement, that

is, his physical liberty. He made the required *prima facie* showing to justify such a hearing. If this Court does not reverse on the jurisdictional point as a matter of law, it should therefore at least remand with directions to permit an evidentiary hearing on the question of "custody."

ARGUMENT

I. THE DISTRICT COURT DID NOT LACK JURISDICTION, BECAUSE APPELLANT'S SEX OFFENDER REGISTRATION, IMPOSED AT SENTENCING AND IN FORCE AT THE TIME OF FILING THE HABEAS CORPUS PETITION, PLACED HIM "IN CUSTODY PURSUANT TO THE JUDGMENT" OF THE STATE COURT, NOTWITHSTANDING THE EXPIRATION OF HIS TERM OF PROBATION.

Standard or Scope of Review This Court's review of the question whether the district court had subject matter jurisdiction, insofar as it turns on questions of law rather than of fact, is plenary. *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

Discussion

The restrictions placed on his physical liberty as a result of mandatory sex offender registration, triggered solely by his challenged convictions and imposed as part of his sentence, placed appellant Piasecki "in custody pursuant to the judgment of [the] state court" within the meaning of 28 U.S.C. § 2254(a), both at the time he filed his federal habeas corpus petition and presently. See also *id.* § 2241(c)(3) (all federal habeas corpus jurisdiction dependent on petitioner's being "in custody"). Adopting the report and recommendation of the Magistrate Judge (1App. 6a), the district court ruled, 1App. 2a, that petitioner was not "in custody" as a matter of law. To the contrary, the restrictions that SORNA registration placed on his physical liberty are more than sufficient to establish "custody" under this Court's cases. Moreover, that registration obligation was part of his sentence, so its restrictions fall upon him "pursuant to

the judgment of a state court." Accordingly, the final order of the district court must be reversed and the case remanded for consideration of the merits.

The restrictions imposed on Mr. Piasecki as a SORNA registrant, at the time his habeas petition was filed, were at least akin to those resulting from a term of probation. This Court has repeatedly held, relying on Supreme Court case law holding even lesser impositions sufficient to constitute "custody," that being subject to a term of probation satisfies § 2254(a)'s "custody requirement." See *Lee v. Stickman*, 357 F.3d 338, 342–43 (3d Cir. 2004); *Barry v. Brower*, 864 F.2d 294, 296 (3d Cir. 1988). This aspect of his sentence placed significant restrictions on Mr. Piasecki's freedom of movement. It imposed an obligation – potentially for many years, if not for the rest of his life – to travel quarterly (or perhaps annually depending on the version, if any, eventually held to apply[7]) to a State Police Barracks and to remain there, behind locked doors,

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[7] Appellant's sentencing occurred in 2010. The subsequent enactment of SORNA (2012), as amended in March 2014, was deemed applicable and was being enforced against him at the time he filed his federal petition in December 2014. SORNA potentially extended the registration obligation to the duration of petitioner's life, by raising from Tier I to Tier III those defendants who were convicted more than once for a covered offense. The State Police interpreted the amendment as requiring lifetime registration for Tier I offenders convicted in a single case on multiple counts, resulting in an administrative reclassification for Mr. Piesecki. In *Commonwealth v. Lutz-Morrison*, 143 A.3d 891 (Pa., Aug. 15, 2016), however, the state Supreme Court ruled that Tier III lifetime registration based on having more than one conviction (as in Mr. Piasecki's case) does not apply unless the second or subsequent conviction resulted from an offense *committed after conviction for* the first offense. While this reasoning would appear to apply to Mr. Piasecki and require that no more than Tier I registration be reinstated (under which the base number of in-person reports is annual, rather than quarterly) rather than Tier III,

answering questions from a police officer and unable to leave until excused. It further requires that he update the registration, again in person, an unlimited number of additional times (within 3 days in each instance), depending on whether he changes his employment, his residence, his schooling, his telephone number(s), internet identifiers, or what vehicle he uses). *See* 42 Pa.C.S. § 9799.15(e),(g). It even requires detailed, in-person reporting of seven-day out-of-state trips and vacations, *id.*(g)(7), and of advance details of international travel. *Id.*(i). These obligations and conditions are not meaningfully distinguishable, in terms of their impact on physical liberty, from what might be imposed as a rather strict probation.

In *Barry v. Bergen County Probation Dept.*, 128 F.3d 152, 159–62 (3d Cir. 1997),[8] the defendant had been sentenced to 180 days in jail with the balance of three years to be served on probation and to pay a fine. When he proved unable, following incarceration, to pay the fine, the state court substituted a 500-hour community service obligation. Barry was allowed an extended

_____(footnote continued)

neither the State Police nor the state court has acted to correct his registration notice as of the time of drafting of this brief, to his knowledge, more than a year after the decision. The later decision of the state Supreme Court in *Muniz* finding SORNA's registration obligations to trigger Ex Post Facto analysis, *see* pp. 23–24 *infra*, places in doubt what if any registration obligations can be imposed on him. Be that as it may, a ten-year registration, which is the least that applies if any applies, had not expired as of the time of filing of the habeas petition, and was being enforced at that time as SORNA Tier III.

[8] The petitioner in *Barry v. Bergen County Probation* was the same defendant who had prevailed, at an earlier stage of his challenge to his conviction, in this Court's decision in *Barry v. Brower*, *supra*. *See* 128 F.3d at 158.

period to complete this service obligation, past the expiration of his probationary term. Even though his formal probation had expired before he filed his federal habeas corpus petition, this Court held that the obligation to complete the 500 required hours of community service, even with no other probation-like restrictions, "significantly restrained [Barry's] liberty to do those things which in this country free [people] are entitled to do." *Id.* 162 (second bracketed word per original), quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (parole constitutes a form of "custody").

A key factor was that the court's order "[r]equir[ed] appellant's physical presence at a particular place ...." 128 F.3d at 160 (quoting with approval a Ninth Circuit decision; emphasis deleted). This Court noted Supreme Court decisions holding that even pretrial release on recognizance constitutes "custody," as does a personal recognizance pending surrender for service of sentence. *Id.* It follows *a fortiori* that several of SORNA's obligations are sufficiently restrictive of a registrant's physical liberty – including obligations specifically "[r]equiring [his] physical presence at a particular place" – to constitute "custody" for purposes of habeas corpus jurisdiction.

As noted in *Barry*, the "custody" requirement for habeas jurisdiction is determined solely as of the time of filing the petition. 128 F.3d at 159; accord, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Lee v. Stickman*, 357 F.3d at 342. If the sentence expires while the

habeas proceedings are pending, the federal court does not lose jurisdiction.[9] At bottom, as the Court explained in *Maleng v. Cook*, 490 U.S. 488, 491–92 (1989) (per curiam), "While we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction," *id.* 492, with "present" meaning "at the time his petition is filed." *Id*. 491.

SORNA's requirements are at least as severe and burdensome on his physical liberty as the post-probation community service obligation involved in *Barry*. There is no indication in any of the cases cited by the court below, 1App. 3a (or by respondents in their opposition to the petition; 2App. 46a–48a) that the registration requirements at issue there entailed equally onerous obligations. The cases cited below also fail to show that the obligation was explicitly articulated by the court at sentencing, as here. Nor, for all that appears, did they arise in states where the state appellate courts have declared the registration obligations of convicted sex offenders to be part of the sentence.[10]

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[9] The only issue in federal habeas jurisprudence, when a state sentence expires, is the potential for mootness, that is, whether the petitioner would still benefit in any meaningful way from a judgment in his favor. *Spencer v. Kemna*, *supra*. A motion to dismiss on that basis is defeated by the existence of significant collateral consequences. *Id*. 7–9; *Lee*, 357 F.3d at 343; *Maleng v. Cook*, 490 U.S. 488, 491–92 (1989) (per curiam), explaining *Carafas*, *supra*. Quite apart from the initial question of "custody," Mr. Piasecki's continuing SORNA obligations, even if viewed as "collateral," would prevent his habeas case from becoming moot.

[10] The court below viewed *Barry* as irrelevant because the restrictive SORNA registration requirements were not a formal part of petitioner's sentence. 1App. 3a, 4a. That rationale has been eroded, if not defeated, by subsequent decisions of the

Not only is SORNA registration in Pennsylvania a form of "custody" as measured against this Court's and the Supreme Court's precedent, but that custody is also imposed "pursuant to the judgment of [the] state [sentencing] court," as further required by § 2254(a). The state's SORNA (42 Pa.C.S. §§ 9799.13–9799.14) was enacted and classified by the Legislature as part of the state's "Sentencing" law (title 42, Pennsylvania Consolidated Statutes, chapter 97). Petitioner's SORNA registration obligation was triggered exclusively by his conviction for violating 18 Pa.C.S. § 6312(d). *See* 42 Pa.C.S. §§ 9799.13(2), 9799.14(b)(9). Moreover, his sex offender registration obligation was initially imposed on him – as a matter of both fact and law – by the judge at the time of sentencing.

At sentencing, on April 26, 2010, the Common Pleas court imposed a term of three years' probation on Mr. Piasecki, which included a judicial pronouncement placing him on the state's sex offender registry for ten years:

> [A]s to counts 16 to 30, as to each count the defendant is sentenced to 36 months' county probation. The conditions of his sentence are that he undergo sex offender supervision, that he be subject to ten-year registration, that he have no unsupervised contact with minor children under the age of 18, excluding your son ..., You're to have no computer Internet use. You're to continue in treatment .... You're not to drink, and you're to take medications as directed.

_____(footnote continued)

state appellate courts, as discussed further in the following discussion of this Argument.

2App. 151a–52a (Sent.Tr. 13–14).[11] The district court, on habeas review, focused on its reading of the state statute's wording, rather than on the actual pronouncement of sentence. Both Magistrate Judge Heffley and District Judge Davis noted SORNA's requirement that "'[t]he sentencing court shall **inform** offenders and sexually violent predators at the time of sentencing of the provisions of [SORNA].'" 1App. 14a (R&R, at 9 n.4) (bold emphasis original to R&R), *quoting* the former 42 Pa. Cons. Stat. § 9795.3 (Megan's Law); 1App. 3a (district court order).

Whatever the state statute may say (or have said), the record of sentencing shows that in this case the judge stated, "The conditions of his [probationary] sentence are ... that he *be subject to* ten-year registration ...." 2App. 152a (emphasis added). The sentencing judge thus did not merely *advise* Mr. Piasecki at sentencing that he *was* subject by law to ten years of registration, as the court below claimed. 1App. 3a–4a. Nor did the sentencing court simply make compliance with the defendant's sex offender obligations (whatever they might be) a condition of probation. Instead, Judge Boylan expressly *imposed*

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[11] The sex offender registration law in effect at the time of Mr. Piasecki's sentencing (as well as at the time of the offense) was the provision known as "Megan's Law III" (42 Pa.C.S. § 9795.1 (expired)), which (like its predecessor, "Megan's Law II") required registration of persons convicted under § 6312(d) for a period of ten years. When SORNA was enacted in 2012, it repealed and replaced Megan's Law, placing Mr. Piasecki into either Tier I or Tier III (*see* note 7 *ante*) and thus requiring registration for either 15 years or for life.

the registration as part of the sentence.[12] Judge Davis held otherwise by quoting only a few words of the sentencing judge out of context. *See* 1App. 3a.[13]

Regardless of the words used by Mr. Piasecki's sentencing judge, and regardless of the district court's understanding of the statute, the Pennsylvania courts have since ruled, as a matter of state law, that SORNA registration is indeed part of a defendant's sentence for a covered offense. That interpretation of the state statutory scheme is binding on this and any other federal court. See *Lee v. Stickman*, 357 F.3d at 342–43 n.3.

In vacating and remanding a recent appellate judgment of the Superior Court after finding an error in the length of registration, for example, the Pennsylvania Supreme Court recognized in the terms of its mandate that SORNA registration is part of the sentence that is subject to the defendant's right of direct appeal:

> AND NOW, this 15th day of November, 2016, the petition for allowance of appeal is GRANTED, LIMITED TO Petitioner's lifetime registration issue. The Superior Court's order in this regard is VACATED and this matter is REMANDED for *imposition of* a fifteen-year reporting requirement under the Sexual Offender Registration and Notification Act ....

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[12] A condition of probation is part of the sentence, in any event, whether in state or federal court. See *United States v. Goodson*, 544 F.3d 529, 537–38 (3d Cir. 2008).

[13] The court below focused solely on the words "subject to ten-year registration," 1App. 3a, omitting (and thus implicitly altering) the associated, preceding declaratory verb ("that he be") and thus the grammatical meaning of the statement. As explained in text above, the totality of the pertinent sentencing transcript leads to a different conclusion, as does subsequent state court appellate precedent.

Commonwealth v. Reynolds, 160 A.3d 796, 2016 WL 6704302 (Pa.) (mem.) (emphasis added). The sentencing court was thus recognized as imposing – not merely as notifying the defendant of – the applicable reporting requirement. The interpretation by the Pennsylvania Supreme Court on this point of state law is authoritative.

The Pennsylvania Superior Court, which handles all direct appeals in criminal cases, unsurprisingly adheres to the same interpretation. See *Commonwealth v. Leonard*, — A.3d —, 2017 WL 4639571 (Pa.Super., Oct. 17, 2017) (applying *Lutz-Morrison*, note 7 *ante*, "we vacate Appellant's judgment of sentence in part, as to his classification as a Tier III offender, and remand to the trial court to impose a twenty-five year registration requirement"; challenge to extent of registration obligation implicates legality of sentence, not an administrative dispute with the State Police). Similarly, in *Commonwealth v. Sauers*, 159 A.3d 1 (Pa.Super. 2017), the panel addressed *sua sponte* in light of *Lutz-Morrison* "the trial court's designation of Appellant as a Tier III sexual offender" under SORNA. Finding this to be a "non-waivable legality-of-sentence issue," the court concluded that "we are constrained to vacate the lifetime registration portion of Appellant's sentence and remand for re-sentencing under SORNA." *Id*. 16. There is simply no doubt at this point that the Pennsylvania courts recognize SORNA registration not as a "collateral consequence" of certain convictions but rather as part of the sentence imposed

on account of those convictions.[14] For purposes of federal habeas corpus jurisdictional, the significance of this development is that SORNA restrictions are now unambiguously imposed "pursuant to the judgment of [the] state court" as required by 28 U.S.C. § 2254(a).

Even if it were not formally part of the sentence under state law, the SORNA registration, as enhanced beyond the terms of Megan's Law and imposed on petitioner Piasecki, is "punitive" under the rubric established by the Supreme Court of the United States in *Smith v. Doe*, 538 U.S. 84, 92 (2003), that is, a criminal penalty for constitutional purposes rather than a legal burden that is merely civil in nature. Indeed, this was the recent conclusion of Pennsylvania's Supreme Court in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). In *Muniz*, a fractured majority held that the enhanced registration requirements imposed by Pennsylvania's SORNA statute were punitive rather than genuinely remedial, and therefore violated the Ex Post Facto Clause of Pa. Const. art. I, § 17, as applied to offenses committed prior to December 20, 2012.[15] See also

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[14] This Court has similarly recognized that an obligation imposed at sentencing is part of a defendant's sentence even if it serves, in part, remedial rather than punitive purposes and even though the obligation to impose that sanction is not set forth in the same statute as the law defining the offense. See *United States v. Perez*, 514 F.3d 296 (3d Cir. 2007) (restitution).

[15] The underlying offense in the instant case was committed in 2009, prior to the enactment of SORNA in 2012; *Muniz* therefore applies to Mr. Piasecki. What effect *Muniz* will have on him while the present proceedings are pending, or in the event that Mr. Piasecki does not prevail here, remains to be determined. Either some version of pre-SORNA registration will be deemed applicable or he will have none. Those questions are not before this Court.

Coppolino v. Comm'r (Noonan), 102 A.3d 1254, 1277–78 (Pa.Commw. 2014) (en banc), *aff'd*, 125 A.3d 1196 (Pa. 2015) (per curiam) (some of the registration requirements imposed by SORNA, over and above those imposed by the prior Megan's Law, held punitive and therefore unconstitutional under the state and federal Constitutions' Ex Post Facto Clauses). While classification of a penalty as "punitive" under the Ex Post Facto Clause does not automatically lead to the conclusion that it creates "custody" for habeas purposes, the concepts and standards are very similar.

Other states' SORNA requirements have likewise been held "punitive" under the Ex Post Facto Clause in recent federal decisions. See, *e.g.*, *John Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan "SORA" law held to impose punishment for purposes of Ex Post Facto prohibition); *Doe v. Miami-Dade County*, 838 F.3d 1050 (11th Cir. 2016) (complaint that Florida sex offender restrictions are sufficiently punitive to trigger Ex Post Facto analysis states a claim for relief).[16] Pennsylvania's SORNA is similar to the provisions addressed in these recent decisions. Some of the same factors that make SORNA registration "punitive" for Ex Post Facto purposes are the same limitations on physical liberty that placed Mr. Piasecki "in custody" – in

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[16] This Court's cases on related matters under earlier and less onerous sex offender registration regimes are not determinative. See *United States v. Shenandoah*, 595 F.3d 151, 158–59 (3d Cir. 2010) (abrogated on other grounds by *Reynolds v. United States*, 565 U.S. 432 (2012)); *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996) (Megan's Law).

December 2014, at the time of filing of his petition – for purposes of establishing the district court's habeas corpus jurisdiction.

Likewise, SORNA's "punitive" restrictions are imposed "pursuant to" the judgment of sentence (the federal issue) – that is, as a legal consequence that is dependent upon the formal act of pronouncing sentence – even if somehow they are not seen as *part of* that sentence (which would technically be a state law question). See *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 406 (2001) (plurality) (acknowledging exceptions to presumption that "pursuant to the judgment" means "as part of the formal sentence"). Accordingly, when he filed his habeas corpus petition, Mr. Piasecki was "in custody" within the meaning of 28 U.S.C. §§ 2241(c) and 2254(a).

The court below also erred insofar as it relied on a sharp distinction between direct and collateral consequences of a criminal conviction to conclude that the SORNA registration obligations are not part of the sentence for habeas purposes, and on that basis cannot place a defendant in custody "pursuant to the judgment," as 28 U.S.C. § 2254(a) puts it. *See* 1App. 3a. The U.S. Supreme Court decisions addressing the legal significance of "collateral consequences" do not impose a simple or mechanical rule. The district court's reasoning fails to take into account the Supreme Court's recent erosion of the direct/collateral line, where those consequences are as weighty as those involved here. See *Padilla v. Kentucky*, 559 U.S. 356, 364–65 (2010) (counsel was ineffective in plea negotiation for failing to advise defendant of clear immigration conse-

quences of conviction). The court below explained why the *Padilla* decision is distinguishable, which it certainly is, but not why in principle it does not defeat any attempt to use the direct/collateral rule as a bright line in either constitutional or habeas-jurisdictional analysis. Most recently, this Court engaged in a close analysis of collateral consequences before concluding that a particular sentence did not place a § 2255 movant "in custody." See *United States v. Ross*, 801 F.3d 374, 378–79, 382–84 (3d Cir. 2015). Indeed, Judge Jordan's opinion in *Ross* states that whether sufficient collateral consequences may serve to place a petitioner "in custody" is not settled under this Court's cases, *id*. 382, and *Ross* itself did not decide the point. Under the *Ross* interpretation, the SORNA restrictions place Mr. Piasecki in continuing custody as long as the registration continues even if that obligation is viewed as merely "collateral." But more important, the state court cases treating SORNA registration as part of a Pennsylvania sentence for purposes of direct appeal, as a matter of state law, render the "collateral" label mistaken.

Normally, custody for habeas purposes ends when probation expires. But that is because the liberty-restricting obligations associated with probation supervision are ordinarily assumed to expire at the same time as the probationary term. See, *e.g.*, *Gov't of Virgin Is. v. Vanterpool*, 767 F.3d 157, 163–64 & nn. 6–7 (3d Cir. 2014). Here, the state's SORNA law places the onerous and continuing registration obligation on Mr. Piasecki as a direct and inexorable result of his conviction(s) and nothing else, and the record shows that the

registration obligation was even pronounced by the judge at sentencing as part of the sentence. The ongoing concrete restrictions imposed on Mr. Piasecki affect his present liberty, and are unavoidably triggered by the conviction itself as pronounced at sentencing by the judge. It therefore follows that SORNA registration and the obligations that go with it constitute an imposition "pursuant to the judgment" that placed Mr. Piasecki "in custody" for federal habeas corpus purposes when he filed his petition.

For all these reasons, the order of the district court should be reversed and the case remanded with directions to address the merits.

II. IF JURISDICTION WAS NOT ESTABLISHED AS A MATTER OF LAW, THEN THE PETITIONER-APPELLANT WAS AT LEAST ENTITLED TO AN EVIDENTIARY HEARING TO ESTABLISH THAT THE CONDITIONS OF HIS SORNA REGISTRATION PLACED HIM IN "CUSTODY" AS A MATTER OF FACT.

Standard or Scope of Review: The Magistrate Judge determined, in her report and recommendation, not to convene a hearing. On *de novo* review, the district court's refused to overturn that ruling. This Court reviews the district court's denial of an evidentiary hearing for abuse of discretion. *Goldblum v. Klem*, 510 F.3d 204, 214–15, 219 (3d Cir. 2007).

Discussion: The jurisdictional issue in this case is whether Jason Piasecki's conviction and sentence imposed restrictions on his physical liberty, through SORNA, sufficient as of December 4, 2014, when he filed his habeas petition, 2App. 28a, to constitute "custody" under the case law interpreting 28

U.S.C. § 2254(a). In contending that it did, Mr. Piasecki also recognized in the proceedings below that the question presented might be viewed as having a factual component as well as a legal dimension.[17] He therefore requested an evidentiary hearing "to make a full and clear record of the ways that his SORNA registration obligation – triggered directly and solely by his challenged conviction – restrains his physical liberty, so as to place him in continuing 'custody' under that judgment." 2App. 87a (Traverse). The district court abused its discretion in approving the Magistrate Judge's refusal to conduct an evidentiary hearing before recommending denial of the petition. *See* 1App. 2a (final order); 1App. 17a (R&R, at 12 n.6).

The Magistrate Judge's only stated reason that a hearing should be denied ("in light of my recommendation that the case be dismissed") illogically placed the cart before the horse.[18] The district court upheld that denial on a

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[17] If this Court agrees, as shown in the previous Point of this Argument, that his SORNA registration obligations placed Mr. Piasecki "in custody" simply because they were part of the sentence and/or affected his physical liberty (that is, they were not merely monetary in nature, like a fine), then the request for a hearing to elucidate further details on that subject would obviously be moot.

[18] The cases cited by the Magistrate Judge, such as *Goldblum v. Klem*, 510 F.3d 204, 221 (3d Cir. 2007), concern the discretion of the federal court to deny a hearing to develop a response to an affirmative defense (in that case, abuse of the writ), for which the federal judge concludes an adequate factual basis already exists in the state court record. That reasoning has no application to the request for a hearing that petitioner made in this case. Where subject matter jurisdiction depends on a conclusion to be drawn from an array of relevant facts, a hearing can be necessary. See, *e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010) (citizenship of corporation, for purposes of diversity jurisdiction, based on fact-intensive "nerve center" test).

different basis, claiming that petitioner had "failed to forecast" what information an evidentiary hearing might add to the record that would aid the court in making its decision. 1App. 2a, citing *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000). To the extent that Mr. Piasecki has such an obligation, he fully satisfied it.

The hearing that petitioner sought was for the purpose of making a clear and complete record concerning the restrictions and burdens that SORNA registration in fact places on him personally, in practice.[19] Because "custody" in the sense important here was not at issue in the PCRA proceedings in state court, AEDPA's restrictive 28 U.S.C. § 2254(e) – which sometimes precludes a federal hearing in habeas corpus cases – did not apply. See *Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) (§ 2254(e) restriction does not apply to hearings on preliminary procedural issues), citing *Cristin v. Brennan*, 281 F.3d 404, 412–13 (3d Cir. 2002).

As this Court has ruled, "Whenever § 2254(e)(2) does not bar an evidentiary hearing, a district court retains discretion to conduct one …." *Morris v. Beard*, 633 F.3d 185, 196 (3d Cir. 2011). Indeed, there may be circumstances where an evidentiary hearing is mandatory, that is, where the denial of a hearing would necessarily constitute an abuse of discretion. See

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[19] His own particular intellectual and psychological limitations (*see* p. 6 *ante*), insofar as they affect his ability to comprehend his SORNA obligations and then to comply with them, would be pertinent to this inquiry.

Boyd v. Warden, SCI Waymart, 579 F.3d 330, 332–33 (3d Cir. 2009) (en banc, per curiam); see *id.* at 357–60 (Sloviter, J., with McKee, J., concurring in the judgment). "We have interpreted this [standard] to require a petitioner to make a 'prima facie showing' that 'would enable [him] to prevail on the merits of the asserted claim.'" *Morris*, 633 F.3d at 196, quoting *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010). This does not mean that every fact to be established must already be articulated in the request for a hearing. The key question is whether a hearing "would have the potential to advance the petitioner's claim." *Campbell*, 592 F.3d at 287, quoted in *Morris*, *id*. Here, it certainly would have.

Applying these standards, this Court has not hesitated to reverse when, as here, district courts have abused their discretion in failing to allow a hearing on potentially determinative, preliminary procedural issues. For example, in *Pabon v. Superintendent, SCI Mahanoy*, 654 F.3d 385 (3d Cir. 2011), this Court reversed and remanded the denial of a habeas corpus petition by a state prisoner who claimed that extraordinary circumstances – lack of English-language proficiency, and the state court's failure to acknowledge or ameliorate this problem – justified equitable tolling of the statute of limitations. Similarly, in *U.S. ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982), having determined on the State's appeal that there had been – contrary to the district court's holding – a procedural default, the Court remanded for an evidentiary hearing

on whether there was "cause" to excuse the default under a "cause and prejudice" analysis.

In his Traverse, Mr. Piasecki alleged that he was required, among other things, to "travel quarterly to a State Police Barracks and to remain there, behind locked doors, answering questions, on a regular basis (and also an unlimited number of additional times, depending on whether he changes his employment, his residence, his schooling, his telephone number(s), internet identifiers, or what vehicle he uses)." 2App. 86a. The "locked doors," the duration and nature of in-person questioning, the (lack of) freedom to leave until excused, the time spent getting to the barracks, and then waiting once there, the nature of the room where the "updating" occurs and of the interaction with the State Police official (indeed whether that person is an armed police officer, a clerical employee, or something else), the degree of isolation during that time, and the like, are all details that a mere reading of the statute cannot provide.

In his Objections, Mr. Piasecki therefore reiterated his request for a hearing "for the purpose of making a record of the nature and extent of these restrictions on his liberty." 2App. 102a. The onerous, burdensome, liberty-infringing, and punitive aspects of SORNA's registration requirement affect his freedom of movement (thus placing him "in custody"), petitioner argued. It is the details of these restrictions, as applied in fact to himself, that Mr. Piasecki sought to fully establish at an evidentiary hearing.

If this Court does not hold that the SORNA statute on its face, as made concrete by judicially noticeable facts, itself shows that Mr. Piasecki was "in custody" when he filed his habeas petition, then a hearing to establish the precise facts would be helpful and relevant to the legal determination of whether his registration obligations constituted a form of "custody." The refusal of the court below to convene a hearing on the question was therefore a reversible abuse of discretion.

CONCLUSION

The dismissal of appellant's petition for a writ of habeas corpus should be reversed. The case should be remanded with directions to reach the merits, or at least to convene an evidentiary hearing.

Dated: October 27, 2017

Respectfully submitted,

s/Peter Goldberger

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REQUIRED CERTIFICATIONS

A. Bar Membership. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. Type-Volume. This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 32(g)(1), I certify, based on the word-counting function of my word processing system (Word 2010), that this brief complies with the type-volume limitations of Rule 32(a)-(7)(B), in that the brief contains fewer than 13,000 words, that is, no more than 8117 words including footnotes.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. Avast! Antivirus ver. 17.7 with current updates, has been run against the electronic (PDF) version of this brief before filing, and no virus was detected.

/Peter Goldberger

CERTIFICATE OF SERVICE

On October 27, 2017, I served a copy of the foregoing brief and Volume I appendix via this Court's ECF system on:

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