AVOIDING "MAGIC MIRRORS"[1]—A POST-*PADILLA* CONGRESSIONAL SOLUTION TO THE 28 U.S.C. § 2254 "CUSTODY" AND "COLLATERAL" SANCTIONS DILEMMA

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INTRODUCTION

In the winter of 1806, Chief Justice John Marshall termed the writ of habeas corpus a "great Constitutional privilege."[2] He observed that the First Congress, in drafting the Judiciary Act of 1789, "must have felt, with peculiar force, the obligation of providing efficient means by which [the writ] should receive life and activity; for if the means be not in existence, the privilege itself would be lost."[3] Throughout the more than two centuries that have passed since Chief Justice Marshall's characterization of the "Great Writ," Congress and the federal courts have demonstrated a remarkable ability to adapt habeas corpus to the equally compelling demands of individual liberty and governmental authority.

One important facet of contemporary federal habeas relief is that those convicted of state crimes may challenge in federal court the validity of their convictions under the U.S. Constitution. Congress has codified this federal court review at 28 U.S.C. § 2254.[4] As an essential jurisdictional element, § 2254 requires that a petitioner seeking federal habeas relief must be in "custody" pursuant to a state court judgment at the time that he files the petition.[5]

Federal courts have repeatedly instructed that § 2254 "custody" does not require "physical restraints." As a general matter, a petitioner satisfies the § 2254 custody requirement when he is under "some type of continuing governmental supervision" and is "subject

2. *Ex parte* Bollman, 8 U.S. 75, 95 (4 Cranch) (1807).
3. *Id.*
4. *See infra* Part I.B for a general discussion of habeas relief.
5. *See infra* Part I.C for a discussion of the "custody" requirement.

to restraints not shared by the public generally" that significantly restrict his liberty.[6]

The increasing use of "collateral" sanctions as an integral part of criminal penalties, however, has rendered the "custody" requirement far more convoluted than it has been in previous decades.[7] "Collateral" consequences are generally not an explicit component of the punishment that the sentencing court imposes; they result from the defendant's convicted status, rather than from the sentence itself. Collateral sanctions include, for example, deportation, loss of public benefits, deprivation of the right to vote, and the loss of the right to engage in certain occupations. Direct consequences, by contrast, include those sanctions resulting directly from a conviction, such as imprisonment, probation, or fines.

In 1968, the Supreme Court held in *Carafas v. LaVallee* that these collateral consequences may prevent a § 2254 petition from becoming moot—so long as the petitioner filed it while he was "in custody."[8] In its 1989 *Maleng v. Cook* decision, however, the Court held that these same consequences do not by themselves satisfy the requirement that the § 2254 petitioner be in custody at the time that he files his petition.[9] As the First Circuit has noted, "There are no magic mirrors: even grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the presence of custody for the purpose of habeas review."[10] Consistent with this formalistic custody framework,[11] courts do not differentiate between those collateral consequences that are potentially serious—such as deportation—and those that are likely trivial—such as anxiety resulting from a conviction.

Importantly, state convicts may not challenge their sentence through a § 2254 petition until they have exhausted all available state court remedies.[12] This rule can create difficulties for state convicts who are no longer in custody by the time that they have

6. *See infra* Part I.C.1 for a discussion how the federal courts devised this definition of "custody."

7. *See infra* Part I.A for a discussion of "collateral" sanctions.

8. 391 U.S. 234, 237–38 (1968). *See infra* Part I.C.2 for a discussion of how "collateral" sanctions prevent a § 2254 petition from becoming "moot."

9. 490 U.S. 488, 492 (1989). *See infra* Part I.C.3 for a discussion of authority holding that "collateral" sanctions do not sufficiently establish "custody."

10. Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987).

11. *See infra* Part II.A for a discussion of the *Carafas/Maleng* paradox.

12. *See infra* notes 80–85 and accompanying text for a brief discussion of the exhaustion requirement.

finished exhausting state remedies.[13] To illustrate, a state court may impose a sentence of six months of incarceration followed by two years of probation on a defendant convicted of a misdemeanor. Due to a crowded appellate court docket, however, the entire state direct appeal and post-conviction review process takes five years. Under these circumstances, the defendant would no longer satisfy the traditional conception of custody so as to permit him to file a § 2254 petition. Thus, contrary to the axiomatic justification for § 2254 review, "short-sentence" state convicts will rarely have the opportunity to challenge their convictions in federal court, regardless of (1) the underlying merit of their federal constitutional claims, and (2) any significant collateral sanctions that they may suffer as a result of their now-expired sentence. In short, under the current legal framework, these collateral consequences are sufficient to prevent mootness, but fail to establish custody where the sentence has already expired.

Collateral sanctions have created equally vexing issues within the Sixth Amendment ineffective assistance of counsel context.[14] In both the § 2254 custody and the Sixth Amendment contexts, courts have often relied upon a formalistic distinction between the direct and collateral results of a conviction.[15] Just as *Maleng* held that collateral consequences were insufficient to establish § 2254 custody,

13. *See infra* Part II.B for a discussion of this difficulty.

14. The Supreme Court has created a two-part test that a criminal defendant must satisfy in order to prove that his attorney provided "ineffective assistance" of counsel in violation of the Sixth Amendment of the U.S. Constitution. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the defendant must demonstrate that his attorney's performance failed to satisfy an "objective standard of reasonableness." *Id.* at 687–88. Second, the defendant must demonstrate that a reasonable probability exists that if his attorney had performed adequately, the result of the proceeding would have been different. *Id.* at 694.

15. A considerable amount of scholarly discussion concerning "collateral consequences" has centered on the issue of whether an attorney, in order to provide constitutionally effective assistance of counsel, must advise his client of the collateral consequences of a guilty plea or conviction. *See, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 CORNELL L. REV. 697, 698 (2001); Michael Pinard, *An Integrated Perspective on Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 633 (2006) [hereinafter Pinard, *Collateral Consequences*]; Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process,* 95 IOWA L. REV. 119, 147 (2009) [hereinafter Roberts, *Guilty-Plea Process*] (arguing that "exploring the potential collateral consequences of a particular guilty plea" with defendant may be equally important as "basic investigation" of the case itself). Many of these observers have argued that the Supreme Court should "overcome the mythical divide between direct and collateral consequences." Roberts, *Guilty-Plea Process, supra*, at 120.

courts had held that an attorney's failure to advise a client about the collateral consequences of a conviction was insufficient to establish "constitutionally deficient counsel" under the Sixth Amendment.[16] The Ninth Circuit's decision in *Resendiz v. Kovensky* illustrates the analogous relationship between these two concepts.[17] Holding that the collateral sanction of deportation was insufficient to establish § 2254 custody, the Ninth Circuit cited the then-prevailing rule that "the failure of counsel to advise his client of the potential [collateral] immigration consequences of a conviction does not violate the Sixth Amendment right to effective assistance of counsel."[18]

Yet, in its pivotal 2010 *Padilla v. Kentucky* decision, the Supreme Court held that criminal defense attorneys must advise non-citizen clients about the deportation risks of guilty pleas.[19] In reaching this conclusion, *Padilla* emphasized the seriousness of deportation as a collateral consequence and noted that it is "intimately" related to the criminal process. The Court also remarked that the "collateral versus direct distinction" was "ill-suited" to determining whether an attorney provided constitutionally sufficient assistance of counsel under the Sixth Amendment. Applying and extending *Padilla*, some federal and state courts have held that attorneys are constitutionally ineffective if they fail to advise their clients about collateral consequences other than those related to immigration.[20]

By elevating collateral sanctions to the level of Sixth Amendment scrutiny, *Padilla* represents a paradigm shift in how courts view collateral sanctions. This Article argues that the *Padilla* analysis can be applied to the analogous issue of collateral sanctions as a

16. *See, e.g.,* Broomes v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004) (holding that counsel was not ineffective for failing to advise client of possibility of deportation as collateral sanction of criminal conviction), *abrogated by* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

17. 416 F.3d 952, 956–57 (9th Cir. 2005).

18. *Id.* at 957.

19. 130 S. Ct. 1473, 1478 (2010). *See infra* Part II.D.1 for an overview of the *Padilla* decision.

20. See *infra* Part I.D.2 for an overview of how courts have extended the *Padilla* holding in the Sixth Amendment "ineffective assistance of counsel" context. *See also* Webb v. State, 334 S.W.3d 126, 138 (Mo. 2011) (Wolff, J., concurring) (explaining why *Padilla* should apply to collateral consequences other than those related to immigration); Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction after* Padilla v. Kentucky *and* State v. Sandoval, 9 SEATTLE J. SOC. JUST. 855, 863–64 (2011) (arguing that *Padilla* analysis should apply to "other consequences").

basis for § 2254 custody.[21] As a result of the *Padilla* paradigm shift, federal courts may eventually decide that some collateral sanctions also sufficiently establish custody for purposes of § 2254 claims.

Nevertheless, an indiscriminate expansion of the definition of "custody" based on the existence of collateral sanctions would prove to be problematic. This Article recognizes that an inappropriately broad definition of § 2254 custody frustrates not only the inherently limited purpose of federal habeas review, but also the compelling societal interest in finality.[22] On a superficial level, when applied to the custody context, the *Padilla* analysis seems to create the undesirable result of an overly expansive meaning of § 2254 custody. When examined more critically and in its proper context, however, the *Padilla* analysis provides a necessary new perspective on the "collateral" sanctions and § 2254 custody dilemma.

Thus it is necessary to resolve the arduous question of which collateral sanctions are substantial enough to constitute custody. Some scholars have contended that "just how 'substantial' restraints must be . . . is a question of degree and one that ultimately falls to the judiciary.' "[23] However, this Article contends that it is Congress—and not the federal judiciary—that must ultimately provide statutory guidance for determining whether a collateral consequence is sufficient to establish custody under § 2254. Under Article III of the U.S. Constitution, Congress possesses the authority to determine the jurisdiction of the federal courts. Given the inherently jurisdictional nature of custody, Congress should provide a statutory framework to aid courts in determining whether a collateral sanction sufficiently establishes custody under § 2254. Indeed, since the Judiciary Act of 1789, Congress has exercised a vital role in remedying disagreements concerning the scope and availability of federal habeas review.[24] Furthermore, considered as a collective whole, the collateral consequences that may result from convictions in each of the fifty states are numerous and vary widely in their degree of severity. Therefore, clear Congressional guidance would have the practical effect of ensuring uniformity in federal case law concerning custody and collateral consequences. Consistent with

21. *See infra* Part III.C for a discussion of how the *Padilla* analysis abandons formalistic reliance on the distinction between "collateral" and "direct" consequences of a conviction.

22. *See infra* Part II.C for a discussion of this societal interest.

23. Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 208 (2000).

24. *See infra* Part III.A for a discussion of why Congressional intervention is necessary.

the *Padilla* analysis and traditional understandings of custody, this Article proposes statutory language that both avoids a formalistic reliance on the direct and collateral distinction, and enables federal courts to meaningfully determine whether § 2254 custody exists.

Pursuant to this proposed statutory solution, the § 2254 petitioner whose sentence has expired bears the burden of establishing that his purported collateral harm satisfies the custody requirement. Drawing upon the *Padilla* language as well as established § 2254 custody jurisprudence,[25] the statutory proposal provides factors relevant to determining whether a collateral sanction sufficiently establishes custody. The petitioner must demonstrate that he is subject to "significant restraints not shared by the public generally" and that "governmental action" created these restraints. In determining whether a petitioner has established "significant restraints," courts should consider: (1) the permanency of the restraints, (2) the degree to which the restraints are "intimately related to the criminal process," (3) the relative severity of the restraint to the petitioner, (4) the degree to which the severity of the restraint exceeds the severity of the sentence itself, and (5) the availability of relief from the restraint through means other than § 2254 review.[26]

In contrast to the underlying premise of this Article, some federal district courts have squarely rejected the contention that *Padilla* alters the habeas "custody" analysis.[27] Most existing scholarship, however, has asserted that the collateral sanctions of offender registration and immigration satisfy the definition of custody.[28] Yet, as a critical matter, this scholarship not only predates

25. *See infra* Parts III.B.1–4 for a discussion of how traditional definitions of "custody" would affect proposed statutory analysis.

26. *See infra* Part III.D for this proposed statutory solution.

27. *See, e.g.*, Fenton v. Ryan, No. 11–2303, 2011 WL 3515376, at *2 (E.D. Pa. Aug. 11, 2011) (holding that *Padilla* did not "expand" custody requirement to "encompass" conviction's immigration consequences). *See infra* Part I.D.3 for a discussion of case law declining to extend *Padilla* to the custody context.

28. *See, e.g.*, Tina D. Santos, Note, Williamson v. Gregoire: *How Much is Enough? The Custody Requirement in the Context of Sex Offender Registration and Notification Statutes,* 23 SEATTLE U. L. REV. 457, 459 (1999) ("The registration and notification provisions operate to constructively restrain the liberty of a convicted sex offender and, therefore, [render him] 'in custody' for purposes of habeas corpus relief."); Kerri L. Arnone, Note, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief?,* 42 ARIZ. L. REV. 157, 158-59 (2000); Garrett Ordower, Comment, *Gone But Not Forgotten? Habeas Corpus for Necessary Predicate Offenses,* 76 U. CHI. L. REV. 1837, 1873 (2009); Joshua D. Smith, Comment, *Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitution-*

the watershed *Padilla* decision but also embraces an inapt willingness to automatically establish custody merely because a petitioner encounters a collateral sanction.

Two hundred years after Chief Justice Marshall's assertion, federal courts and Congress must now confront which restraints can enable a state offender to claim the benefit of the "great Constitutional privilege" of federal habeas review. Consistent with their historic dialogic relationship in the federal habeas context, the legislative and judicial branches should collaboratively resolve whether a given collateral restraint constitutes § 2254 custody.

I.
OVERVIEW OF EXISTING LAW

Determining the appropriate extent to which § 2254 petitioners satisfy the custody requirement based on collateral consequences requires a basic understanding of these sanctions as well as federal habeas law.

A. Collateral Sanctions of Convictions

Criminal convictions result in two general types of consequences: direct and collateral.[29] However, the boundaries of these categories are not always apparent.[30] Even though collateral consequences have become an increasingly key component of the criminal process,[31] courts often disagree on how to precisely distinguish between direct and collateral consequences.[32]

As a general matter, direct consequences are largely limited to the penal sanction that will be imposed as a result of a conviction,

ality of a Deportation Based on an Expired Conviction?, 58 OKLA. L. REV. 59, 61 (2005); Logan, *supra* note 24, at 147 (arguing that laws mandating that sex offenders provide information to law enforcement satisfy custody requirement).

29. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 678 (2008) [hereinafter Roberts, *The Mythical Divide*].

30. *Id.* at 678–80 ("It is . . . far from clear exactly where the line between direct and collateral consequences falls.").

31. Chin & Holmes, *supra* note 15, at 699.

32. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 n.8 (2010). Some observers have asserted that the "doctrine draws a sharp but false distinction between 'direct' consequences of criminal proceedings (such as incarceration) and 'collateral' consequences (such as deportation)." McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 796 (2011).

such as imprisonment, probation, or fines.[33] Direct consequences may also include parole eligibility in some jurisdictions.[34] Collateral consequences, on the other hand, are the penalties or civil disabilities that indirectly result from a conviction and that do not constitute part of the "explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court."[35] To illustrate, immigration consequences of a state conviction are deemed collateral because they "arise from the action of an independent [federal] agency—indeed, in the case of a state conviction, an independent *sovereign*—and are consequences over which the state trial judge has no control whatsoever."[36] Often functioning as a "secret sentence,"[37] collateral consequences encompass the "vast network" of civil sanctions that constrain a convicted person's "social, economic, and political access."[38] Many collateral consequences are codified in a variety of federal and state statutes and regulations.[39]

These collateral consequences may include, for example, the loss of the right to vote, to engage in some occupations, to hold

33. Roberts, *The Mythical Divide*, *supra* note 29, at 679–80; Stearns, *supra* note 20, at 869.

34. Pinard, *Collateral Consequences*, *supra* note 15, at 634 ("Direct consequences include the duration of the jail or prison sentence imposed upon the defendant as well as, in some jurisdictions, the defendant's parole eligibility or imposition of fines.").

35. *Id.*; Arnone, *supra* note 28, at 166 n.80; *see also* North Carolina v. Rice, 404 U.S. 244, 247 (1971) ("A number of disabilities may attach to a convicted defendant even after he has left prison . . . ."); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L. J. 1067, 1074 (2004) [hereinafter Pinard, *Broadening the Holistic Mindset*] (noting that collateral consequences are "legally separate" from the criminal sentence).

36. Resendiz v. Kovensky, 416 F.3d 952, 957 (9th Cir. 2005).

37. Chin & Holmes, *supra* note 15, at 700.

38. Pinard, *Collateral Consequences*, *supra* note 16, at 634–35; *see also* Fiswick v. United States, 329 U.S. 211, 222 (1946) (noting that because of a criminal conviction, an individual would "carry through life the disability of a felon; and by reason of that fact he might lose certain civil rights"). For a helpful overview of the significance of collateral consequence in contemporary society, see generally Michael Pinard, *Reflections and Perspective on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010) [hereinafter Pinard, *Perspective on Reentry*].

39. Webb v. State, 334 S.W.3d 126, 138 (Mo. 2011) (Wolff, J., concurring) (noting that "consequences can be broad-ranging and scattered" throughout both federal and state statutes); Roberts, *The Mythical Divide*, *supra* note 30, at 678; *see also* Chin & Holmes, *supra* note 15, at 704.

public office, or to serve as a juror, as well as the possibility of deportation.[40] As Justice Samuel Alito has recently observed:

> [C]riminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities.[41]

Although governmental entities acting independently of the criminal justice system impose some collateral sanctions as a matter of discretion, other collateral sanctions "attach automatically upon the conviction by operation of law."[42] For example, after a physician is convicted of a crime, the state agency responsible for issuing physicans' licenses may choose to revoke his license.[43] In many jurisdictions, a felony conviction automatically bars a defendant from possessing a firearm.[44] Also, collateral consequences accompany misdemeanor as well as felony convictions.[45] As one scholar has observed, "[M]isdemeanor convictions can render defendants ineligible for several employment related licenses. Perhaps most critically,

40. Arnone, *supra* note 28, at 166 n.80; McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 481 (2005).

41. Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring); *see also* Chin & Holmes, *supra* note 16, at 705–06 (listing potential "collateral" sanctions); Roberts, *Guilty-Plea Process*, *supra* note 16, at 124 (noting other severe collateral consequences "including deportation, sex-offender registration, post-sentence involuntary commitment as a 'sexually violent predator,' the loss of voting rights, and the loss of housing and employment").

42. Pinard, *Collateral Consequences*, *supra* note 15, at 635. As another scholar has explained: "Collateral sanctions—often referred to as collateral consequences or civil disabilities—are not part of the sentence calculus, even though they derive from a criminal conviction. Some of them follow automatically upon a conviction; others must be imposed by an administrative agency or another regulatory body." Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 356 (2005).

43. *See, e.g.*, Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987) (noting that the state agency revoked the physician's medical license after his criminal conviction).

44. *See, e.g.*, 18 U.S.C. § 922(g) (2006) (barring certain felons from possessing firearms as a matter of federal law); 18 PA. CONS. STAT. ANN. § 6105 (West 2000) (proscribing persons convicted of certain felonies from possessing firearms in Pennsylvania).

45. Pinard, *Collateral Consequences*, *supra* note 15, at 635; Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1073, 1078.

for non-citizen defendants certain misdemeanor convictions constitute 'aggravated felonies' under federal law. Consequently, numerous convictions that are misdemeanors under state law can result in deportation."[46] Notably, scholarship concerning collateral consequences has focused primarily on felony convictions and has largely neglected to address the effect of collateral consequences in the misdemeanor context.[47]

Although criminal convictions have historically been accompanied by collateral sanctions,[48] the number and severity of these consequences, including limitations on employment and housing, have substantially increased over the past two decades.[49] For example, Congress has expanded the number of conviction-related justifications for the deportation of non-citizens.[50] Both federal and state sentencing frameworks have increasingly imposed more serious sentences on defendants with prior convictions.[51] In an attempt to accommodate the ever-increasing costs of prison systems, many states have imposed "non-prison sanctions" on low-risk, non-violent offenders.[52] Furthermore, the enforcement of collateral sanctions has become much more stringent.[53] As a result, "the successful inte-

46. Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1077–78; *see also, e.g.*, Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity,* 22 GEO. IMMIGR. L.J. 665, 667 (2008) (noting that the current "crimmigration system" depends upon both state and federal criminal proceedings to "form the basis of grounds for deportation in the federal immigration system").

47. Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1076–77.

48. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 55 (1968) ("[It is an] obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.").

49. Chin & Holmes, *supra* note 15, at 699–700; Demleitner, *supra* note 42, at 356; Pinard, *Collateral Consequences*, *supra* note 15, at 638 (explaining that collateral consequences "have reached unprecedented breadth in recent decades"); Roberts, *Guilty-Plea Process*, *supra* note 29, at 701–02 (asserting that "collateral consequences have mushroomed").

50. Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes,* 27 YALE J. ON REG. 47, 63–66 (2010). As Justice Stevens noted in *Padilla*, "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

51. Alan C. Smith, Note, *More Than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following* Custis v. United States, 47 STAN. L. REV. 1323, 1324 (1995).

52. Demleitner, *supra* note 42, at 340–41.

53. Chin & Holmes, *supra* note 15, at 699–700; Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1075–76; *see* Roberts, *The Mythical Divide, supra* note 29, at 673–74.

gration of individuals convicted of crimes while burdened with civil liabilities is of major social and economic concern."[54]

The collateral consequences of a conviction may adversely affect a convicted person for the rest of his life.[55] Especially where the defendant committed a minor offense, the collateral consequences frequently overshadow and outlast his direct penal sentence:[56]

> [I]t is fairly typical for an individual pleading guilty for the first time to felony possession or sale of hard drugs to walk out of court[ ] receiving a sentence of time served and probation. The collateral consequences are a far more meaningful result of such a conviction. By virtue of the conviction, the offender may become ineligible for federally funded health care benefits, food stamps and Temporary Assistance for Needy Families, and housing assistance. She is ineligible for federal educational aid. Her driver's license will probably be suspended and she will be ineligible to enlist in the military, receive a security clearance, or possess a firearm. If an alien, she will be deported; if a citizen, she will be ineligible to serve on a federal jury and in some states will lose her right to vote. In cases like these, traditional sanctions such as a fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences.[57]

As one scholar has noted, "At no point in United States history have collateral consequences been as expansive and entrenched as they are today."[58]

B. Habeas Corpus Relief under 28 U.S.C. § 2254

The "Great Writ of Liberty," federal habeas corpus review provides a "procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny."[59] In the United States, the writ has evolved into what Chief Justice Earl Warren termed a

54. Roberts, *Guilty-Plea Process*, *supra* note 15, at 126–27, 193.

55. *See id.* at 127 (noting permanent effect of some consequences, such as lifelong civil commitment).

56. *Id.* at 147; Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1078; *see also* Smyth, *supra* note 40, at 482 (asserting that "hidden sanctions" can wield "more severe" consequences than "the immediate criminal sentence" does).

57. Chin & Holmes, *supra* note 15, at 699–700.

58. Pinard, *Perspective on Reentry*, *supra* note 38, at 1214–15.

59. Peyton v. Rowe, 391 U.S. 54, 58 (1968); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 619 (1842); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001); Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (noting that habeas corpus writ allows petitioner to challenge and secure release from unlawful custody).

"symbol and guardian of individual liberty."[60] Habeas corpus constitutes "an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."[61] In short, the writ is a fundamental means for protecting "individual freedom against arbitrary and lawless state action."[62]

As the Supreme Court has repeatedly explained, the writ "is not now and never has been a static, narrow, formalistic 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."[63] Interpretations of the scope of the Great Writ "must retain the 'ability to cut through barriers of form and procedural mazes.'"[64] At the same time, however, the "sole function" of the writ traditionally has been to grant relief from unlawful custody—and "it cannot be used properly for any other purpose."[65]

Congress has codified federal habeas corpus review in 28 U.S.C. §§ 2241–2255.[66] Section 2241 statutorily recognizes the general authority of the federal courts to grant the habeas corpus writ.[67] Section 2241 provides, for example, the means for a non-

60. *Peyton*, 391 U.S. at 58; Jones v. Cunningham, 371 U.S 236, 243 (1963). The writ is probably the most "extolled, and storied, aspect of the Anglo-American legal tradition . . . . Tracing its lineage back to the Magna Carta, the Great Writ was so revered by the Framers of the U.S. Constitution that they expressly prohibited its suspension except in times of extreme governmental distress." Logan, *supra* note 24, at 147. For a historical overview of the habeas corpus writ, see generally PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

61. Carafas v. LaVallee, 391 U.S. 234, 238 (1968) ("[The writ is] shaped to guarantee the most fundamental of all rights . . . .").

62. Harris v. Nelson, 394 U.S. 286, 290–91 (1969).

63. *Peyton,* 391 U.S. at 66; *Jones,* 371 U.S. at 243; Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 349–50 (1973).

64. *Hensley,* 411 U.S. at 350 (quoting *Harris*, 394 U.S. at 291).

65. Pierre v. United States, 525 F.2d 933, 935–36 (5th Cir. 1976).

66. 28 U.S.C. §§ 2241–2255 (2006).

67. Section 2241 provides that as a general matter, the writ "shall not extend to a prisoner" unless he is in "custody." 28 U.S.C. § 2241(c) (2006). Section 2241(d) additionally provides:

> 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.

citizen facing removal to challenge his final order of deportation; this final order of deportation sufficiently establishes "custody" for purposes of § 2241.[68]

By contrast, § 2254 constitutes the principal means through which state criminal offenders can challenge the constitutionality of their convictions in a federal forum.[69] Once a judgment of conviction has been entered in state court, it is "subject to review in multiple forums."[70] Each state has a framework that permits a defendant to challenge his conviction through appellate and post-conviction review by the state's courts.[71] After unsuccessfully litigating his federal constitutional claims through the state appellate and post-conviction process, a state criminal offender may petition for habeas corpus relief in a federal district court.[72] Should the federal district court deny relief, the § 2254 petitioner can appeal to the federal courts of appeals and the Supreme Court.[73]

As a result, through § 2254, Congress granted federal courts the authority to hear a habeas claim alleging that a state conviction violated the U.S. Constitution. Section 2254 provides that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody

§ 2241(d).

68. Zadvydas v. Davis, 533 U.S. 678, 687 (2001); Rosales v. Bureau of Immigration & Customs Enforcement, 426 F.3d 733, 735 (5th Cir. 2005). Similarly, a military personnel who is seeking discharge from service may petition for a writ of habeas corpus pursuant to § 2241. *See, e.g.,* Kanai v. McHugh, 638 F.3d 251 (4th Cir. 2011) (holding that a conscientious objector seeking discharge from military service satisfies § 2241 custody requirement). Additionally, some circuits allow inmates who allege defects in the "execution" of their sentences—rather than a constitutional error in the underlying conviction or sentence—to seek relief pursuant to § 2241. *See, e.g.*, Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000) (holding that claim was properly brought under § 2241).

69. CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 1 (2006); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 997 (1985) (noting that § 2254 review provides a crucial means for state defendants to challenge the federal constitutionality of their convictions). Section 2255, by contrast, allows those convicted of *federal offenses* to challenge their federal convictions and/or sentences. 28 U.S.C. § 2255 (2006).

70. Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 402 (2001).

71. *See generally* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK (2009-2010 ed. 2009) (discussing state post-conviction remedies).

72. *See* 28 U.S.C. § 2254(a), (b)(1) (2006).

73. FEDERMAN, *supra* note 69, at ix.

> in violation of the Constitution or laws or treaties of the United States.[74]

In short, a § 2254 challenge seeks invalidation of the state court judgment authorizing the petitioner's constraints.[75]

Crucially, under § 2254, a one-year "period of limitation" applies to a habeas corpus petition filed by a person in custody pursuant to a state court judgment.[76] The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate the claims or claims presented could have been discovered through the exercise of due diligence.[77]

As an additional matter, the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."[78]

Furthermore, before a federal court may review the merits of a § 2254 claim, the petitioner must "exhaust" available remedies in state court.[79] Specifically, a § 2254 petitioner "must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."[80] Thus a state petitioner may not obtain § 2254 relief unless he has properly litigated his "claims through 'one complete round of the State's established

74. § 2254(a).

75. Wilkinson v. Dotson, 544 U.S. 74, 83 (2005).

76. 28 U.S.C. § 2244(d)(1) (2006); Rhines v. Weber, 544 U.S. 269, 274 (2005) (noting this "one year" statute of limitations requirement).

77. § 2244(d)(1)(A)–(D).

78. § 2244(d)(2).

79. 28 U.S.C. § 2254(b)(1) (2006); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

80. *Boerckel*, 526 U.S. at 842.

appellate review process.'"[81] As Justice Sandra Day O'Connor explained in *O'Sullivan v. Boerckel*, exhaustion is premised on comity; its primary goal is to reduce the "friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance."[82] Procedural default constitutes the "sanction" for a § 2254 petitioner's failure to exhaust state remedies properly, meaning that the petitioner loses his right to present his habeas claim in federal court.[83] In other words, if state court remedies are no longer available because the petitioner failed to comply with procedural requirements for state-court review, "those remedies are technically exhausted, but exhausted in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court"; instead, if the petitioner "procedurally defaulted," the petitioner *may not* obtain federal review of the merits of his claims.[84]

C. The § 2254 Custody Requirement

The primary justification for § 2254 review is that the individual's interest in freedom from unlawful detention "warrants a second look at federal claims already rejected by the state courts."[85] The subject matter jurisdiction of federal courts reviewing § 2254 claims, however, is "limited explicitly to petitions from applicants who allege they are in 'custody' in violation of federal law."[86]

A petitioner seeking relief pursuant to § 2254 must demonstrate "that he is in 'custody pursuant to the judgment of a State

81. Woodford v. Ngo, 548 U.S. 81, 92 (2006) (quoting *Boerckel*, 526 U.S. at 845); *see also, e.g.*, Dill v. Holt, 371 F.3d 1301, 1303 (11th Cir. 2004) (holding that where petitioner has failed to pursue state remedies he "has not met § 2254(b)(1)(A)'s exhaustion requirement"); Jones v. Jones, 163 F.3d 285, 296 (5th Cir. 1998) (noting that in order to exhaust state remedies, § 2254 petitioner "must have fairly presented the substance of his claim to the state courts").

82. *Boerckel,* 526 U.S. at 845.

83. *Id.* at 848.

84. *Ngo* 548 U.S. at 93. Relief under § 2254 "may be granted on a procedurally defaulted claim only if the petitioner 'can demonstrate cause for the default and actual prejudice' from the alleged violation of federal law or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Jones,* 163 F.3d at 296.

85. Yackle, *supra* note 69, at 998; *see also* FEDERMAN, *supra* note 69, at ix (explaining that § 2254 review provides "an important avenue of appeal for state prisoners with unresolved federal questions").

86. Yackle, *supra* note 69, at 999 (emphasis added).

court.'"[87] As a historical matter, the federal habeas corpus statutes, including the present version of § 2254 contained in the Anti-Terrorism and Effective Death Penalty Act (AEDPA),[88] have all required that those seeking relief through the Great Writ must be "in custody."[89]

The fundamentality of "custody" to the purpose and meaning of federal habeas review cannot be overemphasized. The writ "lies to examine the lawfulness of the *custody*; if unlawful, it must be invalidated, and the petitioner must consequently be released from its restraints."[90]

Not only does § 2254 statutorily require "custody," but a petitioner must also demonstrate that he is in custody in order to satisfy the "case or controversy" requirement of Article III of the U.S. Constitution.[91] The case or controversy requirement demands that, throughout the litigation, the party seeking relief must have suffered, or have "be[en] threatened with, an actual injury . . . [that is] likely to be redressed by a favorable judicial decision."[92] Therefore, a party's challenge to the validity of a conviction, in order to satisfy the case or controversy requirement, must demonstrate a "concrete injury caused by the conviction and redressable by invalidation of the conviction."[93]

Because the custody requirement of § 2254 is jurisdictional, it constitutes a critical threshold question that courts must resolve

87. McCormick v. Kline, 572 F.3d 841, 847 (10th Cir. 2009) (quoting Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 401 (2001)).

88. As the First Circuit noted in *Lefkowitz v. Fair*, the requirement of "custody" originated "on this side of the Atlantic in the very first federal habeas statute[, the Judiciary Act of 1789,] and derives from the historic practice in England." 816 F.2d 17, 19 (1st Cir. 1987).

89. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.3(a), (b), at 1342, 1344 (5th ed. 2009); *see also, e.g.*, Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (noting that the requirement that applicant be "in custody" when habeas corpus petition is filed is "required not only by the repeated references in the statute, but also by the history of the Great Writ"); Mays v. Dinwiddie, 580 F.3d 1136, 1138–39 (10th Cir. 2009) (noting that § 2254 relief is appropriate only where state prisoner is "in custody in violation of the Constitution or laws of the United States"); Logan, *supra* note 23, at 150–51 ("[D]ating back to its common law origins and throughout its extended statutory history . . . federal habeas has required that a petitioner be in 'custody . . . .').

90. *Developments in the Law, Federal Habeas Corpus*, 83 HARV. L. REV. 1072, 1079–80 (1970) [hereinafter *Developments*] (emphasis added) (noting that courts have "traditionally" held that habeas corpus is available only to obtain petitioner's "discharge from custody").

91. U.S. CONST. art. III, § 2.

92. Spencer v. Kemna, 523 U.S. 1, 7 (1998).

93. *Id.*

before hearing the merits of any habeas challenge.[94] The pivotal point on the time continuum for determining whether a § 2254 petitioner is in custody is the time at which he files the petition.[95]

Notably the text of § 2254(a) uses the phrase "in custody" twice.[96] First, the text requires that the petition be "filed in behalf" of a person "in custody." Second, federal courts can hear the petition only on the ground that the petitioner is "in custody" in violation of the "Constitution or laws or treaties of the United States."[97] Consequently, although case law often refers generally to a single "in custody" requirement, "this statutory requirement has two distinct aspects."[98] The language of § 2254(a) "explicitly requires a nexus between the petitioner's claim and the unlawful nature of the custody."[99] Although it limits federal habeas review to those "in custody," § 2254 does not otherwise "attempt to mark the bounda-

94. Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010); *see also, e.g.*, Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 401 (2001) (instructing that § 2254 petitioner must first demonstrate that he is "in custody" pursuant to state court judgment); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (noting, as a "jurisdictional" matter, that the habeas corpus statute "implements the constitutional command that the writ of habeas corpus be made available" to those "in custody"); McCormick v. Kline, 572 F.3d 841, 848 (10th Cir. 2009) (terming the "in custody" requirement of § 2254 "jurisdictional"); Erlandson v. Northglenn Mun. Court, 528 F.3d 785, 788 (10th Cir. 2008) (terming the "in custody" requirement "jurisdictional"); *Developments, supra* note 91, at 1072 (noting that contemporary federal habeas statutes retain custody as "jurisdictional requirement").

95. *Spencer*, 523 U.S. at 7 (noting that petitioner must satisfy custody requirement at the time that habeas petition is filed); Carafas v. LaVallee, 391 U.S. 234, 239–40 (1968) (explaining that the filing of a petition is the relevant point the on time continuum to determine custody); *Bailey*, 599 F.3d at 978–79 (quoting Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005) (internal quotation marks omitted) ("Section 2254(a)'s 'in custody' requirement has been interpreted to mean that federal courts lack jurisdiction over habeas corpus petitions unless the petitioner is under the conviction or sentence under attack at the time his petition his filed.")); Tinder v. Paula, 725 F.2d 801, 803 (1st Cir. 1984) ("Custody is determined from the date that the habeas petitioner is first filed."); Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984) (holding that determination of whether petitioner is in § 2254 custody "is made at the time" petition is filed).

96. *Bailey*, 599 F.3d at 978.

97. *Id.*

98. *Id.* Other observers have similarly explained that to obtain federal habeas corpus review pursuant to § 2254, the petitioner "must satisfy two jurisdictional requirements—(1) the status requirement that the petition be 'in behalf of a person in custody pursuant to the judgment of a State court' and (2) the substance requirement that the petition challenge the legality of that custody on the ground that it is in violation of the Constitution or laws or treaties of the United States.'" 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 425 (6th ed. 2011).

99. *Bailey*, 599 F.3d at 980.

ries of 'custody'" or "the situations in which the writ can be used."[100]

1. Extending the Concept of Custody

Throughout most of America's history, federal courts restrictively interpreted the custody requirement to mean actual physical restraint.[101] Yet, beginning in the 1960's, the Supreme Court broadened the definition of "custody" under § 2254.[102] Consistent with this jurisprudential "metamorphosis," § 2254 custody for the past half-century has not required physical restraints or confinement.[103]

In its pivotal 1963 *Jones v. Cunningham* decision, the Supreme Court held that a § 2254 petitioner who had been paroled was in custody for purposes of federal habeas corpus review.[104] *Jones* concluded that a petitioner remained in custody even though he had changed status from a prisoner to a parolee. While a prisoner, the petitioner had been under the custody of the Virginia prison superintendent, but once he became a parolee, the Virginia Parole Board assumed custody over him. As the *Jones* Court critically observed, the parole order (1) placed the petitioner in the control of the Virginia Parole Board; (2) confined him to a particular community, house, and job; (3) required that he periodically report to a parole officer and follow the officer's advice; and (4) required that he allow the officer to visit him at any time.[105] Because of these

100. Jones v. Cunningham, 371 U.S. 236, 238 (1963); *see also* Smith, *supra* note 51, at 1338 ("Despite the jurisdictional importance of the custody requirement, Congress has never defined its meaning.").

101. *See* Barry v. Bergen Cnty. Prob. Dep't, 128 F.3d 152, 160 (3d Cir. 1997) (noting that an early Supreme Court decision held that incarceration was necessary to establish "custody"); Westberry v. Keith, 434 F.2d 623, 624 (5th Cir. 1970); *see also, e.g.*, HERTZ & LIEBMAN, *supra* note 98, at 426 (noting that as a historical matter, federal courts had limited federal habeas corpus review to prisoners "who, at the moment the federal petition was actually adjudicated, were seeking release from actual physical confinement by challenging the particular judgment of conviction or sentence responsible for the confinement").

102. Logan, *supra* note 23, at 148–49, 151. *See generally* FEDERMAN, *supra* note 69, at 95–124 (discussing the expansion of habeas corpus during the 1960's as well as the limits that the Supreme Court subsequently imposed beginning in the 1970's).

103. *Westberry*, 434 F.2d at 624; *Barry,* 128 F.3d at 160; Lefkowitz v. Fair, 816 F.2d 17, 19 (1st Cir. 1987); *see also* Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1183–84 (2005) ("[T]he Court has held that habeas petitioners satisfy the 'custody' requirement as long as they are 'in custody' at the time they initially file their habeas petitions . . . .").

104. *Jones,* 371 U.S. at 243; *see also* HERTZ & LIEBMAN, *supra* note 98, at 426 n.6 (terming *Jones* a "watershed" decision).

105. *Jones*, 371 U.S. at 240–41.

conditions, the Court held that the *Jones* petitioner was in the custody of the Virginia Parole Board. Concluding that "[a]ctual physical custody" is sufficient but not necessary to satisfy the custody requirement, *Jones* reasoned:

> It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they *significantly restrain* petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. . . . While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of . . . the Virginia Parole Board within the meaning of the habeas corpus statute . . . .[106]

Importantly, *Jones* asserted, "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."[107] Abandoning a constrained definition of custody, *Jones* recognized that "legal as well as physical restraints could constitute 'custody.'"[108]

Subsequent interpretations of the "in custody" language have consequently not required that a prisoner be physically confined in order to obtain § 2254 review.[109] To illustrate, the Supreme Court in *Peyton v. Rowe* relied on the *Jones* holding to expand the concept of custody.[110] Decided five years after *Jones, Peyton* involved a state prisoner who was sentenced to two consecutive sentences and who raised a habeas challenge as to his second conviction and sentence while he was still serving his first sentence.[111] The Court held that a prisoner serving consecutive sentences was "in custody" under any one of them for purposes of § 2254 review.[112] In reaching this con-

106. *Id.* at 242–43 (emphasis added) (footnote omitted).

107. *Id.* at 240.

108. *Developments*, *supra* note 91, at 1074.

109. *See, e.g.*, Maleng v. Cook, 490 U.S. 488, 491 (1989); Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010).

110. *Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

111. *Id.* at 55.

112. *Id.* at 55, 64–65 (overturning *McNally v. Hill*, 293 U.S. 131, 138 (1934)); *see also, e.g.*, Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99, 101 (1995) (asserting that the Supreme Court read in custody in *Peyton*).

clusion, *Peyton* rejected the assertion that "immediate physical release was the only remedy under the federal writ of habeas corpus."[113]

Consistent with the *Peyton* rule, a habeas petitioner may challenge his state sentences even though he is not presently serving them due to his incarceration in federal prison on federal charges.[114] Likewise, a state prisoner who is serving consecutive state sentences is "in custody" and may challenge the sentence scheduled to run first, even after it has expired, until all sentences have been served—at least as long as they "continue to postpone the date for which he would be eligible for [release]" under the expired sentence.[115] Thus, when determining whether a petitioner has satisfied the § 2254 custody requirement, courts must view "consecutive sentences in the aggregate, not as discrete segments."[116]

In addition, a § 2254 petitioner may satisfy the custody requirement even if he has served no part of his sentence. In *Hensley v. Municipal Court, San Jose Milpitas Judicial District*, the Supreme Court held that a petitioner who was released on his own recognizance pending execution of his state sentence but who (1) was subject by court order to appear at specified times and places, (2) remained at large only by "grace of a stay," and (3) had exhausted all available state court remedies was "in custody" for purposes of § 2254 review.[117]

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113. *Peyton*, 391 U.S. at 67.

114. *Maleng*, 490 U.S. at 493–94. The federal circuit courts are divided on the question of whether a conviction is subject to habeas corpus challenge by a prisoner incarcerated in another jurisdiction on a different conviction when the demanding state has not formally filed a detainer. *See, e.g.*, Vargas v. Swan, 854 F.2d 1028, 1031–32 (7th Cir. 1988); Frazier v. Wilkinson, 842 F.2d 42, 45 (2d Cir. 1988); Stacey v. Warden, 854 F.2d 401, 403 (11th Cir. 1988).

115. Garlotte v. Fordice, 515 U.S. 39, 43, 47 (1995). In *Garlotte*, invalidation of the petitioner's marijuana conviction, for which the sentence had expired, would have advanced "the date of his eligibility for release from present incarceration." *Id.* Consistent with this rule, a prisoner who was still serving the longer of two concurrent sentences, but who had completed the shorter sentence, was not "in custody" for the purpose of raising a § 2254 challenge to the conviction underlying the shorter sentence. Mays v. Dinwiddie, 580 F.3d 1136, 1137–38 (10th Cir. 2009); *see also* Rosenberg, *supra* note 113, at 101 (terming situation in *Garlotte* the "mirror image" of that in *Peyton*).

116. *Garlotte,* 515 U.S. at 47.

117. 411 U.S. 345, 351–53 (1973); *see also* Lawrence v. 48th Dist. Court, 560 F.3d 475, 480 (6th Cir. 2009) (concluding that a habeas petitioner on recognizance bond at the time of filing a habeas petition met the custody requirement); McVeigh v. Smith, 872 F.2d 725, 727 (6th Cir. 1989) (holding that a stayed one-year probation sentence on recognizance bond satisfied "custody" requirement).

As a practical matter, the Court observed that the *Hensley* petitioner was "subject to restraints 'not shared by the public generally . . . .' He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense."[118] Notably, although the *Hensley* petitioner had been convicted only of a misdemeanor and received a sentence of one year of imprisonment as well as a $625 fine,[119] the Court stated:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate. Applying that principle, we can only conclude that petitioner is in custody for purposes of the habeas corpus statute.[120]

As a final consideration, the Court explained that its conclusion that the *Hensley* petitioner was "in custody" did not interfere "with any significant interest of the State."[121]

Importantly, the Supreme Court has held that a petitioner may satisfy the § 2254 custody requirement even where the state court

118. *Hensley*, 411 U.S. at 351 (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)). The Supreme Court cautioned, however, that its decision did not "open the door of the [federal] district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance." *Id.* at 353. Instead, where a state petitioner is "released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts. Nothing in today's opinion alters the application of that doctrine to such a defendant." *Id.*

119. *Id.* at 346.

120. *Id.* at 351. Relying upon the reasoning in *Hensley*, the Supreme Court held in *Justices of Boston Municipal Court v. Lydon* that a petitioner was in § 2254 "custody" where he had been released on personal recognizance between (1) a vacated bench trial conviction and (2) the beginning of a jury "trial de novo." 466 U.S. 294, 300–301 (1984). The conditions of release for the *Lydon* petitioner subjected him to "restraints not shared by the public generally." *Id.* at 301 (quoting *Hensley*, 411 U.S. at 351) (internal quotation marks omitted). The Court concluded, "Although the restraints on [the *Lydon* petitioner's] freedom are not identical to those imposed on Hensley, we do not think that they are sufficiently different to require a different result." *Id.*

121. *Hensley,* 411 U.S. at 352; *see also infra* Part II.B (discussing the governmental and societal interest in the finality of state convictions).

judgment from which he seeks relief is not a criminal conviction. In *Duncan v. Walker*, the Court observed that incarceration pursuant to a state criminal conviction constitutes the "most common and most familiar basis for satisfaction of the 'in custody' requirement in § 2254 cases."[122] Yet other types of state court judgments, such as a state court order of civil commitment or civil contempt, also satisfy the § 2254 custody requirement.[123]

Likewise, some courts have held that community service satisfies the § 2254 custody requirement.[124] For example, in *Barry v. Bergen County Probation Department*, the Third Circuit held that a § 2254 petitioner who was serving a sentence of 500 hours of community service satisfied the custody requirement.[125] *Barry* emphasized that the petitioner was subject to a "severe restraint on his liberty" that was not "shared by the public generally" and to some "level of supervision" by the government.[126]

2. "Collateral" Sanctions May Prevent Mootness

The concept of mootness derives from Article III of the U.S. Constitution "under which the exercise of judicial power depends upon the existence of a case or controversy."[127] As the Seventh Circuit has explained, "jurisdiction is a matter of satisfying the statutory 'in custody' requirement, whereas mootness is a question of whether there is any relief the court can grant once it has determined that it indeed has jurisdiction."[128] Thus, federal courts do not possess the "power to decide questions that cannot affect the rights of litigants in the case before them."[129]

The 1968 Supreme Court decision in *Carafas v. LaVallee* held that for purposes of § 2254 petitions, once federal jurisdiction has attached, the expiration of a state prisoner's sentence and his un-

122. 533 U.S. 167, 176 (2001).

123. *Id.* ("[T]hese state court judgments neither constitute nor require criminal convictions.").

124. Barry v. Bergen Cnty. Prob. Dep't, 128 F.3d 152, 159–62 (3d Cir. 1997); Lawrence v. 48th Dist. Court, 560 F.3d 475, 481 (5th Cir. 2009) (holding that § 2254 petitioner's probation and 500 hours of community service imposed "significant restraints" on his liberty).

125. *Barry,* 128 F.3d at 161.

126. *Id.* at 159–61; *see also* Tinder v. Paula, 725 F.2d 801, 803 (1st Cir. 1984) (noting this "two-element" requirement).

127. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (quoting Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964)); U.S. CONST. art. III, § 2; *see also* St. Pierre v. United States, 319 U.S. 41, 42 (1943) (observing that federal courts may not decide moot issues).

128. Harrison v. Indiana, 597 F.2d 115, 118 (7th Cir. 1979).

129. *Rice*, 404 U.S. at 246.

conditional release from state prison prior to the final adjudication of federal habeas proceedings do not terminate federal jurisdiction.[130] The *Carafas* petitioner had been convicted of burglary and grand larceny in New York state court; because of his conviction, he could not serve as a labor union official, vote in state elections, or serve as a juror.[131] The Supreme Court concluded, "On account of these 'collateral consequences,' the *Carafas* petitioner's habeas claim [was] not moot."[132] The *Carafas* Court reasoned that, because of the "disabilities or burdens" that may have resulted from the petitioner's conviction, he possessed "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[133] *Carafas* elaborated that a habeas petitioner "should not be . . . required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence."[134]

Consequently,"[a]s long as the habeas corpus petition was filed in federal court at a time when the petitioner was in custody, an action challenging that custody is not necessarily mooted by the petitioner's release from custody prior to final trial and appellate ad-

130. Carafas v. LaVallee, 391 U.S. 234, 236, 238–39 (1968) (overturning Parker v. Ellis, 362 U.S. 574 (1960)); *see also, e.g.*, Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010) (holding that petitioner must be in custody at the time that the petition is filed, but petitioner's "subsequent release from custody does not itself deprive federal habeas court of its statutory jurisdiction").

131. *Carafas*, 391 U.S. at 235, 237.

132. *Id.* at 237–38 (quoting Ginsberg v. New York, 390 U.S. 629, 633 n.2 (1968)).

133. *Id.* (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)); *see also, e.g.*, Ginsberg v. New York, 390 U.S. 629, 633 n.2 (1968) (holding that the fact that defendant was given suspended sentence did not render the case moot where certain disabilities, including the possibility of ineligibility for licensing, resulted from conviction); Carty v. Nelson, 426 F.3d 1064, 1071 (9th Cir. 2005) (holding that the release of § 2254 petitioner from state civil commitment did not moot a petition challenging initial commitment where (1) petitioner suffered continuing and concrete injury due to collateral risk of incarceration if he failed to comply with reporting requirements and (2) "meaningful relief" was available from consequences); Nakell v. Attorney Gen. of N.C., 15 F.3d 319, 322–23 (4th Cir. 1994) (holding that a $500 fine and possible disciplinary proceedings as a result of an attorney's state direct criminal contempt conviction were collateral consequences which prevented the attorney's § 2254 petition from becoming moot upon his release from custody after serving his sentence); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir. 1992) (holding that case had not become moot where attorney, cited for contempt of court, faced state disciplinary sanctions); Minor v. Dugger, 864 F.2d 124, 127 (11th Cir. 1989) (holding that § 2254 petition was not rendered moot by defendant's unconditional release, given the possibility that the conviction might later be used for sentence enhancement purposes).

134. 391 U.S. at 240.

judication of the petition."[135] Once the convict's sentence has expired, courts may "presume" that the criminal conviction has continuing collateral consequences that prevent mootness.[136]

In short, a § 2254 petitioner's "subsequent and unfettered release from custody" fails to render his claim moot under Article III.[137] Endowing a degree of "elasticity" to the custody requirement, the Supreme Court has consequently allowed § 2254 petitioners "to attack convictions for which they have yet to be in custody, and for which they have already completed their custody. For persons in any of these situations, habeas is not simply about 'release . . . from unlawful confinement.'"[138] Furthermore, "*Carafas* not only broadened beyond release from custody the relief available by means of habeas, [but] it also recognized that habeas is appropriate to remedy the collateral consequences of a conviction."[139]

3. Collateral Sanctions Are Insufficient to Establish Custody

The Supreme Court and lower federal courts, however, have rejected the argument "that a habeas petitioner may be 'in custody' under a conviction whose sentence has fully expired at the time his petition is filed."[140] The Court has asserted that "this interpretation

135. HERTZ & LIEBMAN, *supra* note 98, at 428–29 (internal citations omitted).

136. Spencer v. Kenna, 523 U.S. 1, 8–12 (1998) (noting this presumption); HERTZ & LIEBMAN, *supra* note 98, at 430 n.11. Notably, however, in *Spencer v. Kemna*, the Supreme Court held that the presumption that a "wrongful criminal conviction has continuing collateral consequences" does not extend to a petitioner's challenge to his parole revocation. *Spencer*, 523 U.S. at 8, 14. The *Spencer* petitioner had been imprisoned as a result of a parole violation; after he was released from prison, he attempted to challenge the legality of the parole revocation—but not his conviction. *Id.* at 5–7. He alleged that he would suffer "collateral consequences" from the alleged improper revocation of his parole—for example, the parole revocation could be used against him in a later proceeding. *Id.* at 14. The Court concluded that such "collateral consequences" were not "concrete injuries" sufficient to avoid "mootness." *Id.*

137. Hoffstadt, *supra* note 103, at 1184.

138. *Id.* (quoting Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980)).

139. Harrison v. Indiana, 597 F.2d 115, 118 (7th Cir. 1979).

140. Maleng v. Cook, 490 U.S. 488, 491 (1989); *see also* Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005) (noting that once a sentence imposed for conviction has "completely expired," the collateral consequences of the conviction do not render an individual "in custody" for purposes of § 2254 review); Tinder v. Paula, 725 F.2d 801, 803 (1st Cir. 1984) ("[A] sentence that has been fully served does not satisfy the custody requirement of the habeas statute, despite the collateral consequences that generally attend a criminal conviction."); Furey v. Hyland, 395 F. Supp. 1356, 1360 (D.N.J. 1975) ("The discussion of the [collateral] disabilities in *Carafas* was necessary only to decide the mootness issue." (citation omitted)).

stretches the language 'in custody' too far."[141] The Court acknowledged that collateral consequences prevent a § 2254 petition that a petitioner filed while in custody from becoming moot upon his subsequent release from custody; yet, these very same consequences "do *not* by themselves satisfy the requirement that the petitioner be 'in custody' when the petition is first filed—even if those consequences have actually materialized."[142]

The 1989 Supreme Court decision in *Maleng v. Cook* held that a habeas petitioner does not remain 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."[143] The Court distinguished *Carafas*, reasoning that the *Carafas* holding "rested . . . *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed."[144] Consequently, *Maleng* asserted, "The negative implication of this holding is, of course, 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 a habeas attack upon it."[145]

141. *Maleng*, 490 U.S. at 491.

142. HERTZ & LIEBMAN, *supra* note 98, at 433–34 n.12; *see also* Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998) (noting that once a sentence has completely expired "collateral consequences" of that conviction are insufficient to "render an individual in custody" (quoting *Maleng*, 490 U.S. at 492)); *Harrison*, 597 F.2d at 118 ("[The] collateral consequences, although insufficient to establish custody and thus jurisdiction, are enough to keep a petition from becoming moot by the petitioner's release from custody."). As one observer has concisely explained:

> The arguments for an expansive interpretation of the "custody" requirement stemmed from *Carafas'* holding that the "collateral consequences" of a conviction prevented mootness upon release. By the same logic, the argument went, a whole host of "collateral consequences" flowing from convictions warranted the availability of habeas, even post-release.

Ordower, *supra* note 28, at 1843–44.

143. *Maleng*, 490 U.S. at 492; McCormick v. Kline, 572 F.3d 841, 848 (10th Cir. 2009) (repeating the rule that a habeas petitioner does not remain in custody under a conviction after the sentence imposed for it has fully expired merely because the prior conviction could be used to enhance sentences imposed for any later convictions).

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

145. *Id.*

Thus *Maleng* squarely forecloses § 2254 relief where the convicted party files his petition after his state conviction has expired.[146] As one observer cogently noted:

> [I]n deciding [*Carafas*] as it did, the Court gave several indications that it was consciously eschewing its opportunity to extend the custody concept to include petitioner's disabilities. First, by refusing to consider the collateral restraints themselves a custody, *Carafas* results in an apparent, arbitrary distinction. The negative pregnant of the not-moot holding is that habeas relief is not available to those who apply for the writ after their release, even though they may be subject to the same disabilities which the Court saw as sufficient to warrant a remedy in *Carafas*.[147]

In sum, beginning with *Jones*, the Supreme Court has clearly expanded the concept of custody "beyond immediate physical restraint."[148] *Jones* relied on several different factors in establishing "the necessary degree of restraint, [but it left unclear] what, short of actual physical confinement, remains essential to a finding of custody."[149] Nevertheless, one clear limitation on the § 2254 custody definition is the line between a "restraint on liberty" and a collateral consequence of a conviction.[150] As one scholar has aptly noted:

> [Federal courts have been reluctant to] recognize the lasting effects of criminal convictions as a basis for habeas jurisdiction. This is so despite the obvious inconsistency thereby created: that collateral consequences can preserve habeas jurisdiction, once established, against a claim of mootness, but do not suffice in and of themselves, in the absence of initial jurisdiction.[151]

The Eighth Circuit's decision in *Harvey v. South Dakota* illustrates the unwillingness of federal courts to view collateral consequences as sufficient to establish § 2254 custody.[152] Convicted of grand larceny in 1968, the *Harvey* petitioner was released from

146. Smith, *supra* note 28, at 83.

147. *Developments*, *supra* note 90, at 1077.

148. *Id.* at 1078. A broadened definition of "custody" accompanied the general expansion of the scope of federal habeas corpus review during the 1960s; "[s]ubsequent contractions of habeas review have left this expanded definition intact." LAFAVE, *supra* note 89, at 1342.

149. *Developments*, *supra* note 90, at 1075.

150. Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998); Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010) (noting this boundary).

151. Logan, *supra* note 23, at 157.

152. 526 F.2d 840, 841 (8th Cir. 1975).

prison in March of 1971.[153] In 1969, the conviction was affirmed on state direct appeal and the *Harvey* petitioner initiated the state post-conviction relief process.[154] Eventually exhausting his state post-conviction remedies, the *Harvey* petitioner finally filed a § 2254 claim in 1974—three years after his release from prison.[155]

In an attempt to satisfy the threshold jurisdictional requirement of custody, the *Harvey* petitioner contended that "the disabilities which [arose from his] conviction" established custody within the meaning of § 2254.[156] He noted that not only was he "unable to pursue certain professions" or possess a firearm, but also that he would "occup[y] the status of a recidivist if he commits another crime."[157]

The Eighth Circuit concluded that the *Harvey* petitioner failed to satisfy the custody requirement of § 2254 and thus was barred from seeking federal habeas review. *Harvey* found *Carafas* to be distinguishable because the *Carafas* petitioner had "filed his habeas corpus petition while he was still incarcerated."[158] The Eighth Circuit elaborated that the collateral consequences in *Carafas* "kept the case from becoming moot; they did not suffice to give the federal courts jurisdiction."[159] Furthermore, the Eighth Circuit observed that finding custody in a case such as *Harvey* would render Congress's "in custody" requirement meaningless and that "[t]he restraints on [the *Harvey* petitioner's] liberty are 'neither severe nor immediate.'"[160]

Lastly, the *Harvey* petitioner had contended that he had not filed his federal habeas petition while he was in prison because of "state delay in processing his attempts to obtain post-conviction relief."[161] In response, the Eighth Circuit crucially instructed, "It would appear that much of the delay in [the *Harvey* petitioner's] case in state court was attributable to his own inaction. But even if this were not so, we are powerless to grant the federal courts subject matter jurisdiction; only Congress or the Constitution may do so."[162]

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

Additionally, federal courts have limited the § 2254 "custody" definition within the context of sentence-enhancing prior convictions. The Supreme Court has held that § 2254 relief is unavailable where a prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody.[163] In *Lackawanna District Attorney v. Coss*, a state prisoner brought a § 2254 petition in which he sought to attack a current state sentence that had been enhanced by an earlier, expired state conviction.[164] The Court concluded that the petitioner was in custody pursuant to the later court judgment, but not with regard to the expired conviction—even though this enhanced sentence was a collateral consequence of the earlier, expired, and purportedly unconstitutional conviction. Thus once a state conviction is no longer open to direct or collateral attack in its own right, the conviction may be regarded as conclusively valid.

Furthermore, federal courts have held that a non-citizen may not "collaterally attack the legitimacy of a state criminal conviction in a deportation proceeding."[165] In reaching this conclusion courts have applied the reasoning in *Coss*, asserting that "no meaningful difference" exists "between a collateral attack on an expired state conviction underlying removal proceedings and a collateral attack on an expired state criminal conviction underlying an enhanced sentence."[166] Because immigration consequences, "such as deporta-

163. Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 396–97 (2001). *Coss* thus resolved the issue of the "extent to which the prior expired conviction itself may be subject to challenge in the attack on the current sentence which it was used to enhance." *Id.* at 402 (quoting Maleng v. Cook, 490 U.S. 488, 494 (1989)). The Supreme Court suggested an exception to this rule (1) where the petitioner did not receive counsel in violation of the Sixth Amendment for the adjudication of his prior conviction, or (2) in those rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction due to no fault of his own. *Id.* at 404–06.

164. *Id.* at 401–02.

165. Trench v. INS, 783 F.2d 181, 184 (10th Cir. 1986); *see also* Contreras v. Schiltgen, 151 F.3d 906, 908 (9th Cir. 1998) (noting that federal habeas review is "limited" where the habeas petitioner challenges the use of an expired conviction that forms the basis for the immigration custody). As the Fifth Circuit has reasoned, a collateral challenge to a criminal conviction in deportation proceedings "could not, as a practical matter, assure a forum reasonably adapted to ascertaining the truth of the claims raised. It could only improvidently complicate the administrative process. Once the conviction becomes final, it provides a valid basis for deportation unless it is overturned in a judicial post-conviction proceeding." Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. 1981).

166. *Drakes v. INS*, 330 F.3d 600, 604 (3d Cir. 2003); Neyor v. INS, 155 F. Supp. 2d 127, 133 (D.N.J. 2001).

tion, have long been viewed as 'collateral,'" they are "not themselves sufficient to render an individual 'in custody'" for purposes of § 2254 review.[167] As the Third Circuit reasoned in *Drakes v. INS*,:

> [R]emoval of an alien who violates the immigration laws does not constitute punishment but, rather, is a civil action necessary to enforce the country's immigration laws. Even if removal involves a greater potential injury to a petitioner than an enhanced sentence, such an injury does not outweigh the interests of finality and ease of administration. Allowing [a noncitizen in removal proceedings] to collaterally attack his prior convictions would "sanction an end run around statutes of limitations and other procedural barriers that would preclude the movant from attacking the prior conviction directly."[168]

The reasoning in *Neyor v. INS* is illustrative.[169] The *Neyor* petitioner, convicted of New Jersey drug offenses, was sentenced to fifteen months of imprisonment; his convictions were affirmed through state appellate and post-conviction relief proceedings.[170] After the *Neyor* petitioner completed his sentence, federal immigration authorities began proceedings to deport him to Liberia.[171] Seeking federal habeas relief, the *Neyor* petitioner did not "attack the validity of the deportation proceeding itself" but claimed only that the "underlying conviction [was] invalid."[172]

Neyor observed that individuals in immigration custody might challenge their deportation pursuant to § 2241,[173] whereas § 2254 constitutes the "principal means" for state criminal offenders to raise a federal challenge to the constitutionality of their convictions.[174] *Neyor* instructed that a federal court may not review the validity of an expired state conviction pursuant to § 2241 even if that conviction serves as a predicate for immigration detention.[175] *Neyor* reasoned that removal statutes "do not allow [immigration au-

167. Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005); Ogunwomoju v. United States, 512 F.3d 69, 74–75 (2d Cir. 2008) (holding that one held in immigration detention is not "in custody" for purpose of challenging state conviction under § 2254).

168. *Drakes,* 330 F.3d at 605.

169. 155 F. Supp. 2d at 127.

170. *Id.* at 130.

171. *Id.* at 132.

172. *Id.*

173. *See supra* notes 68–69 and accompanying text for a general overview of § 2241.

174. *Neyor*, 155 F. Supp. 2d at 131, 134; *see also* 28 U.S.C. § 2241(c)(3) (2006) (using similar language in federal cases).

175. *Neyor*, 155 F. Supp. 2d at 137, 139.

thorities] to inquire into the validity of the underlying convictions during removal proceedings but allow only an inquiry as to the fact of conviction."[176] Therefore, *Neyor* concluded that § 2241 is a means to challenge only final administrative determination of immigration authorities and not the "validity of the conviction."[177]

The *Neyor* court explained that the petitioner should have sought § 2254 relief "directly against the state during the time he was incarcerated for his state conviction and before the 1-year statute of limitations [had]. . .expired."[178] By the time that he had filed his habeas petition, however, the *Neyor* petitioner had completed his sentence, thus rendering the state conviction "expired."[179] Therefore, *Neyor* held that the petitioner was not in "custody" under the expired state conviction and could not attack the conviction through a § 2254 petition.[180]

Notably, although often a "direct" consequence of a conviction,[181] a fine or a restitution order does not establish § 2254 custody—particularly where incarceration or the threat of incarceration for non-payment is assent. As some courts have reasoned, a fine or restitution, on its own, does not constitute a "significant restraint on liberty."[182]

In *Bailey v. Hill*, for example, the § 2254 petitioner, who had been convicted in state court of kidnapping and attempted murder, received a sentence of imprisonment and was ordered to pay $6,606.65 in restitution.[183] The *Bailey* petitioner, while serving his

176. *Id.* at 139.

177. *Id.*; *see also* Smith, *supra* note 28, at 83 ("The merits of a conviction are not subject to litigation in deportation itself.").

178. *Neyor*, 155 F. Supp. 2d at 138.

179. *Id.* at 134.

180. *Id.*

181. *See supra* notes 34–35 and accompanying text for a brief discussion concerning "direct consequences" of convictions.

182. Bailey v. Hill, 599 F.3d 976, 979–981 (9th Cir. 2010); Obado v. New Jersey, 328 F.3d 716, 717 (3d Cir. 2003); *see also, e.g.*, Erlandson v. Northglenn Mun. Court, 528 F.3d 785, 787–88 (10th Cir. 2008) (declining to find that petitioner convicted of littering was in custody where his only punishment was a fine); Barnickel v. United States, 113 F.3d 704, 706 (7th Cir. 1997); United States v. Michaud, 901 F.2d 5, 6–7 (1st Cir. 1990) (holding that an outstanding $60,000 fine and the possibility of imprisonment for nonpayment failed to establish custody); Duvallon v. Florida, 691 F.2d 483, 485 (11th Cir. 1982) (holding that a § 2254 petitioner subject only to a fine did not satisfy the "custody" requirement).

183. 599 F.3d at 977. The 2009 Seventh Circuit decision in *Washington v. Smith* is similarly instructive. 564 F.3d 1350 (7th Cir. 2009). A Wisconsin jury convicted the petitioner of forgery, and "[h]e was sentenced to serve two and a half years in prison and three years of [probation]. Additionally, the trial court ordered [him] to pay restitution in the amount of $15,000, as well as other fines and costs." *Id.* at

term of imprisonment, challenged only the restitution aspect of his conviction.[184] In holding that the *Bailey* petitioner failed to satisfy the § 2254 custody requirement, the Ninth Circuit reasoned that the desired remedy, "the elimination or alteration of a money judgment, does not directly impact—and is not directed at the source of the restraint—on his liberty."[185] Thus the "physical custody" component of the *Bailey* petitioner's sentence was insufficient to confer jurisdiction over his § 2254 petition that challenged only the "restitution" aspect of his sentence.[186] As some courts have reasoned, fines do not constitute custody because "such sentences implicate only property, not liberty."[187]

Likewise, a $250 fine and a driver's license suspension of one year following the petitioner's conviction for failure to yield the right of way did not satisfy the § 2254 custody requirement.[188] As the Fifth Circuit has reasoned, "To allow such circumstances to form the basis of a claim that [a § 2254 petitioner] was in custody would go far beyond that degree of confinement found sufficient in *Carafas* and *Jones*."[189]

Furthermore, the loss of a professional license following a criminal conviction fails to establish § 2254 "custody." To illustrate, in *Lefkowitz v. Fair*, the state medical board revoked the medical license of a physician who had been convicted of rape.[190] In holding that this revocation was insufficient to establish § 2254 custody, the First Circuit stated: "Insofar as the [*Lefkowitz* petitioner] urges that 'custody' remains attached to a degree sufficient to warrant the exercise of federal habeas jurisdiction even after the expiration of his state sentence, he is whistling past the graveyard."[191] *Lefkowitz* rea-

1350. After exhausting his state remedies, the *Washington* petitioner sought § 2254 relief on the basis that his attorney provided ineffective assistance of counsel with respect to the restitution amount. *Id.* The Seventh Circuit, noting that the petitioner attacked only the restitution aspect of his sentence, concluded that he did not state a claim for relief under § 2254. *Id.* at 1351. The court reasoned that a § 2254 petitioner must attack the "fact or duration of one's sentence; if it does not, it does not state a proper basis for relief." *Id.*

184. *Bailey*, 599 F.3d at 978.

185. *Id.* at 981.

186. *Id.* at 980–81.

187. *See* Barry v. Bergen Cty. Prob. Dep't, 128 F.3d 152, 161 (3d. Cir. 1997).

188. Westberry v. Keith, 434 F.2d 623, 624 (5th Cir. 1970); *see also* Lillios v. New Hampshire, 788 F.2d 60, 61 (1st Cir. 1986) (holding that fines and a driver's license suspension were not "severe restraints" and thus did not establish "custody").

189. *Westberr*y, 434 F.2d at 625.

190. Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987).

191. *Id.*

soned that habeas jurisprudence "has traditionally been concerned with liberty rather than property, with freedom more than economics. . . . '[S]ome vaguely defined discrimination or some sort of economic duress' resulting from a conviction does not, by itself, confer standing to invoke the remedy of habeas corpus."[192] *Lefkowitz* concluded that "revocation of a medical license . . . does not constitute the type of grave restraint on liberty or . . . ongoing governmental supervision which are unavoidable prerequisites of actionable 'custody.'"[193] The First Circuit elaborated:

> Adverse occupational and employment consequences are a frequent aftermath of virtually any felony conviction. Government regulation, in the nature of the imposition of civil disabilities—say, loss of voting rights or disqualification from obtaining a gun permit—often follows a defendant long after his sentence has been served. To hold that the custody requirement is so elastic as to reach such sequellae would be to stretch the concept of custody out of all meaningful proportion, to render it limp and shapeless—in the last analysis, to make habeas corpus routinely available to all who suffer harm emanating from a state conviction, regardless of actual custodial status. We abjure such an expansive rule.[194]

Lefkowitz added, "There are *no magic mirrors*; even grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the presence of custody for the purpose of habeas review."[195]

Unsurprisingly, reputational restraints on a person's ability to pursue his occupation following a criminal conviction also fail to establish § 2254 custody. To illustrate, in *Edmunds v. Won Bae Chang*, an attorney who had received a state court contempt citation contended that it constituted a "severe restraint" on his "liberty" because it harmed "his reputation as a lawyer" and "adversely affect[ed]" his relationship with the courts.[196] In holding that the *Edmunds* petitioner failed to satisfy the § 2254 custody requirement, the Ninth Circuit emphasized that the $25 contempt fine consti-

192. *Id.*; *see also* Ginsberg v. Abrams, 702 F.2d 48, 49 (2d Cir. 1983) (holding that a habeas petitioner's removal from bench of family court, revocation of his law license, and disqualification from being licensed as real estate broker or insurance agent did not "so greatly limit[ ] his economic mobility as to constitute 'custody'").

193. *Lefkowitz*, 816 F.2d at 20.

194. *Id.*

195. *Id.* (emphasis added).

196. 509 F.2d 39, 41 (9th Cir. 1975).

tuted the only demonstrable harm that the *Edmunds* petitioner had suffered.[197]

Anxiety resulting from the "unconstitutional delay" of a state appeal also fails to establish custody. The Second Circuit instructed in *Diaz v. Henderson* that "[a]nxiety, even when unconstitutionally inflicted, is harm of a personal nature."[198] Finally, offender registration requirements do not create custody.[199] As the Ninth Circuit has reasoned, these obligations are merely a "collateral consequence" of a conviction, thus barring federal courts from exercising § 2254 jurisdiction.[200]

D. The 2010 Supreme Court Decision in Padilla v. Kentucky

The watershed 2010 Supreme Court decision in *Padilla v. Kentucky* marked a paradigm shift in how courts view the collateral sanctions of a conviction. As one observer has noted, *Padilla* "suggests the potential for a more general blurring of the line between 'direct' and 'collateral' consequences of convictions."[201]

1. The *Padilla* Analysis

Prior to *Padilla v. Kentucky*, courts were divided as to whether a criminal defense attorney's failure to inform a non-citizen client about the immigration consequences of his guilty plea constituted ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution.[202] *Padilla* resolved that question, holding that in order to provide constitutionally adequate representation, criminal defense counsel must inform his client if the guilty plea and resulting conviction might result in deportation.[203]

197. *Id.*

198. 905 F.2d 652, 654 (2d Cir. 1990).

199. Williamson v. Gregoire, 151 F.3d 1180, 1184 (9th Cir. 1998); *see also, e.g.*, Resendiz v. Kovensky, 416 F.3d 952, 958 (9th Cir. 2005) (holding that a "narcotics offender" registration requirement did not establish custody under § 2254); Leslie v. Randle, 296 F.3d 518, 522–23 (6th Cir. 2002) (holding that because registration requirements were merely a "collateral consequence," the § 2254 petitioner was not "in custody").

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

201. Rachel E. Rosenbloom, *Will* Padilla *Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 328 (2011); *see also* Smyth, *supra* note 32, at 796 (asserting that *Padilla* "shocked commentators and practitioners alike").

202. *See, e.g.*, Trench v. INS, 783 F.2d 181, 184 (10th Cir. 1986) (noting division among courts); *see also supra* note 15 for a brief definition of a Sixth Amendment "ineffective assistance of counsel claim."

203. Padilla v. Kentucky, 130 S. Ct. 1473, 1478, 1483.

A native of Honduras, Jose Padilla had been a lawful permanent resident of the United States for more than 40 years.[204] He faced deportation after pleading guilty in Kentucky state court to the transportation of a large amount of marijuana.[205] Padilla claimed that his counsel was constitutionally ineffective because he had failed to warn him that his guilty plea would potentially result in deportation.[206]

In affirming the validity of Padilla's conviction, the Kentucky Supreme Court concluded that "collateral consequences," such as deportation, were outside "the scope of representation required by the Sixth Amendment" and therefore that the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."[207] Having exhausted available state post-conviction remedies, Padilla sought § 2254 review of his conviction.[208]

In concluding that Padilla's § 2254 claim was meritorious, the Supreme Court explained, "[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[209] Justice John Paul Stevens, writing the majority opinion for the Court, further observed:

> We have long recognized that deportation is a particularly severe "penalty;" but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it most difficult to divorce the penalty from the conviction in the deportation context.[210]

204. *Id.*, at 1477; *see also* Rosenbloom, *supra* note 201, at 328 ("[*Padilla* holds] that criminal defense attorneys have a duty to provide accurate advice to noncitizen clients regarding the immigration consequences of a guilty plea.").

205. *Padilla,* 130 S. Ct. at 1477.

206. *Id.* at 1478.

207. *Id.* at 1481 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).

208. *See id.* at 1478.

209. *Id.* at 1478, 1480.

210. *Id.* at 1481. The Court reserved the determination of whether *Padilla* satisfies the necessary "second" element of an ineffectiveness claim—prejudice—for the Kentucky courts. *Id.* at 1483–84.

Padilla conceded that disagreement existed among courts concerning "how to distinguish between direct and collateral consequences."[211] Yet *Padilla* notably chose to avoid applying this distinction in reaching its decision. Instead Justice Stevens explained that "whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation."[212] Thus the Court, perhaps self-consciously recognizing the significance of its reasoning, declined to explicitly abandon the "direct/collateral" distinction.

At a minimum, however, *Padilla* had clearly eroded the formalistic "direct/collateral" distinction within the context of Sixth Amendment effective assistance of counsel claims. The Court elaborated:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a [Sixth Amendment ineffective assistance of counsel] claim concerning the specific risk of deportation.[213]

The Court also observed that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[214] *Padilla* elaborated that the "severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[215] *Padilla* emphasized that "the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[216]

Nevertheless, in his dissenting opinion, Justice Antonin Scalia asserted that the *Padilla* holding "prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion."[217] Terming the *Padilla* decision a "sledge hammer," he added, "If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements,

211. *Padilla*, 130 S. Ct. at 1481 n.8.
212. *Id.* at 1481.
213. *Id.* at 1482.
214. *Id.* at 1483.
215. *Id.* at 1486.
216. *Id.*
217. *Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting).

what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given."[218]

2. Extending *Padilla* to Other Collateral Sanctions in the Sixth Amendment Context

Padilla seemingly sidestepped the "direct/collateral" distinction within the context of Sixth Amendment effective assistance of counsel claims; it instructed courts to focus on whether the consequence is "intimately related to the criminal process" and is "an integral part of the penalty."[219] In doing so, however, *Padilla* "effectively undermined" the formalistic rule that only direct consequences were legally significant for Sixth Amendment purposes and that "collateral" consequences were of no moment.[220]

Within the context of Sixth Amendment ineffective assistance of counsel claims, some courts have expanded the *Padilla* reasoning to encompass collateral sanctions other than deportation.[221] As one observer has asserted:

> These cases all demonstrate that the analysis conducted in *Padilla* can [be], and certainly is, applied to other consequences, especially those that courts have found to be fundamental or related to constitutional rights. These may include the right to vote, serve on a jury, possess a firearm, create and remain with [one's] family, and serve in the military. Likewise, those consequences which result in "drastic measures," including registration as a sex offender, the imposition of legal financial obligations, losing the ability to work, losing the right [to] drive a vehicle, losing stable housing, and losing the ability to seek an education may also fall within *Padilla*'s definition of "integral part" of the penalty.[222]

218. *Id.* at 1496–97.

219. *Id.* at 1476; *see also* Smyth, *supra* note 32, at 800 (noting that the analysis shifted from "collateral" to "integral").

220. Smyth, *supra* note 32, at 798.

221. *Id.* at 809 ("Even a cursory reading of *Padilla* begs an inquiry into its application to other so-called 'collateral consequences.'"). In *Frost v. State,* for example, the Alabama Court of Criminal Appeals held that *Padilla* applied to the failure of an attorney to advise his client that he would not be eligible for parole. *See* CR-09-1037, 2011 WL 2094777, at *1–2 (Ala. Crim. App. May 27, 2011). *But see* Brown v. Goodwin, Civ. No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) ("[T]he holding of *Padilla* seems not importable—either entirely or, at the very least, not readily importable—into scenarios involving collateral consequences other than deportation.").

222. Stearns, *supra* note 21, at 863–64.

To illustrate, in *Bauder v. Department of Corrections*, the Eleventh Circuit held that an attorney was constitutionally ineffective when he incorrectly advised his client that the client would not be subject to civil commitment past his sentence if he were to plead guilty to aggravated stalking.[223] Citing *Padilla*, *Bauder* reasoned that even if the relevant law is unclear a criminal defense attorney must still advise his client that the "pending criminal charges may carry a risk of adverse [collateral] consequences."[224]

Likewise, in *Taylor v. State*, the Georgia Court of Appeals held that, consistent with *Padilla*, a defense attorney provides constitutionally deficient representation if he fails to advise his client that a guilty plea might require him to register as a sex offender.[225] In reaching this conclusion, *Taylor* observed that *Padilla* "calls into question the application of the direct versus collateral consequences distinction in the context of ineffective assistance claims."[226]

Similarly, in *Commonwealth v. Abraham*, the Pennsylvania Superior Court held that, pursuant to *Padilla*, counsel was obligated to warn a criminal defendant that he would lose his teacher's pension as a consequence of pleading guilty to indecent assault.[227] In reaching this conclusion, the *Abraham* court reasoned that the pension loss is "automatic and inevitable, the stakes are high and the consequences are succinct, clear, and distinct. Because of the automatic nature of forfeiture, the punitive nature of the consequence, and the fact that only criminal behavior triggers forfeiture, the [pension loss] is, like deportation, intimately connected to the criminal process."[228]

223. 619 F.3d 1272, 1274–75 (11th Cir. 2010).

224. *Id.* at 1275. The Eleventh Circuit emphasized that the attorney did not tell his client that he possibly faced civil commitment, that the relevant law was unclear, or that "he simply did not know." *Id.* Instead the *Bauder* attorney told his client "that pleading to the criminal charge would *not* subject Bauder to civil commitment, and this constituted affirmative misadvice." *Id.*

225. 698 S.E.2d. 384 (Ga. Ct. App. 2010).

226. *Id.* at 387. The Pennsylvania Superior Court has likewise observed, "Under *Padilla,* it is unclear if the direct/collateral analysis is still viable. That analysis might still be useful if the nature of the action is not as 'intimately connected' to the criminal process as deportation." Commonwealth v. Abraham, 996 A.2d 1090, 1092 (Pa. Super. Ct. 2010).

227. *Abraham*, 996 A.2d at 1095.

228. *Id.* at 1094–95. Additionally, in *Wilson v. State*, the Alaska Court of Appeals concluded that, consistent with *Padilla,* an attorney provided ineffective assistance of counsel where he incorrectly advised his client that his "no-contest" plea to second-degree assault would not be used against him in a later trial for civil damages. 244 P.3d 535, 536 (Alaska Ct. App. 2010).

As one scholar has contended, "It makes sense that [the *Padilla*] analysis can be applied to other consequences, too. Those consequences that meet the standard set by *Padilla* and are 'intimately related to the criminal process' should be subject to [Sixth Amendment] analysis . . . ."[229] Thus, the *Padilla* analysis "applies to a broad range of penalties traditionally considered 'collateral' and outside the concern of the criminal justice system."[230]

In short, *Padilla* repudiated the "fiction of the collateral consequence doctrine with a simple truth: so-called 'collateral' consequences are anything but collateral. In reality, they are 'enmeshed,' 'intimately related to the criminal charge such that it is 'difficult to divorce the penalty from the conviction.'"[231] Within the Sixth Amendment context, *Padilla* "ripped the foundations from the perennially unsound 'collateral/direct' consequence distinction."[232] At a minimum, *Padilla* "may well limit the courts' ability to disregard some consequences as 'collateral' if a particular consequence can be considered 'truly clear' and an integral part of the punishment."[233]

3. *Padilla* and the § 2254 Custody Dilemma

Nevertheless, some courts have declined to extend the *Padilla* analysis to collateral consequences in the § 2254 custody context. As one court has asserted, "the *Padilla* Court discussed whether it was appropriate to classify deportation as either a 'direct' or 'collateral' consequence of a conviction, but did so only in the context of considering whether advice about the consequences of deportation fell within the ambit of the Sixth Amendment guarantee."[234]

To illustrate, in *Fenton v. Ryan*, the U.S. District Court for the Eastern District of Pennsylvania rejected the argument that *Padilla* "impact[s]" the custody "analysis" under § 2254.[235] The *Fenton* peti-

229. Stearns, *supra* note 20, at 861–62. Because of *Padilla*'s holding and its avoidance of "the broader issue [of other collateral consequences], state and federal courts are grappling with whether to extend *Padilla* beyond the issue of immigration consequences." *Id.* at 856.

230. Smyth, *supra* note 32, at 798–99.

231. *Id.* at 825.

232. *Id.* at 798.

233. Webb v. State, 334 S.W.3d 126, 139 (Mo. 2011) (Wolff, J., concurring).

234. Donahue v. Souders, No. 10-2761, 2011 WL 1838780, at *3 n.7 (E.D. Pa. Apr. 20, 2011).

235. Fenton v. Ryan, No. 11-2303, 2011 WL 3515376, at *2 (E.D. Pa. Aug. 11, 2011). Albeit within the context of a § 2255 petition, the U.S. District Court for the Eastern District of California rejected a similar argument in *United States v. Krboyan*. Nos. CV-F-10-2016 OWW, CR-F-02-5438 OWW, 2010 WL 5477692 at *4–6 (E.D.

tioner, a non-citizen of the United States, pled guilty to a drug offense and served a sentence of nearly two years in prison.[236] Seeking habeas relief, the *Fenton* petitioner alleged that his counsel had failed to inform him of the collateral consequences his guilty plea might have on his immigration status in violation of *Padilla*.[237] Concluding that the *Fenton* petitioner did not satisfy the § 2254 custody requirement, the federal district court reasoned that "removal proceedings and removal itself—much less the possibility of removal proceedings—do not constitute [§ 2254] custody for habeas purposes."[238]

II.
THE PROBLEM: FEDERAL HABEAS REVIEW WHERE THE § 2254 PETITIONER IS NO LONGER IN CUSTODY AT THE TIME OF FILING THE PETITION, BUT ENCOUNTERS COLLATERAL SANCTIONS

Given the ever-increasing frequency of "collateral" sanctions that result from criminal convictions, the impractical formalism of the current bright-line framework concerning "collateral consequences" and § 2254 custody has engendered considerable difficulty. Federal courts have fashioned an incongruous rule according to which, so long as the petition was filed before the sentence expired, "collateral" sanctions are sufficient to prevent a § 2254 petition from becoming moot, but are insufficient to establish custody where the petition was filed after the sentence has expired. Because collateral consequences are insufficient to establish custody, "short sentence" state offenders, unlike more serious offenders, frequently cannot claim the benefit of federal habeas review even if their convictions produce detrimental collateral consequences. At the same time, however, an overly broad definition of § 2254 custody that automatically establishes custody because of an alleged collateral consequence is inimical to the inherently limited purpose of habeas relief as well as the compelling societal interest in finality.

Cal. Dec. 30, 2010). Citing the axiomatic "*Maleng*" rule, the *Krboyan* court noted that the *Padilla* petitioner's sentence, in contrast to that of the *Krboyan* petitioner's, had not yet expired at the time that he filed his petition. *Id.* at *6.

236. *Fenton*, 2011 WL 3515376, at *1.

237. *Id.*

238. *Id.* at *2; *see also, e.g.*, *Donahue*, 2011 WL 3515376 at *3 (rejecting the contention that, under *Padilla,* a sexual offender designation is sufficient to establish § 2254 custody).

A. The Carafas/Maleng Paradox

For the past two decades, courts have applied the "*Carafas/Maleng*" paradox to determine whether custody exists for purposes of § 2254. Importantly, however, the increasing use of collateral consequences as a punitive device seems to militate against the future practicality of this paradox.

The 1968 Supreme Court decision in *Carafas v. LaVallee* held that once federal jurisdiction has attached, the expiration of a state prisoner's sentence and his unconditional release from state prison prior to the final adjudication of federal habeas proceedings failed to render the § 2254 petition moot.[239] *Carafas* reasoned that because of the "disabilities or burdens" that may result from a conviction, a § 2254 petitioner possesses a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."[240] Moreover, *Carafas* explained that a habeas petitioner "should not be . . . required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence."[241] Yet twenty-one years later, the Supreme Court held in *Maleng v. Cook* that regardless of any collateral consequences he may encounter, a § 2254 petitioner is not "in custody" if the sentence imposed for his underlying conviction has fully expired by the time that he files his habeas petition.[242]

In short, although collateral consequences sufficiently prevent a petition "*filed* when the petitioner was in custody from becoming moot thereafter, [these consequences] do not by themselves satisfy the requirement that the petitioner be 'in custody' when the petition is first filed—even if those consequences have actually materialized."[243] As one scholar has incisively observed, "A critical exception to [the generally] liberal stance in custody jurisprudence concerns the claims of petitioners who, having completed their sentences, remain subject to 'collateral consequences,' the gamut of legal disabilities attaching to convictions that can extend well beyond the period of confinement or conditional release."[244]

239. Carafas v. LaVallee, 391 U.S. 234, 236, 238–39 (1968).

240. *Id.* at 237 (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)).

241. *Id.* at 240.

242. 490 U.S. 488, 491 (1989); *see also* Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005) (noting that once a sentence imposed for a conviction has "completely expired," collateral results of conviction fail to establish "custody" under § 2254).

243. HERTZ & LIEBMAN, *supra* note 98, at 433–34 n.12.

244. Logan, *supra* note 23, at 154.

Besides the obvious inconsistency between the *Carafas* rule and the *Maleng* rule, the two decades that have elapsed since *Maleng* have witnessed the steady increase in both the frequency and severity of civil disabilities that result from the fact of conviction.[245] At the state level, collateral sanctions result from misdemeanor as well as felony convictions.[246] Furthermore, the increasing use of sentence enhancements and "necessary-predicate-based" offenses has rendered the custody requirement far more complicated than it had been in previous decades.[247] As one scholar has noted, "Contemporary America, . . . faced with ever-mounting prisoner populations, and the enormous associated costs, is pursuing novel methods of social control that press the envelope of the jurisprudence of custody in unprecedented ways."[248]

B. The "Less Serious" Offenders Bear Consequences of Habeas Framework

Ostensibly, the custody requirement does not formally preclude most minor offenders from seeking § 2254 relief.[249] Defendants convicted of misdemeanors can receive sentences involving incarceration, "and some may still be detained after state avenues for testing their claims have been exhausted."[250]

Yet as a practical matter, minor offenders have little opportunity to challenge their state convictions in a federal forum. Before a federal court may review a § 2254 claim, the state petitioner must exhaust available remedies in state court.[251] A § 2254 petitioner must provide state courts with an opportunity to review his federal constitutional claims before he litigates those same claims in a federal habeas petition.[252] In other words, a state petitioner must properly present his federal constitutional claims through one

245. *See* Pinard, *Collateral Consequences*, *supra* note 16, at 634–36.

246. *See, e.g.*, Pinard, *Collateral Consequences*, *supra* note 15, at 635; Pinard, *Broadening the Holistic Mindset*, *supra* note 35, at 1073, 1078.

247. Ordower, *supra* note 28, at 1838. This "new penology" attempts to protect society through surveillance and "management of potential criminal harm on the basis of perceived risk." Logan, *supra* note 23, at 177.

248. Logan, *supra* note 23, at 149.

249. Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 562 (2006).

250. *Id.*

251. 28 U.S.C. § 2254(b)(1) (2006); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1998); *see also* Yackle, *supra* note 69, at 1001 (noting that § 2254 petitioners "need time" to "marshal their federal claims, exhaust state remedies, and frame their contentions for federal adjudication").

252. *Boerckel*, 526 U.S. at 842.

"complete round of the State's established appellate review process."[253] If the petitioner fails to comply with this "exhaustion" requirement, the petitioner generally may not obtain § 2254 review.[254]

The crucial point for determining whether a § 2254 petitioner is "in custody" is the time at which he files his petition. If the would-be § 2254 petitioner files his petition *after* his release from "custody," the federal courts lack jurisdiction and are barred from evaluating the merits of his claim.[255] Therefore, by the time a "short sentence" petitioner exhausts state remedies and is ready to file a § 2254 claim, his sentence may have already expired—thereby rendering him not "in custody."[256] As a result, the practical effect of the current framework is that "short sentence" § 2254 petitioners will no longer be "in custody" by the time they have finally exhausted state remedies and will therefore be unable to obtain § 2254 relief.

To illustrate, in Pennsylvania, a first-time offender convicted of stealing $1,000 will likely face a sentence ranging from restorative sanctions to several months of imprisonment.[257] By contrast, a repeat offender who commits a robbery in which he inflicted serious bodily harm on the victim may receive a sentence of at least twelve years in prison.[258] Under the current legal framework, this recidivist offender will likely have ample time to challenge his conviction in federal district court pursuant to § 2254. By contrast, by the time that the first-time offender "exhausts" his remedies in Pennsylvania courts, his sentence will in all likelihood have expired. Nevertheless, this comparatively more sympathetic offender may suffer collateral consequences including disqualification from obtaining certain occupational licenses. In some sense it is counter-intuitive that the prisoner serving the longer sentence as a result of (1) the severity of his offense and (2) his prior criminal record will have more of an opportunity to vindicate his constitutional rights in a

253. Woodford v. Ngo, 548 U.S. 81, 92 (2006); Jones v. Jones, 163 F.3d 285, 296 (5th Cir. 1998).

254. *Ngo*, 548 U.S. at 92; *Jones*, 163 F.3d at 296.

255. Maleng v. Cook, 490 U.S. 488, 490 (1989).

256. A "short sentence" petitioner is one whose sentence or whose "custody," as that term is currently defined, expires before he has had exhausted state remedies. Given the timing of his "release from custody" and the duration of state court review, a "short sentence" petitioner will be unable to satisfy the threshold jurisdictional requirement of § 2254.

257. 204 PA. CODE § 303.16.

258. *Id.*

federal forum than the first-time offender convicted of a relatively minor crime ever will.

The Eighth Circuit decision in *Harvey v. South Dakota* evinces the difficulties that uniquely attend "short sentence" state convictions.[259] Convicted of grand larceny in 1968, the *Harvey* petitioner was released from prison in March 1971.[260] After exhausting his state post-conviction remedies, the *Harvey* petitioner finally filed an otherwise timely § 2254 claim in 1974—three years after his release from prison.[261] In an attempt to satisfy the threshold jurisdictional requirement of custody, the *Harvey* petitioner asserted that the "disabilities" resulting from his conviction established custody within the meaning of § 2254.[262]

In concluding that the *Harvey* petitioner failed to satisfy the § 2254 custody requirement, the Eighth Circuit reasoned that collateral consequences may keep a case from becoming moot, but they cannot "suffice to give federal courts jurisdiction."[263] The Eighth Circuit also rejected the *Harvey* petitioner's contention that he had not filed his federal habeas petition while he was still "in custody" because of "state delay in processing his attempts to obtain post-conviction relief."[264]

Consequently, the current legal framework defining § 2254 custody problematically "trims the field down to convicts sentenced to substantial terms (or death)."[265] As one scholar has explained:

> Because habeas corpus today is often used by death-row inmates, more often than not the criminal's legal unveiling as a constitutional person serves instead to reveal an unworthy holder of civil rights. Important procedural questions regarding jury, police, and prosecutorial bias fade into the background of the judicial investigation and are replaced by a legal calculus based on the criminal's propensity for violence, his criminal record, and vivid descriptions of his deeds and the nature of his crime. Narratives of violence replace the law's dispassionate inquiry into the merits of punishment.[266]

259. 526 F.2d 740, 841 (8th Cir. 1975).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Yackle, *supra* note 258, at 562.

266. FEDERMAN, *supra* note 69, at 185.

Thus, the reality of who may obtain the "Great Privilege" appears inimical to the fundamental purpose of § 2254 review. As Chief Justice Earl Warren once perceptively noted:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against the repetitions of unconstitutional conduct.[267]

Federal review of state convictions has constituted an integral component of this nation's federalist structure. The Supreme Court has instructed that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[268] Federal habeas review pursuant to § 2254 "insures that, even though the Supremacy Clause of the Constitution already requires state courts to give criminal defendants every protection of the Bill of Rights and federal law, those defendants are also entitled to insist that a federal court review the state court proceedings."[269] Ostensibly, § 2254 review merely permits those convicted of state offenses to "contest the validity of their detention in independent, civil proceedings in [a] federal forum."[270] More fundamentally, however, § 2254 review provides a powerful mechanism for the "federal relitigation of federal questions" following state court adjudication.[271] As one scholar has keenly observed, § 2254 review constitutes far more than a mere "procedural vehicle for the protection of physical liberty."[272] Section 2254 review is instead intrinsically premised on the notion that "state criminal defendants are entitled

267. Sibron v. New York, 392 U.S. 40, 52–53 (1968) (footnote omitted).

268. Fay v. Noia, 372 U.S. 391, 424 (1963). This nation's "system of dual-level scrutiny of state incarceration" has demonstrated the "practical importance of assuring that vigorous federal review actually occurs." FREEDMAN, *supra* note 59, at 153; *see also id.* at 6 (positing that § 2254 review is "not an affront to federalism, but rather implements the theme of checks and balances that pervades our Constitutional structure").

269. FREEDMAN, *supra* note 59, at 1.

270. Yackle, *supra* note 69, at 992–93.

271. *Id.* at 992.

272. *Id.* at 997.

to litigate their federal claims in a federal forum other than the Supreme Court."[273]

Furthermore, unlike those convicted of a federal crime, state convicts cannot seek federal review of the conviction pursuant to the *coram nobis* writ.[274] The *coram nobis* writ is available to vacate a federal conviction after the sentence has been served and the defendant is no longer in custody.[275] In justifying the writ the Supreme Court has noted, "Although a term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, [and] civil rights may be affected."[276] The writ helps to "bring an end to what may be substantial civil disabilities attached to criminal convictions."[277] A petitioner seeking the *coram nobis* writ must demonstrate (1) that the allegedly invalid conviction produced continuing civil disabilities (collateral consequences) and (2) "that the error is the type of defect that would have justified relief during the term of imprisonment."[278] Crucially, however, federal court review pursuant to the *coram nobis* writ is unavailable to defendants not convicted in federal court.[279]

Therefore, state convicts whose sentences expire before they exhaust state remedies lack a federal forum to challenge their con-

273. *Id.* Yackle elaborates that relitigation pursuant to § 2254 review "is appropriate not because petitioners' interest in physical liberty justifies an exemption from ordinary preclusion rules, but because criminal defendants in state court are not permitted to remove their cases to federal court when they have federal claims to raise in their defense. Because there is no opportunity for removal, it is essential that postconviction habeas be available to ensure the choice of a federal forum—at some point." *Id.*

274. 28 U.S.C. § 1651(a) (2006). State court "*coram nobis* remedies" also exist. Yackle, *supra* note 69, at 1003.

275. *See* United States v. Morgan, 346 U.S. 502, 512 (1954). The writ "has been exclusively used by petitioners who have not yet commenced serving their sentence or have completed service of their sentence." Neyor v. INS, 155 Fed. Supp. 2d 126, 136 (D.N.J. 2001). Limited in its availability, the writ is appropriate "only under circumstances compelling such action to achieve justice." *Morgan,* 346 U.S. at 511.

276. *Morgan,* 346 U.S. at 512–13.

277. United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988).

278. *Id.* at 203; *see also Morgan,* 346 U.S. at 512–13 ("Although the term has been served, the results of the conviction may persist. . . . [R]espondent is entitled to an opportunity to attempt to show that this conviction was invalid.").

279. *Neyor,* 155 F. Supp. 2d at 136. To illustrate, in *Ogunwomoju v. United States* the petitioner, a Nigerian citizen, was convicted of state drug offenses. 512 F.3d 69, 70 (2d Cir. 2008). Facing deportation, he attempted to challenge the legality of the state court judgment through the *coram nobis* writ. *Id.* at 75. Rejecting the *Ogunwomoju* petitioner's argument, the Second Circuit held that federal courts lack jurisdiction to grant the writ with respect to state convictions because courts have traditionally used it "to correct errors within their own jurisdiction." *Id.*

victions—regardless of any collateral consequences that they may encounter or the underlying merit of their constitutional claims. Several factors necessitate a critical reevaluation of the present § 2254 custody framework, including (1) the continued importance of the federal forum that § 2254 review provides, (2) the recent expansion of collateral sanctions resulting from state convictions, and (3) the departure from the traditional "direct/collateral" distinction that *Padilla* effectuated.

C. The Imprudence of an Overly Broad Definition of "Custody"

As the scholar Larry W. Yackle has aptly noted, "[A]s a docket control mechanism, the 'custody' doctrine has come under enormous pressure to give way in the interest of providing meaningful relitigation opportunities to [federal habeas] applicants."[280] Yet the custody requirement persists as a vital "gatekeeping" device for determining which state convicts should benefit from § 2254 review.[281] Consequently, arguments in favor of jettisoning or indiscriminately liberalizing the custody requirement are, at a minimum, tenuous.[282]

An overly broad interpretation of "custody" contravenes the intrinsic purpose of § 2254 review.[283] The custody requirement is "no mere artificial prerequisite to a habeas action, designed to restrict access to those most in need of judicial attention. It is part and parcel of what habeas corpus is, what it means, or, at least, what it has been and meant traditionally."[284]

As the Supreme Court noted in *Hensley*, "Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate."[285] Consistent with its extraordinary nature, habeas corpus should not be "casually available."[286] Thus in order for the § 2254 custody requirement to meaningfully function

280. Yackle, *supra* note 69, at 1001.

281. *Id*. at 999.

282. *But see id.* at 1009–10 (asserting that custody serves a "symbolic function").

283. *See Developments*, *supra* note 90, at 1076.

284. Yackle, *supra* note 69, at 999.

285. Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 351 (1973).

286. Lefkowitz v. Fair, 816 F.2d 17, 19 (1st Cir. 1987).

as a gatekeeper to the "Great Privilege," the "definition of the term must be constrained by its natural legal boundaries."[287]

To that end, some courts have understandably cautioned that allowing collateral consequences to establish custody "would render the 'in custody' requirement of [§ 2254] a nullity, and extend the habeas corpus remedy to all persons convicted of crimes. It would ignore the [notion] that the writ of habeas corpus is available only to remedy 'severe restraints on individual liberty.' "[288] Furthermore, individual victims, the government, and society as a whole all have a significant interest in the finality of convictions.[289] Jurisdictions other than the one imposing the sentence acquire "an interest [in finality] as well, as they may then use that conviction for their own recidivist sentencing purposes, relying on the presumption that regularly attaches to final judgments."[290] Establishing custody on the basis of some minor collateral harm inappropriately marginalizes the compelling need for finality.

Moreover, as the Supreme Court noted in *Coss,* concerns about the "ease of administration of challenges to expired state convictions" weigh against an overly inclusive definition of the § 2254 custody requirement.[291] Federal courts reviewing § 2254 claims

> must consult state court records and transcripts to ensure that challenged convictions were obtained in a manner consistent with constitutional demands. As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially.[292]

Additionally, federal habeas review pursuant to § 2254 places a significant burden on federal judicial resources.[293] Permitting a state convict to establish custody merely because of some purported collateral harm resulting from his conviction ignores the realities of an already overcrowded federal docket.[294]

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287. *Id.*

288. Furey v. Hyland, 395 F. Supp. 1356, 1360 (D.N.J. 1975); *see also Lefkowitz*, 816 F.2d at 20 (similarly expressing concern about liberalizing the "custody" requirement); Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir. 1975) (stating that existence of custody based solely on "collateral consequences" would render Congress's "custody" requirement meaningless).

289. Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 402 (2011).

290. *Id.* at 403.

291. *Id.*

292. *Id.*

293. FEDERMAN, *supra* note 69, at 159.

294. Yackle, *supra* note 59, at 562 (noting that having no "threshold" for review of § 2254 claims would be "unrealistic").

The watershed *Padilla* decision, viewed in light of the increasing prevalence and severity of collateral consequences, suggests that some consequences may be sufficient to establish § 2254 custody. Concomitantly, however, any proposed revision to the fundamental habeas jurisdictional requirement of custody should not automatically establish custody upon the mere existence of a collateral consequence.[295] A statutory solution is needed that will allow courts to determine which collateral consequences qualify as restraints sufficient to warrant habeas review under § 2254.

III.
THE STATUTORY SOLUTION

As the Supreme Court instructed in *Peyton v. Rowe*, the "development of the writ of habeas corpus did not end in 1789."[296] Throughout the more than two centuries during which the habeas corpus writ has existed in America, Congress has played an important role in remedying problems concerning the scope and availability of the Great Writ—and thus adapting it to compelling national needs. Under Article III of the U.S. Constitution, Congress is charged with defining the jurisdiction of the federal courts. Because custody is fundamentally a jurisdictional issue, an effective solution to the collateral sanctions and § 2254 custody dilemma will require Congressional intervention.

Congressional intervention will also have the benefit of ensuring a degree of uniformity in federal case law that confronts the relationship between § 2254 custody and collateral sanctions. Such uniformity is particularly crucial given the immense number and variety of collateral consequences that may result from state convictions.

Any legislative solution must draw upon traditional judicial definitions of § 2254 custody. The *Padilla* decision discussed but avoided a formalistic reliance on the "direct/collateral" distinction; a statutory solution to the § 2254 custody issue should incorporate the *Padilla* Court's functional analysis. A flexible standard will allow federal courts to meaningfully determine whether a given collateral consequence sufficiently establishes custody and will prevent an undesirably broad expansion of the § 2254 "custody" definition.

295. For this reason, previous scholarship that has posited that § 2254 "custody" may exist merely because of the presence of a given restraint, such as a registration requirement, is unpersuasive.

296. Peyton v. Rowe, 391 U.S. 54, 66 (1968).

A. The Need for Congressional Intervention

A petitioner seeking relief pursuant to § 2254 must demonstrate that he is in custody pursuant to the judgment of a state court.[297] As the Supreme Court noted in *Jones v. Cunningham*, this "in custody" requirement constitutes a necessary jurisdictional element of § 2254 relief.[298] Because of the inherently jurisdictional nature of the custody requirement, congressional action is required to provide a substantive solution to the collateral sanction and custody dilemma.

Under Article III of the U.S. Constitution, Congress possesses cardinal authority for regulating the jurisdiction of the federal judiciary.[299] Article III instructs that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[300]

At the same time, however, the scope of federal jurisdiction and the authority to define that jurisdiction have dynamically developed "through a dialogic process of congressional enactment and judicial response."[301] Thus both Congress and the Supreme Court exercise consequential roles in determining the jurisdiction of the federal judiciary. As one scholar has explained, where an issue concerning the proper scope of federal jurisdiction exists,

> the Court and Congress simply express their opinions in the manner unique to each branch. The Court decides cases and writes opinions that establish doctrines governing the exercise of jurisdiction. Congress considers and passes legislation that governs the exercise of jurisdiction. Through these vehicles, the contours of federal jurisdiction are resolved.[302]

297. 28 U.S.C. § 2254(a) (2006); *see also, e.g.*, McCormick v. Kline, 572 F.3d 841, 847 (10th Cir. 2009) (noting this requirement).

298. *See, e.g.*, Jones v. Cunningham, 371 U.S. 236, 238 (1963) (noting that the "custody" requirement is "jurisdictional"); Erlandson v. Northglen Mun. Court, 528 F.3d 785, 788 (10th Cir. 2008) (terming the "in custody" requirement "jurisdictional").

299. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction,* 85 NW. U. L. REV. 1, 1–2 (1990) ("[N]o one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction.").

300. U.S. CONST. art. III, § 1.

301. Friedman, *supra* note 299, at 2. Friedman elaborates that through "this dialogic process between Congress and the Court . . . the content of federal jurisdiction ultimately is determined." *Id.* at 10.

302. *Id.* at 53 (footnote omitted).

Factors relevant to determining the proper scope of federal jurisdiction include the "protection of federal rights and interests, . . . comity and federalism, caseloads and the extent of judicial resources, and the need for uniformity."[303] Furthermore, within the habeas context, the collaborative relationship between Congress and the Supreme Court promotes the equally imperative interests of finality and individual liberty. Habeas review under § 2254 illustrates "how the Court will take a jurisdictional grant and transform it to serve judicial purposes, all the while engaging Congress in a fairly cooperative discussion concerning the breadth of that exercise of federal judicial authority."[304] In short, the development of jurisdiction under § 2254 has been "a cooperative, and largely cordial, enterprise [between Congress and the Supreme Court], but with the Court demonstrably taking the leading role."[305]

The historical development of the federal habeas writ as a means to review state convictions constitutes a powerful manifestation of this collaborative relationship. In 1867, Congress granted the lower federal courts jurisdiction to review the claims of state convicts challenging the federal constitutionality of their convictions.[306] However, this post-Civil War provision was largely ineffectual; not until the 1950s did the Supreme Court substantially expand the power of federal courts to review habeas petitions challenging state convictions.[307] Nevertheless, despite its weaknesses, the 1867 act "codified the budding relationship that prisoners would have with the national judiciary, to the states, under the Fourteenth Amendment."[308] Through this Reconstruction-era piece of legislation, Congress dramatically altered habeas jurisdiction, enabling the "Great Writ" to eventually emerge as a bulwark for federal constitutional rights during the twentieth-century.[309]

303. *Id.* at 52.

304. *Id.* at 10. Friedman also adds that § 2254 review is "one of the most controversial exercises of federal judicial power." *Id.* at 11.

305. *Id.* at 13.

306. FEDERMAN, *supra* note 69, at 26; Friedman, *supra* note 299, at 11.

307. FEDERMAN, *supra* note 69, at 26; Friedman, *supra* note 299, at 13 (noting that regardless of Congress' precise "intent" in 1867, "it was the Court, approximately eighty years later, that brought habeas review to full bloom"). In 1868, Congress temporarily suspended this habeas jurisdiction, restoring it in 1885. FEDERMAN, *supra* note 69, at x.

308. FEDERMAN, *supra* note 69, at 26. "The act . . . marks . . . [the] passage of power from state court to Congress (as an overseer of federal court jurisdiction) . . . ." *Id.*

309. *Id.* During the apex of the Warren Court's expansion of civil rights and federal power, one contemporary observer noted that it was a "somewhat extraordinary process by which the 1867 statute, after reposing almost quiescent for

Meaningful Congressional action has thus helped adapt the jurisdiction of the federal judiciary to compelling societal needs. The historical evolution of § 2254 review has saliently demonstrated this flexibility.[310] When amending the § 2254 grant of jurisdiction, "Congress either has revised the statute to reflect judicial decisions, or has sanctioned judicial interpretations of the statute in the reenacting legislative history."[311]

The 2010 Supreme Court decision in *Padilla* will likely revolutionize how courts view collateral consequences. Although *Padilla* implicated only Sixth Amendment ineffective assistance of counsel claims, the paradigm shift it announced may have implications that extend to the § 2254 context. Post-*Padilla*, federal courts will likely be faced with the issue of whether collateral sanctions can sufficiently establish custody under § 2254. Consistent with its historical and constitutional role within the habeas context, Congress must again act to provide the federal judiciary with a meaningful framework to resolve this issue.

As an additional matter, Congressional intervention will have the coincident benefit of ensuring a degree of uniformity in federal case law analyzing the relationship between § 2254 custody and collateral sanctions. Given the immense number and variety of collateral consequences that may result from a conviction in each of the states, such uniformity is particularly desirable.

However, any Congressional solution must not categorically dictate which collateral sanctions establish § 2254 custody and which do not. Instead, it should provide substantive factors for federal courts to consider when determining whether a petitioner has sufficiently established custody based on a given collateral consequence.

To that end, a Congressional solution should avoid a "laundry list" approach to resolving the § 2254 custody and collateral sanc-

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decades, has proved in more recent years to have been a sleeping giant, capable, when aroused, of . . . astonishing results." Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 31 (1965).

310. FEDERMAN, *supra* note 69, at 26. In 1996, Congress, through AEDPA, enacted "a relatively modest set of reforms" that sought to expedite habeas proceedings and clarify the deference that federal courts should accord to state court interpretations of federal constitutional law. FREEDMAN, *supra* note 59, at 153; *see also* Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor?, 2001 WIS. L. REV. 1493, 1502–03 (2001) (noting the interaction between Supreme Court decision in *Williams v. Taylor* and AEDPA).

311. Friedman, *supra* note 299, at 12; *see also* FEDERMAN, *supra* note 69, at 21–26 (exploring relationship between Congress and habeas corpus).

tions issue. Criticizing the *Padilla* decision, Justice Scalia asserted in his dissenting opinion that *Padilla* "prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion."[312] He added that "legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given."[313]

Congressional intervention certainly has the ability to effectively resolve incongruities in federal law—particularly where these incongruities implicate the jurisdiction of federal courts. Yet the formalistic approach that Justice Scalia envisioned in the ineffective assistance of counsel context is profoundly inapplicable to the § 2254 custody and collateral sanctions dilemma. As a practical matter, it would be nearly impossible for Congress to consider every potential collateral sanction that might accompany a state criminal conviction and categorize each one as either sufficient or insufficient for § 2254 custody. Instead, because of the considerable number and variety of collateral sanctions, a practicable legislative solution must provide courts with sufficient flexibility to determine whether a given sanction establishes § 2254 custody.

An appropriate Congressional framework must therefore consider the existing habeas jurisprudence that the federal judiciary has constructed over the past several decades. A meaningful solution to the § 2254 custody and collateral sanctions dilemma should wisely continue the cooperative discussion between Congress and the federal judiciary that the Great Writ has historically necessitated.

In short, the federal judiciary, in determining the appropriate relationship between § 2254 custody and collateral sanctions post-*Padilla*, will likely need substantive guidance. It is entirely appropriate—and critical—for Congress to provide it.

B. Articulating the Essence of Custody

Over the past fifty years, federal courts have identified several factors that are relevant to determining whether custody under § 2254 exists. Given the "dialogic" nature of jurisdiction, any Congressional solution must acknowledge the well-established conceptions of § 2254 custody that the federal judiciary has crafted. In order to appropriately devise the remedial statutory language, Con-

312. Padilla v. Kentucky, 130 S. Ct. 1473, 1496 (2010) (Scalia, J., dissenting).
313. *Id.* at 1496.

gress must articulate the essence of § 2254 custody and include the following elements.

1. The Nature of the Restraints

The Supreme Court in *Jones* instructed that § 2254 custody encompasses those "conditions and restrictions" that "significantly restrain" the petitioner's liberty "to do those things which in this country free men are entitled to do."[314] Thus, although the *Jones* petitioner's parole released him from immediate physical imprisonment, it "impose[d] conditions which significantly confine[d] and restrain[ed] his freedom."[315] Federal courts over the past five decades have reaffirmed that an exclusive emphasis on physical restraint contradicts the contemporary purpose of § 2254 review.[316]

As some federal courts have articulated, custody requires (1) "significant restraints" not "shared by the public generally" and (2) "some type of continuing governmental supervision."[317] The Supreme Court in *Hensley* indicated that the necessary harm establishing custody must be "severe" and "immediate."[318] Furthermore, courts should assess whether a determination that custody exists impedes on a "significant interest of the State."[319] This acknowledgment of state interests is vital given that

> [f]ederal supervision of state criminal prosecutions through [§ 2254] departs from traditional notions of deference owed state administration of federal law; problems of federalism aside, ordinary concepts of finality in the judicial process are displaced by the continuing availability of habeas for review of restrictions imposed by the judgments of federal courts. Therefore, the restraints which have been thought appropriate for review in habeas proceedings are those which impinge with es-

314. Jones v. Cunningham, 371 U.S. 236, 240 (1963). Because *Jones* abandoned a strict adherence to the notion of "physical custody," the "significance of the types of facts in *Jones* should be seen in terms of the severity of the restraints they describe." *Developments*, *supra* note 90, at 1075–76.

315. *Jones,* 371 U.S. at 243.

316. *Developments*, *supra* note 90, at 1076 (noting that "physical custody requirement was rooted" in procedural nature of the writ as "device compelling [government] to bring the prisoner before the court" but that habeas "no longer serves that purpose").

317. Barry v. Bergen Cnty. Prob. Dep't, 128 F.3d 151, 159 (3d Cir. 1997); Lefkowitz v. Fair, 816 F.2d 17, 19 (1st Cir. 1987); *see also* Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 300–01 (1984).

318. Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 351 (1973); Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir. 1975).

319. *Hensley,* 411 U.S. at 352.

pecial harshness on personal liberty—those severe enough to warrant relitigation.[320]

2. Nexus

Consistent with the essential function of federal habeas review, it is imperative that a § 2254 petitioner establish a nexus between the custody and the restraint that he seeks to challenge. As the Ninth Circuit recently instructed, the language of § 2254(a) "explicitly requires a nexus between the petitioner's claim and the unlawful nature of the custody."[321]

Importantly, however, some Supreme Court precedents have not required a direct nexus between the custody and the "challenge" to the custody. To illustrate, *Peyton v. Rowe* held that a prisoner satisfies the custody requirement where he is serving the first of two consecutive sentences and challenges in his habeas petition the second conviction or sentence.[322] Consistent with the *Peyton* rule, a habeas petitioner may challenge his state sentences even though he is not presently serving them due to his incarceration in federal prison on federal charges.[323] Likewise, a state prisoner who is serving consecutive state sentences is in custody and may attack the sentence scheduled to run first, even after it has expired, until all sentences have been served—at least as long as they "continue to postpone the date for which he would be eligible for [release]" under the expired sentence.[324] When determining whether a petitioner has satisfied the § 2254 custody requirement, courts must view "consecutive sentences in the aggregate, not as discrete segments."[325]

Yet regardless of the judicial willingness in these contexts to liberally construe the relationship between the restraint and the challenge, nexus remains a crucial component of § 2254 custody.[326] A nexus requirement ensures that the challenged harm is the same harm that the § 2254 petitioner is putatively suffering. Within the context of collateral consequences, a nexus requirement effectively

320. *Developments, supra* note 90, at 1073.

321. Bailey v. Hill, 599 F.3d 976, 980 (9th Cir. 2010).

322. Peyton v. Rowe, 391 U.S. 54, 64–65 (1968).

323. Maleng v. Cook, 490 U.S. 488, 493–94 (1989).

324. Garlotte v. Fordice, 515 U.S. 39, 43 (1995).

325. *Id.* at 47.

326. *See, e.g.*, *Bailey*, 599 F.3d at 977–80 (noting importance of nexus); Washington v. Smith, 564 F.3d 1350, 1350–51 (7th Cir. 2009) (explaining importance of nexus).

avoids an inappropriately broad definition of custody.[327] Therefore, a nexus requirement must remain an essential part of any statutory solution.

3. Harm to Person—Not Merely Property

On a fundamental level, a § 2254 petition must demonstrate an actual restraint on the petitioner's person—and not just a financial interest. A challenge to the validity of a conviction must satisfy the "case or controversy" requirement under Article III of the U.S. Constitution.[328] The petitioner must demonstrate "a concrete injury, caused by the conviction and redressable by invalidation of the conviction."[329] Throughout the litigation, the party seeking relief must have suffered or "be threatened with an actual injury . . . [that is] likely to be redressed by a favorable judicial decision."[330] Additionally, under any proposed framework concerning collateral sanctions, § 2254 petitioners must bear the burden of demonstrating harm. Certainly the notion of harm is inextricably linked to the concept of custody—the petitioner seeks release from a restraint imposed on him by the conviction.[331]

Importantly, courts have consistently held that habeas relief "has traditionally been concerned with liberty rather than property, with freedom more than economics."[332] This conception of custody is not unreasonable given that in Latin, "habeas corpus" translates to "you have the body."[333] Therefore, under any proposed statutory solution, for a collateral sanction to constitute "custody," it must harm the liberty of the person seeking relief, and not merely some economic interest of the person.

327. As a hypothetical illustration, a non-citizen is convicted of an offense in Delaware that, under federal law, does not constitute a basis for deportation. Shortly after this Delaware conviction, this non-citizen is convicted of an offense in New York that, under federal law, constitutes a basis for deportation. The "nexus" requirement mandates that where the non-citizen attempts to establish § 2254 custody on the basis of his imminent deportation, he may challenge only the New York conviction—not the Delaware conviction.

328. U.S. CONST. art. III, § 2.

329. Spencer v. Kenna, 523 U.S. 1, 7 (1998).

330. *Id.*

331. *See, e.g.*, Jones v. Cunningham, 371 U.S. 236, 239–40 (1963).

332. *See, e.g.*, Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987) (noting this compelling principle).

333. BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

4. The Identity of the Respondent

Additionally, in order to satisfy the custody requirement, a § 2254 petitioner must have a determinable respondent. Section 2254 requires that a habeas petitioner must name "the state officer having custody of him or her as the respondent to the petition."[334] As some courts have noted, because "the custodian is the state's agent—and the state is therefore the custodian's principal—the state may waive the lack of personal jurisdiction on the custodian's behalf."[335]

Therefore, the collateral sanction that purportedly creates "custody" must include an element of governmental action. The more attenuated the relationship is between governmental enforcement of the sanction and the harm that the § 2254 petitioner alleges, the less likely it is that the sanction will establish "custody." As the Supreme Court has perceptively noted, habeas corpus relief "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."[336] *Jones* provides some guidance in this context, instructing that where the petitioner was on parole, the respondents should be the individual members of the parole board, not the superintendent of the penitentiary system.

C. The Padilla *Paradigm Shift Dispenses with Formalism*

As a result of *Padilla*, collateral sanctions attained legal relevancy as a basis for Sixth Amendment ineffective assistance of counsel claims. Although acknowledging the "direct" and "collateral" distinction, *Padilla* rejected a formalistic insistence that collateral sanctions were, for purposes of post-conviction review, legally insignificant. Although *Padilla* is a Sixth Amendment "assistance of counsel" case, it nevertheless informs how the federal judiciary and Congress should view collateral sanctions within the analogous context of § 2254 custody.

Before 2010, at least one federal circuit court had justified the rule that collateral sanctions do not establish custody for purposes of § 2254 review by invoking the pre-*Padilla* rule that attorneys, in order to provide constitutionally sufficient counsel, did not have to

334. *See, e.g.*, Smith v. Idaho, 392 F.3d 350, 355 (9th Cir. 2004) (quoting Stanley v. Cal. Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994)).

335. *Id.* at 356.

336. Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1972). *Jones* provides some guidance in this context, instructing that where the petitioner was on parole, the respondents should be the parole board, not the superintendent of the penitentiary system. 371 U.S. at 241-42.

advise their clients regarding the collateral sanctions that may result from a guilty plea; in the 2005 *Resendiz v. Kovensky* decision, the Ninth Circuit held that the collateral sanction of deportation did not establish § 2254 custody.[337] In reaching this conclusion *Resendiz* relied on the reasoning that deportation is "wholly independent of the court imposing the sentence. . . . Removal is not part of the sentence."[338] The Ninth Circuit added, "Extending that holding, we have similarly concluded that, because immigration consequences remain collateral, the failure of counsel to advise his client of the potential immigration consequences of a conviction does not violate the Sixth Amendment right to effective assistance of counsel."[339]

Yet *Padilla* instructed that the "collateral versus direct distinction is . . . ill-suited to evaluating a [Sixth Amendment ineffective assistance of counsel] claim concerning the specific risk of deportation."[340] Within the Sixth Amendment ineffective assistance of counsel context, therefore, *Padilla* appeared to abandon the prior formalistic assumption that collateral sanctions, unlike direct sanctions, were of negligible legal consequence.[341]

Padilla reached its holding by considering several factors. *Padilla* analyzed whether the collateral sanction was "intimately related to the criminal process" and was an "integral part" of the penalty.[342] Furthermore, *Padilla* emphasized the seriousness of deportation as well as its impact on the defendant's family.[343] *Padilla* additionally reasoned that deportation resulting from a conviction may be more important to the defendant than any potential sentence.[344]

A comparison of *Padilla* with the Third Circuit's 2003 decision in *Drakes v. INS* evinces the dramatic transformation that *Padilla* effectuated. *Drakes* termed deportation a "civil action" and asserted that even "if removal involves a greater potential injury to a petitioner than an enhanced sentence, such an injury does not outweigh the interests of finality and ease of administration."[345]

337. Resendiz v. Kovensky, 416 F.3d 952, 956–57 (9th Cir. 2005).

338. *Id.* at 957 (emphasis omitted) (quoting United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002)).

339. *Id.*

340. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010).

341. Smyth, *supra* note 32, at 798 (asserting that *Padilla* rejected "formalism").

342. *Padilla,* 130 S. Ct. at 1476.

343. *Id.* at 1481, 1486.

344. *Id.* at 1483.

345. Drakes v. INS, 330 F.3d 600, 605 (3d Cir. 2003).

Although also acknowledging that removal proceedings are "civil in nature," *Padilla* reasoned that removal is "nevertheless intimately related to the criminal process."[346]

Some observers have persuasively suggested that *Padilla* necessitates a "new, more realistic terminology and legal analysis."[347] Consistent with this view, factors such as the "severity" or "enmeshed nature" of the consequence might replace the traditional use of the direct and collateral distinction.[348] Additionally, the "severity" of the "enmeshed penalty" to the defendant should be analyzed "relative to the offense and its traditional criminal penalties."[349]

D. The Proposed Statutory Solution

Drawing upon well-established § 2254 jurisprudence, as well as upon the *Padilla* language, Congress should add to § 2254 the following definition of "custody":

> (a)(1) To satisfy the custody requirement, a petitioner whose term of imprisonment has expired bears the burden of establishing by a preponderance of the evidence that (i) he is subject to significant restraints not shared by the public generally and (ii) governmental action created these restraints.
>
> (a)(2) In assessing whether a petitioner has satisfied the requirements of subsection (a)(1), courts should consider: (i) the permanency of the restraints; (ii) the degree to which the restraints are "intimately related to the criminal process"; (iii) the relative severity of the restraint to the petitioner; (iv) the degree to which the severity of the restraint exceeds the severity of the sentence itself; and (v) the lack of relief from the restraint through means other than those provided under this section.
>
> (a)(3) The petitioner bears the burden of establishing a nexus between this "custody" and the relief that he seeks.
>
> (a)(4) The respondent shall be the governmental entity responsible for enforcing the restraints on the petitioner.
>
> (a)(5) The determination of whether petitioner satisfies the "custody" requirement will be made based on the restraints that petitioner claims at the time that he files his petition pursuant to this section.

346. *Padilla,* 130 S. Ct. at 1481.

347. Smyth, *supra* note 32, at 802.

348. *Id.* at 802, 823–24.

349. *Id.* at 823–24 (noting that "measure of relative severity" assesses whether the "enmeshed penalty overshadows the traditional criminal penalty").

Given the guidance that the Supreme Court provided in *Padilla,* bright-line rules that categorically establish or reject custody will often produce unjust results. The complete rejection of collateral consequences as a basis for establishing § 2254 custody deprives some state convicts of § 2254 relief merely because they completed state court review after their sentences had already expired, regardless of any severe collateral consequences that they encounter. At the same time, however, if courts indiscriminately deem "collateral consequences" sufficient to establish § 2254 custody, state convicts will be able to obtain federal habeas review of their convictions merely because of some alleged "collateral harm." Whereas the first result ignores the contemporary reality of collateral consequences, the second result eviscerates the threshold requirement of custody.

Thus any legislative solution to the § 2254 custody issue should eschew the formalism that had characterized the *Carafas/Maleng* paradox. As the Supreme Court has instructed:

> [W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine, the criteria for relitigation of factual questions, the prematurity doctrine, the choice of forum, and the procedural requirements of a habeas corpus hearing. That same theme has indelibly marked our construction of the statute's custody requirement.[350]

Instead, the proposed amendment to § 2254 offers a functional framework that provides federal judges with greater flexibility and discretion.[351] Perhaps more importantly, this statutory framework not only accommodates the sometimes-conflicting values of federal judicial review and state autonomy, but also effectively strikes the critical balance between the societal interests in finality and individual liberty.[352] Furthermore, this statutory frame-

350. Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., 411 U.S. 345, 350 (1973) (citations omitted) ("[I]nterpretation of the Great Writ must retain the ability to cut through barriers of form and procedural mazes.").

351. *See, e.g.*, Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1197–98 (2003) (contrasting formalism with functionalism). Within the context "of setting forth boundaries for future policymaking, formalism favors rules because they give clear guidance, whereas functionalism favors standards because they allow for flexibility." *Id.* at 1197.

352. As one scholar has summarized, "Efforts to conceptualize the federal habeas writ [necessitate balancing] the federal government's interest in enforcing

work maintains the inherently limited power of federal habeas review while concomitantly acknowledging the realities of collateral sanctions as a penal mechanism.

In addition, the proposed statutory solution addresses the permanency of the purported restraint as well as whether means other than § 2254 habeas review could ameliorate it. Given that habeas is properly an extraordinary writ, federal courts should not be needlessly burdened with resolving issues that will either "self-resolve," or that should be resolved by entities other than Article III courts.

For example, a driver's license suspension would almost invariably fail to establish custody, given the temporary nature of the restraint.[353] Likewise, the inability to possess a firearm would be insufficient to establish custody because of the restraint's relative lack of severity. By contrast, deportation, given the permanency of the restraint, may establish custody when the petitioner demonstrates that the deportation exceeds the severity of the sentence itself. Consistent with the *Padilla* factors, the petitioner would bear the burden of demonstrating the relative severity of the restraint on him and his family.[354]

Although the Pennsylvania Superior Court has based a conclusion of ineffective assistance of counsel on the loss of a teacher's pension, this collateral consequence would also likely fail to establish custody under this proposed statutory framework.[355] A pension implicates only a defendant's financial interests and does not constitute a restraint on his liberty within the meaning of § 2254. In short, the predominantly economic nature of a restraint militates against a determination that the restraint establishes custody. Given the substantial extent to which previous § 2254 custody jurispru-

federal rights with the state government's interest in the finality of its convictions. They also focus on the rights of the individual, analyzing the effect of federal habeas on the ability of individuals to assert the rights provided them under federal law." Steinman, *supra* note 310, at 1494.

353. *See* Westberry v. Keith, 434 F.2d 623, 624–25 (5th Cir. 1970); Lillios v. New Hampshire, 788 F.2d 60, 61 (1st Cir. 1986).

354. Under this proposed statutory framework, a non-citizen convicted of multiple robberies and sentenced to fifteen years of incarceration will be unlikely to demonstrate that the severity of his deportation outweighs the severity of his sentence. However, a non-citizen convicted of a minor drug offense and sentenced to two years or probation may be able to demonstrate that the severity of deportation outweighs the severity of his sentence. The presence of this "less serious" offender's family in the United States would be relevant to establishing the severity of his deportation.

355. Commonwealth v. Abraham, 996 A.2d 1090, 1095 (Pa. Super. Ct. 2010).

dence influences this proposed statutory framework, the harm must be personal and not merely financial.[356]

As a result, monetary losses that are a collateral consequence of a sentence will be less likely to satisfy the custody requirement. To illustrate, a person convicted of a drug offense may lose his or her right to reside in public housing or obtain subsidies. Pursuant to the proposed statutory framework, this collateral sanction should be insufficient to establish custody under § 2254 when the sanction adversely affects primarily the offender.

Yet a single mother who cannot obtain essential public housing or benefits in order to regain custody of her children because of a single felony conviction may present a different situation. As some observers have noted, the current public assistance framework establishes in some cases a "lifetime ban on cash assistance and food stamps for individuals with felony drug convictions. Currently, there is no good cause or hardship exemption for parents who resume caretaking responsibilities for their children upon reentry [from prison]."[357] In this case, because of the severity of the restraint and the mother's resulting inability to care for her family, this would-be § 2254 petitioner might satisfy the custody requirement.

As a final consideration, under this proposed statutory framework, petitioners must still adhere to the exhaustion requirement as well as the one-year statute of limitations.[358] Thus a prospective § 2254 petitioner would have to file his petition within one year of the conclusion of state post-conviction review. Consequently, petitioners could not improperly use purported collateral harms to subvert the fundamental time and procedural restrictions that the federal habeas statute currently requires. This statutory proposal thereby preserves essential limits on the availability of § 2254 review.

356. *See supra* notes 182–198.

357. Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs,* 86 N.Y.U. L. REV. 280, 297 (2011); *see also id.* at 299 (noting that loss of benefit frustrates "a parent's ability to resume caretaking responsibilities upon reentry, an element particularly critical to ex-offender parents of children in foster care"); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction,* 30 N.Y.U. REV. L. & SOC. CHANGE 585, 600 (2006) (noting that welfare laws reduce ex-offenders' access "to benefits that might provide transitional support as they seek employment").

358. *See supra* Part II.B for a brief discussion of these requirements.

CONCLUSION

Although collateral sanctions prevent a § 2254 petition filed when the petitioner was in custody from becoming moot, for the past two decades, federal courts have categorically held that these same sanctions fail to establish custody under § 2254 where the petitioner's sentence has already expired. The 2010 *Padilla* decision, however, marked a critical shift in the legal significance that collateral sanctions possess for purposes of Sixth Amendment ineffective assistance of counsel claims. Federal courts may decide to analogously extend the *Padilla* analysis to the issue of whether some collateral consequences are sufficient to establish § 2254 custody.

Because custody is inherently a jurisdictional issue, Congress must ultimately provide a solution to this dilemma. A statutory reform to § 2254 should draw upon both the *Padilla* analysis as well as the nearly five decades of custody jurisprudence that the federal courts have carefully developed. The legislative reform that this Article proposes effectively avoids an inappropriately broad definition of § 2254 custody that would contravene the fundamental purpose of federal habeas review and disregard the compelling societal interest in finality. Instead, the proposed statutory reform maintains that those seeking to claim relief under the "Great Privilege"—as Chief Justice Marshall aptly termed it—must demonstrate harm sufficient to establish custody.

In rejecting the proposition that collateral consequences can establish custody under § 2254, the First Circuit noted, "There are no magic mirrors."[359] Ultimately, the statutory framework proposed in this Article provides an ordinary mirror that reflects not only the realities of contemporary criminal prosecutions but also *Padilla*'s profound effect on how courts will view collateral sanctions. This mirror reflects the deference that federal courts must exercise when reviewing state convictions; yet this mirror concomitantly reflects the necessity for federal habeas review of state convictions. Likewise, this mirror reflects Congress' and the federal courts' collaborative role in defining the jurisdictional limits of § 2254 review. Finally, and perhaps most fundamentally, this mirror reflects with clarity and precision the equally compelling interests of society, the government, and the individual that the "Great Writ" has embodied throughout this nation's history.

359. Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987).