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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REPLY BRIEF FOR APPELLANT PIASECKI

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ARGUMENT IN REPLY

The opening brief for appellant Jason Piasecki ("AOB") shows that the district court erred when it ruled that he was not "in custody" under "the judgment of a state court" when he filed his petition for a writ of habeas corpus in early December 2014. While his three-year term of probation had by then expired, the sex offender registration obligations imposed upon Mr. Piasecki at sentencing under Pennsylvania state law, as they were being enforced at the time of his habeas filing, restricted his physical liberty in various ways that met the requirements to be deemed "custodial." His position is supported by a joint amicus brief, based on experience with hundreds if not thousands of individuals' similar situations, from the Defender Association of Philadelphia and the Pennsylvania Association of Criminal Defense Lawyers.

The District Attorney's brief on behalf of the respondents as appellees ("Resp. Br.") attempts to answer Mr. Piasecki's arguments by making only passing reference to this Court's cases, relying instead on string-cites of out-of-Circuit precedent of questionable relevance, and by giving the narrowest possible reading to important recent state court case law. Accordingly, the order of the district court dismissing Mr. Piasecki's petition should be reversed and the case remanded for further proceedings.

1. At the time he filed his federal habeas corpus petition, Appellant was "in custody pursuant to the judgment" imposed in the state criminal case.

The dismissal of appellant Jason Piasecki's habeas corpus petition was erroneous, because at the time he filed the petition Mr. Piasecki was "in custody pursuant to the judgment of a state court." 28 U.S.C. § 2254(a). This "custody" resulted from the many restrictions on his physical liberty imposed by the conditions of SORNA registration. That registration, in his case, resulted solely and directly from – and was imposed as part of – his Pennsylvania conviction and sentence, that is, "pursuant to the judgment of [the] state court." The district court erred in holding otherwise. The attempts by the respondents-appellees to refute the appellant's arguments fall short.

a. The obligations of his SORNA registration placed Appellant Piasecki "in custody" under habeas law.

The district court had jurisdiction to entertain appellant Piasecki's petition under 28 U.S.C. § 2254(a). He meets the essential requirement of that provision, because at the time of filing[1] he was "in custody" as defined in this Court's case law, explaining and applying Supreme Court precedent. His SORNA registration obligations (as of December 2014[2]) imposed "significant

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[1] In their brief, the respondents finally acknowledge that the determinative time for ascertaining habeas jurisdiction is the time of filing of the petition, Resp.Br. 14, as appellant has consistently contended, despite their having adhered to a different and erroneous position below and in their motions to dismiss this appeal.

[2] That the Megan's Law III obligations, as initially imposed at Mr. Piasecki's 2010 sentencing, may have been less onerous (and thus, under prior case law, arguably insufficient to place him "in custody" for present purposes), Resp. 24, is immaterial, since those are not the restrictions that were being applied to him **[fn. cont'd]**

restraints on [his] liberty" of movement beyond those "shared by the public generally," and those restraints were accompanied by "continuing governmental supervision." *Barry v. Bergen County Probation Dept.*, 128 F.3d 152, 160 (3d Cir. 1997).

Of particular importance, like the court order in *Barry* to continue performing community service after the formal expiration of petitioner Barry's term of probation, Mr. Piasecki's registration obligation, "[r]equir[ed] appellant's physical presence at a particular place ...." 128 F.3d at 160. It thus "significantly restrained [his] liberty to do those things which in this country free [people] are entitled to do." *Id.* 162. Compare *Obado v. New Jersey*, 328 F.3d 716 (3d Cir. 2003) (per curiam) (applying same test to conclude that continuing obligation to pay restitution did not create habeas "custody"). The respondents' brief essentially concedes many of the physical restrictions imposed by SORNA, Resp. Br. 16, and it does not deny the many other direct restrictions on physical liberty due to SORNA, as detailed in appellant's brief (at 15–16) and elaborated by the *amici* (Ami. Br. 18–26).[3] The respondents further concede that the test for "custody" is as appellant has articulated. Resp. Br. 14. Yet the respondents never explain – or even attempt to explain – how

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in 2014. Likewise immaterial are the post-2014 developments in state statutory or constitutional case law that may serve to relieve him of some of those obligations.

[3] The additional, significant, non-physical restraints imposed by SORNA registration are also relevant to understanding the full context, Ami. Br. 26–32, but the respondent-appellees essentially ignore them. *See* Resp. Br. 16–17 (mentioning, but not applying this Court's legal test to, some additional burdens implicated by SORNA).

under that test, the obligations and restrictions triggered by SORNA registration do not suffice to create habeas jurisdiction.[4]

Unable to articulate a persuasive position that applies the governing rule, the respondents resort to misrepresentation of the appellant's argument by asserting that Mr. Piasecki relies "primarily on the analysis of what constitutes 'punishment' to establish an *ex post facto* violation ...." Resp. Br. 17. Appellant properly invokes this important precedent (AOB 23–25) as part of his argument on whether registration is part of the sentence and thus imposed "pursuant to the judgment," but even then, it is not the primary basis for his argument. But that precedent forms no part at all of his argument on the issue of why SORNA registration constitutes "custody," much less does a conclusion on the latter (statutory) subject follow "[c]learly," Resp. Br. 28, from case law addressing the former (constitutional) issue. *Cf. Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 406 (2001) (plurality) (noting that petitioner may be "in custody pursuant to [a] judgment" and yet properly challenging in that habeas proceeding a conviction that underlies a different sentence).

Registration under SORNA imposes obligations remarkably similar to those of a strict probationary regime, which this Court has held to constitute a

[4] Many, if not all, of the adverse (non-binding) federal cases cited by respondents for the proposition that sex offender registration does not establish habeas "custody" (Resp. Br. 28–29) pre-date the enactment of the kind of SORNA obligations involved in the present case and/or fail to apply the correct test, as articulated by this Court in *Barry v. Bergen County Probation*. Likewise off-point are the federal cases that state (rightly or wrongly) that federal SORNA obligations are not "punitive" for purposes of triggering federal constitutional *ex post facto* analysis. *See* Resp. Br. 25–27.

form of "custody" under § 2254(a). *See* AOB 15–16. The respondents note, but do not dispute or refute that fundamental contention. Resp. Br. 25. In short, the respondents' brief utterly fails to defend the judgment of the court below on the first step of the jurisdictional inquiry, that is, whether Mr. Piasecki was still "in custody" as of December 2014.

b. The obligations of his SORNA registration were imposed upon Appellant "pursuant to the judgment" in his criminal case.

Habeas corpus jurisdiction existed in this case because not only was Mr. Piasecki "in custody" in December 2014, but that custody was also imposed "pursuant to the judgment of a state court." The respondents devote most of their brief to trying to refute the appellant's arguments on this aspect of the issue (Resp. Br. 19–27), but once again come up short.[5] The respondents concede that a sex offender registration obligation is treated in Pennsylvania as part of the sentence, both in terms of the trial court's obligations at the time of sentencing and also in terms of how it is treated procedurally when review is sought, either in the trial court itself or on appeal. Resp. Br. 20–22. This goes a

[5] While it is true that state court decisions cannot bind this Court on points of federal law, Resp. Br. 19, appellant does not rely on any state court decisions for that purpose. He relies on state law to determine what is part of the sentence (a matter of state criminal law) and to show that the state Supreme Court recognizes the impact of Pennsylvania SORNA registration as "punitive," which is pertinent not only to that court's holding on state constitutional law, but also to this Court's determination on the federal question – under 28 U.S.C. § 2254(a) of the habeas statute – of what sort of "custody" appellant Piasecki found himself in, "pursuant to the judgment" in his criminal case.

long way toward establishing that if registration creates "custody," then it does so "pursuant to the judgment."

Pennsylvania recognizes that its SORNA obligation is "punitive" in nature. AOB 23–24. Mr. Piasecki's original Megan's Law registration, as imposed in 2010, was changed to SORNA in 2012, prior to his 2014 federal habeas filing, and those were his obligations under his sentence at the time he filed the petition. For all of these reasons, coupled with those discussed in the appellant's opening brief, the Court must reverse the district court's dismissal of Mr. Piasecki's petition for habeas corpus, and remand for consideration of the merits of his *Miranda* issue, as allowed by this Court's COA.

2. Appellant was entitled to a hearing unless the respondents accepted as true all the factual aspects of Appellant's claim that SORNA registration so restricted his physical liberty as to place him "in custody," or unless he prevails on the "custody" issue as a matter of law.

Appellant Piasecki's opening brief explains why, under this Court's case law, he was entitled to a hearing to make a detailed factual showing of how the obligations of SORNA registration restricted his physical liberty. AOB 27–32. That hearing would not be needed, of course, if his arguments from statutory and case law sources (as discussed under Point 1) are held sufficient as a matter of law to establish "custody" (or unless the respondents conceded that his factual averments were true). The respondents brief argues that his factual averments amounted to "bald assertions and conclusory allegations." Resp. Br. 31. But respondents cite no cases under which similar detailed averments,

made through counsel and as a result of counsel's own investigation, have been deemed insufficient.

Appellant's showing is fully advanced in his opening brief. There is nothing on this point in the respondents' brief calling for any further reply. If the dismissal is not reversed outright, the case should be remanded for an evidentiary hearing in support of Mr. Piasecki's claim of jurisdiction, consistent with guidance on that subject from this Court's opinion.

CONCLUSION

For the reasons set forth in the opening brief and in this Reply, the order of the district court dismissing 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.

Respectfully submitted,

Dated: December 11, 2017

s/Peter Goldberger

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REQUIRED CERTIFICATIONS

A. Type-Volume. This reply brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 32(g), I certify, based on the word-counting function of my word processing system (Word 2010), that the brief complies with the type-volume limitations of Rule 32(a)-(7)(B)(ii) (as amended), in that the brief contains 1803 words, including footnotes, which is less than 6500 words, and in any event this Reply does not exceed 15 pages.

B. 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. The anti-virus program Avast! vers. 17.8, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

/Peter Goldberger

CERTIFICATE OF SERVICE

On August 11, 2017, I served a copy of the foregoing reply brief by email on counsel for the appellees (and for the *amici curiae*), via ECF filing and by first class mail within three days thereafter, addressed to:

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