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## Mootness--Contingent Collateral Consequences in the Context of Collateral Challenges

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## MOOTNESS—CONTINGENT COLLATERAL CONSEQUENCES IN THE CONTEXT OF COLLATERAL CHALLENGES

**Lane v. Williams, 102 S. Ct. 1322 (1982).**

### I. INTRODUCTION

Last term, the Supreme Court held in *Lane v. Williams*<sup>1</sup> that state criminal defendants who attack their sentences because of error occurring at their guilty plea hearings, do not have a stake in the outcome of their habeas corpus challenges after they have completed their sentences. The Court was asked to decide whether an Illinois trial court deprived two defendants of due process of law when the court accepted their guilty pleas without advising the defendants that their sentences included a mandatory parole term.<sup>2</sup> Both respondents had been released on parole and were reincarcerated for parole violations. When the cases reached the Supreme Court, however, the respondents already had served their sentences and the Court declared the cases moot.<sup>3</sup>

The Supreme Court rarely finds criminal cases moot.<sup>4</sup> In deciding whether a case is moot, the critical question is whether there is a possibility that the conviction will have collateral legal consequences.<sup>5</sup> In *Lane*, collateral legal consequences could have possibly flowed from the respondents' parole revocations. The respondents' parole violations could be considered in any subsequent parole determinations, in possible future criminal sentencing decisions, and in employment decisions.

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<sup>1</sup> 102 S. Ct. 1322 (1982).

<sup>2</sup> *Id.* at 1324.

<sup>3</sup> *Id.* at 1328.

<sup>4</sup> *See* *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Morgan*, 346 U.S. 502 (1954); *Fiswick v. United States*, 329 U.S. 211 (1946).

<sup>5</sup> One of the first cases to deal with the issue of mootness in a criminal case was *St. Pierre v. United States*, 319 U.S. 41 (1943) (per curiam). In *St. Pierre*, the Supreme Court found the case to be moot because the petitioner had already served his sentence and consequently there was no longer a live controversy. 319 U.S. at 42. However, the *St. Pierre* Court recognized that a court could adjudicate the merits of a criminal case where, "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied." 319 U.S. at 43. Such "further penalties or disabilities" are now referred to as collateral legal consequences.

The Supreme Court dismissed these considerations as inconsequential.<sup>6</sup> In applying the doctrine that an attack on a criminal *conviction* is not rendered moot by the expiration of the underlying sentence, however, the Court in prior cases recognized that similar collateral consequences keep controversies alive.<sup>7</sup> The Court in *Lane* reversed its position in the context of an attack on a criminal *sentence* without giving a satisfactory explanation for its decision.

## II. FACTS OF *LANE*

In *Lane*, Lawrence Williams pleaded guilty in an Illinois State court to a charge of burglary.<sup>8</sup> According to the terms of the plea agreement, Williams agreed to plead guilty in exchange for a reduced sentence of one to two years in prison.<sup>9</sup> Before imposing the sentence, the trial judge informed Williams of the nature of the charge against him and the constitutional rights that he would waive by pleading guilty. Neither the trial judge, the prosecutor, nor defense counsel, however, informed Williams that his negotiated sentence included a mandatory three year parole term. Illinois law required that every indeterminate sentence for burglary include a parole term with the term of imprisonment.<sup>10</sup> After being released from prison on parole, Williams returned to prison as a parole violator. Williams filed a petition for a writ of habeas corpus, alleging that he was not informed of the mandatory parole term until two months before he was released from prison and that therefore his return to prison violated the due process clause of the fourteenth amendment. Williams did not ask the federal court to set aside his conviction, but simply requested his immediate release.<sup>11</sup> The circumstances of Os-

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<sup>6</sup> *Lane v. Williams*, 102 S. Ct. at 1327-28.

<sup>7</sup> For a discussion of the earlier cases, see *infra* notes 49-64 and accompanying text.

<sup>8</sup> 102 S. Ct. at 1323-24.

<sup>9</sup> *Id.* at 1324.

<sup>10</sup> ILL. REV. STAT. ch. 38, § 1005-8-1 (1982). The mandatory parole requirement was first imposed by the Illinois legislature in 1972. 1972 Ill. Laws 77-2097, § 5-8-1. When Williams pleaded guilty, the mandatory parole term for burglary was three years. In 1978, the parole requirement was amended by the Illinois legislature and reduced to two years. 1978 Ill. Laws 80-1099, § 3. In *People v. Wills*, 61 Ill. 2d 105, 330 N.E. 2d 505 (1975), *cert. denied*, 423 U.S. 999 (1975), the Illinois Supreme Court held that a mandatory parole term must be explained to a defendant before a guilty plea can be accepted. The court, however, also held that its decision should not be applied retroactively. Therefore, before May 19, 1975, when *Wills* was decided, there was no state law requirement that a defendant be advised of the parole requirement before pleading guilty.

<sup>11</sup> *Lane v. Williams*, 102 S. Ct. at 1324. The district court found that Williams's guilty plea had been induced unfairly in violation of the due process clause of the fourteenth amendment, and on January 4, 1978, it ordered Williams released from custody. *United States ex rel. Williams v. Morris*, 447 F. Supp. 95 (N.D. Ill. 1978). Williams was not immediately released from custody, however. The district court entered a stay to allow the State to file a motion for reconsideration. Before the stay was lifted, Williams was released from

car Southall's case were similar, and his case was consolidated with that of Williams.<sup>12</sup>

A federal district court granted the petitions for writ of certiorari and both Williams and Southall were later released from prison.<sup>13</sup> The Court of Appeals for the Seventh Circuit reversed and remanded on the ground that Southall and Williams had failed to exhaust an available state remedy.<sup>14</sup> In the course of its decision, the court reached the issue of mootness, and concluded that the cases were not moot.<sup>15</sup> The court reasoned that Southall's mandatory parole term extended beyond the date of its decision and could be reinstated. Although Williams's parole term had expired, the court concluded that the controversy was still alive because adverse collateral consequences could arise from Williams's having a parole violation on his record.<sup>16</sup> On remand, the district court concluded that an intervening decision of the Illinois Supreme Court rendered the exhaustion claims futile and declared the parole terms void.<sup>17</sup> The court of appeals affirmed,<sup>18</sup> but the Supreme Court vacated the decisions of the lower courts.

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prison on a special six month supervisory release term. The district court subsequently denied the state's motion to reconsider its decision, and the state appealed. Williams's six month release term ended while the state's appeal was pending, and he was released from custody.

<sup>12</sup> 102 S. Ct. at 1325. Southall did not allege that he did not know of the parole requirement. He simply alleged that "[he] was not previously aware that [he] would be detained on violation of mandatory parole." Brief for Appellant at 65.

<sup>13</sup> The state discharged Southall in compliance with the district court's decision. The district court's original order for Southall's release was stayed to permit the state to file a motion for reconsideration. Although the record does not indicate whether there was an order terminating the stay, the court of appeals indicated that Southall had been released pursuant to the district court's order. *United States ex rel. Williams v. Morris*, 594 F.2d 614, 615 (7th Cir. 1979).

<sup>14</sup> 594 F.2d at 619.

<sup>15</sup> *Id.* at 615.

<sup>16</sup> *Id.* The court also found the issue to be capable of repetition yet evading review. It said: "It is obvious that because of the short terms often remaining in the mandatory parole terms that the same issue may be expected to be raised as to other petitioners similarly situated with doubtful expectations of resolution." *Id.* The Supreme Court answered by saying:

That doctrine, however, is applicable only when there is "a reasonable expectation that the same complaining party would be subjected to the same action again." Respondents are now acutely aware of the fact that a criminal sentence in Illinois will include a special parole term; any future guilty plea will not be open to the same constitutional attack. The possibility that other persons may litigate a similar claim does not save this case from mootness.

102 S. Ct. 1328.

<sup>17</sup> *United States ex rel. Morris v. Williams*, 483 F. Supp. 775 (N.D. Ill. 1980). The district court again entered judgment for the respondents. Since they had already been released from custody, the court simply entered an order declaring the mandatory parole terms void. *Id.*

<sup>18</sup> *United States ex rel. Morris v. Williams*, 633 F.2d 71 (7th Cir. 1980).

## III. THE COURT'S RATIONALE

Justice Stevens wrote the opinion for the majority in *Lane*.<sup>19</sup> Because the respondents had elected to have the mandatory parole term stricken from their sentences, and because they had already served their terms by the time the cases reached the Court, Justice Stevens declared the cases moot. Justice Stevens noted that the respondents could have asked a court to set aside their convictions and grant them an opportunity to plead anew.<sup>20</sup> If the respondents had chosen this route, they either could have pleaded not guilty and stood trial or tried to negotiate a different plea bargain in light of their knowledge that any sentence they received would include a mandatory parole term.<sup>21</sup> If the respondents had chosen to plead anew, the cases would not have been moot and the respondents would have been freed from all consequences flowing from their convictions. A subsequent trial, however, would have also subjected them to the possibility of reconviction with a potentially greater sentence.<sup>22</sup>

The respondents' decision not to plead anew was, of course, rational. First, the respondents already had served their sentences. Second, the Supreme Court previously had held that if there is any possibility that collateral legal consequences will flow from a criminal conviction, then the case is not moot regardless of whether the sentence had been served.<sup>23</sup> Because there were collateral legal consequences flowing from the respondents' convictions in this case, the respondents justifiably assumed that their cases were not moot even though they were not attacking their convictions.

The principle that collateral legal consequences will save a case from being declared moot was established in *Sibron v. New York*<sup>24</sup> and in

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<sup>19</sup> 102 S. Ct. at 1323. The Supreme Court found the case to be moot in a six to three decision. Justice Marshall, joined by Justice Brennan and Justice Blackmun, wrote the dissenting opinion. 102 S. Ct. at 1322.

<sup>20</sup> *Id.* at 1326. Justice Stevens said that the respondents could have asked the district court to remedy their alleged wrong in one of two ways. They either could have asked the district court to set aside their convictions and give them an opportunity to plead anew or they could have sought relief in the nature of specific enforcement of the plea agreement as they understood it. *Id.* The latter alternative, which the respondents chose, consisted of the elimination of the mandatory parole term from the respondents' sentences and therefore removed any possible harmful consequences from the trial court's incomplete advice. See *Henderson v. Morgan*, 426 U.S. 637 (1976); *Santobello v. New York*, 404 U.S. 257 (1971); *Boykin v. Alabama*, 395 U.S. 238 (1969).

<sup>21</sup> 102 S. Ct. at 1326.

<sup>22</sup> See, e.g., *North Carolina v. Pearce*, 395 U.S. 711 (1969).

<sup>23</sup> See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Morgan*, 346 U.S. 502 (1954); *Fiswick v. United States*, 329 U.S. 211 (1946).

<sup>24</sup> 392 U.S. 40 (1968).

*Carafas v. LaValle*.<sup>25</sup> In *Carafas*, the petitioner was convicted in a New York State court of burglary and larceny. Carafas filed a writ of habeas corpus claiming that illegally obtained evidence had been used against him. Carafas's sentence had expired by the time his case reached the Supreme Court. Because he was convicted, Carafas could not engage in certain businesses, serve as an official of a labor union for a specified period of time, vote in elections, or serve as a juror. The Supreme Court determined that these collateral legal consequences gave Carafas a substantial stake in having his conviction overturned.<sup>26</sup> Less than a month later, in *Sibron*, the Court said: "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."<sup>27</sup>

The majority in *Lane* recognized that collateral consequences had attached to the respondents' parole violation and considered whether to invoke the *Carafas* and *Sibron* doctrine. The majority found the doctrine of *Carafas* and *Sibron* inapplicable, however, because the collateral consequences accompanying the respondents' parole violation were not sufficient to bring the doctrine into play.<sup>28</sup> Justice Stevens held that the doctrine of *Carafas* and *Sibron* did not apply to *Lane* because no civil disabilities like those present in *Carafas* flow from a finding that an individual has violated parole. He found that a return to prison for a parole violation could have at most only non-statutory consequences, such as an adverse impact on employment prospects or future criminal sentencing decisions. The discretionary decisions made by an employer or a sentencing judge are influenced more by the underlying criminal conduct that formed the basis for a parole violation, according to Justice Stevens, than by the actual parole violation itself. A court order that simply states that the parole terms are void, therefore, would not remove any consequences which may flow from the conduct underlying the parole violation.<sup>29</sup>

Justice Marshall argued in dissent that the majority should not have inquired into the existence or non-existence of collateral legal consequences, but should have simply presumed that collateral legal consequences would ensue from the convictions for parole violations.<sup>30</sup> Justice Marshall pointed out that the Court simply presumed the exist-

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<sup>25</sup> 391 U.S. 234 (1968). For general background material on *Sibron* and *Carafas*, see Comment, *The Mootness Question in Habeas Corpus Proceedings Where Petitioner is Released Prior to Final Adjudication*, 1969 Utah L. Rev. 265.

<sup>26</sup> 391 U.S. at 237.

<sup>27</sup> 392 U.S. at 57.

<sup>28</sup> 102 S. Ct. at 1327.

<sup>29</sup> *Id.* at 1327-28.

<sup>30</sup> *Id.* at 1328-32 (Marshall, J., dissenting).

ence of collateral legal consequences in *Sibron* and *Carafas*,<sup>31</sup> among other cases, and so argued that precedent dictated a contrary result.<sup>32</sup> In the context of an attack on a parole term, as opposed to an attack on a conviction, however, the Court refused to make such a presumption in *Lane*. Instead, the Court made a cursory examination of Illinois law, according to Justice Marshall, and found that no significant collateral legal consequences attached to parole violations in Illinois.<sup>33</sup>

Because the majority held that the doctrine of *Carafas* and *Sibron* did not apply, the majority logically could inquire into collateral consequences without having to follow that doctrine's presumption, if indeed the presumption is an integral part of the doctrine. Since collateral legal consequences may attach to convictions, the presumption is reasonable. It is not clear, however, that every conviction for parole violations has collateral legal consequences. Moreover, whether collateral legal consequences will indeed attach to parole revocations is likely to vary from state to state. Even if the doctrine of *Carafas* and *Sibron* had been held to apply, therefore, that doctrine would not have compelled the Court to presume collateral legal consequences. In the *Carafas* case itself, while the Court presumed the existence of collateral legal consequences, the majority was also careful to specifically list the disabilities which flowed from Carafas's criminal conviction.<sup>34</sup> The majority, therefore, was not departing from prior law when it canvassed state law to determine the existence or non-existence of collateral legal consequences.

Justice Marshall was on more solid ground when he criticized the majority's argument that a court could not remove non-statutory consequences of parole revocations:

The majority makes the unwarranted assumption that declaring void the parole term upon which a violation is based has no effect because a sentencing judge would consider the conduct underlying the violation, and not the violation itself, in deciding whether to enhance a sentence. However, as the majority recognizes, there is no way for this Court to determine the basis for respondents' parole revocation [under Illinois law] . . . . [C]onduct giving rise to a parole violation may be completely innocuous but for the fact that it was prohibited or required as a condition of parole, and it may be entirely irrelevant to a sentencing decision once the parole term is declared void.<sup>35</sup>

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<sup>31</sup> *Id.* at 1328. See also *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Morgan*, 346 U.S. 502 (1954).

<sup>32</sup> 102 S. Ct. at 1329 (Marshall, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> For a description of these disabilities, see *infra* text accompanying note 26.

<sup>35</sup> 102 S. Ct. at 1330 (Marshall, J., dissenting) (citations omitted). Justice Marshall added that it is not clear under Illinois law whether a sentencing judge would consider the conduct underlying a parole violation that has been voided, even when the conduct was against the

Moreover, while assuming that an order declaring mandatory parole terms void could not remove the non-statutory consequences of parole violations, the majority virtually ignored what can be considered as a statutory consequence. Justice Marshall pointed out that rules promulgated by the Illinois Prisoner Review Board pursuant to an Illinois statute represent a collateral legal consequence. Under these rules, parole could be denied simply on the basis of a prior parole violation.<sup>36</sup>

Justice Stevens responded to the charge that he had ignored this statutory consequence. He said that the possibility of a prior parole violation being the basis for a future parole denial is not sufficient to bring the case within the doctrine of *Carafas*.<sup>37</sup> He pointed out that the petitioner in *Carafas* faced existing civil disabilities such as being barred from holding public office, from voting in state elections, and from serving as a juror.<sup>38</sup> The collateral consequences that Justice Marshall said the majority overlooked in *Lane*, on the other hand, would only occur if the respondents subsequently violate state law, are returned to prison, and become eligible for parole.<sup>39</sup> Since the respondents could prevent this from occurring, the consequences were not sufficient to save the case from mootness.<sup>40</sup> In addition, Justice Stevens explained that: "[T]he existence of a prior parole violation does not render an individual ineligible for parole under Illinois law. It is simply one factor, among many, that may be considered by the parole authority . . . ."<sup>41</sup>

Finally, Justice Marshall criticized the majority for blindly following the decision of *North Carolina v. Rice*,<sup>42</sup> in which the Court said that seeking habeas corpus review to correct a sentence already served is a

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law. *Id.* In similar situations the Illinois appellate courts have held that trial courts may not consider a reversed conviction in aggravation of new sentences even where the court, in remanding for a new trial, noted that the evidence was sufficient to support the verdict beyond a reasonable doubt and the matter was never retried. *See, e.g.*, *People v. Chellev*, 20 Ill. App. 3d 963, 313 N.E.2d 284 (2d Dist. 1974). Justice Marshall also noted that the Illinois courts have held that review of probation revocation is not rendered moot merely because the defendant has served his entire sentence. 102 S. Ct. at 1330. *See People v. Halterman*, 45 Ill. App. 3d 605, 359 N.E.2d 1223 (1977). Justice Marshall observed that while these cases may not conclusively demonstrate that a judge would not consider the conduct underlying the violation of a void parole term in aggravation of sentence, they do cast serious doubt on the validity of the majority's assumption to the contrary.

<sup>36</sup> 102 S. Ct. at 1331 (Marshall, J., dissenting).

<sup>37</sup> 102 S. Ct. at 1327 n.13.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 404 U.S. 244 (1971). In *Rice*, the respondent was convicted of driving while intoxicated and was fined and sentenced to nine months imprisonment. 404 U.S. at 245. On appeal, he was tried *de novo*, found guilty, and given a two year sentence. The district court denied habeas corpus relief but the court of appeals held that the case was not moot even though *Rice* had been discharged. *Wood v. Ross*, 434 F.2d 297, 300 (4th Cir. 1970).

different matter from seeking a nullification of a conviction. The *Rice* Court pointed out that the nullification of a conviction has important benefits for a defendant that do not arise when a sentence that has already been served is merely corrected.<sup>43</sup> Therefore, the Court held that petitioner *Rice* would be resentenced only if it could be shown that he would benefit under North Carolina law from having his sentence reduced after he had already served that sentence.<sup>44</sup> Because the record before the Court gave no indication of what North Carolina law was, the Court remanded the case to the court of appeals for reconsideration of the question of mootness.<sup>45</sup>

Justice Marshall believed that *Lane* was distinguishable from *Rice* because the respondents in *Lane* sought more than a mere reduction in their sentences; they sought to have the parole term declared void in order to avoid the collateral consequences of their parole violations.<sup>46</sup> Furthermore, the *Rice* Court did not say, as the majority implied, that habeas corpus review to correct a sentence already served is never permitted. The *Rice* Court said that a review would be permitted only if it could be shown that a favorable resentencing would provide important benefits to the person seeking review.<sup>47</sup> In *Lane*, the petitioners would have benefitted from the nullification of their parole sentence because nullification would remove all the collateral consequences flowing from their parole violations. Therefore, even if *Rice* did apply, that case should not preclude the respondents in *Lane* from seeking habeas corpus review to correct their sentences.<sup>48</sup>

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<sup>43</sup> 404 U.S. at 248.

<sup>44</sup> In several jurisdictions, if a defendant is adjudicated guilty, and then placed on probation or given a suspended sentence, statutes imposing disabilities for criminal convictions have no application. *Id.* See Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 954 n.97 (1970). In all other jurisdictions, however, the sentencing that follows adjudication is irrelevant for purposes of disability status.

<sup>45</sup> 404 U.S. at 248.

<sup>46</sup> 102 S. Ct. at 1329 (Marshall, J., dissenting).

<sup>47</sup> 404 U.S. at 248.

<sup>48</sup> The majority made a final argument that the respondents had never attacked the finding that they had violated the terms of their parole. Williams sought an order "freeing him from the present control" of the warden and from "all future liability" under his original sentence. Southall sought his "immediate release" from custody. Since both respondents had already been released from prison, the majority argued that they had obtained all relief sought and that consequently no live controversy remained. 101 S. Ct. at 1328.

The dissent answered this argument by noting that the respondents had requested the district court to "expunge" the parole terms on which the violations were based. 101 S. Ct. at 1329 n.1 (Marshall, J., dissenting). Such expungement would remove the respondents' parole violation status and would relieve the respondent of the collateral consequences flowing from that status. The State of Illinois has a very limited expungement procedure that does not cover the type of expungement to which the majority referred. Therefore, the respondents did all that they could to assure that the collateral consequences accompanying their conviction would be removed.

## IV. AN UNSATISFACTORY MOOTNESS RULE

The major problem with the majority's argument is that it ignores the significance of the collateral consequences attaching to the respondents' parole violations. Justice Stevens attempted to distinguish the facts in *Lane* from those in *Sibron* and *Carafas*, but his distinction is unsatisfactory.

Justice Stevens gave four reasons for holding that the collateral legal consequences accompanying a parole violation were not sufficient to save *Lane* from mootness. First, a judge considers the conduct underlying the parole violation, and not the violation itself, when sentencing a defendant for subsequent violations of the law.<sup>49</sup> Second, the collateral consequences in *Lane* were non-statutory and therefore were distinguishable from the statutory consequences in *Carafas*.<sup>50</sup> Third, the collateral consequences in *Lane* were only possibilities since they involved discretionary decisions by an employer or a sentencing judge.<sup>51</sup> Finally, the possibility of a prior violation causing a future parole denial could be avoided by the respondents themselves if they obeyed the law.<sup>52</sup> This casenote analyzes and criticizes the latter three justifications for the outcome in *Lane*.

Justice Stevens's distinction between statutory and non-statutory consequences is meaningless if a court simply can dismiss a statutory consequence as insufficient because it is a possible rather than an existing legal disability. The Court's reasoning cannot be reconciled with the Court's statement in *Sibron* that a case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed . . . ."<sup>53</sup> Further, *Sibron* merely restates a principle that was well established in other cases. For example, in *Pollard v. United States*<sup>54</sup> the Court did not inquire into the existence of collateral consequences but instead presumed their existence. The Court simply said: "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."<sup>55</sup> The *Pollard* Court clearly set a liberal standard for saving a criminal case from mootness.

The Supreme Court again followed this liberal standard in *Ginsberg v. New York*,<sup>56</sup> holding that:

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<sup>49</sup> 102 S. Ct. at 1327-28.

<sup>50</sup> *Id.* at 1327.

<sup>51</sup> *Id.* at 1327-28.

<sup>52</sup> *Id.* at 1327 n.13.

<sup>53</sup> 392 U.S. at 57.

<sup>54</sup> 352 U.S. 354 (1957).

<sup>55</sup> *Id.* at 358.

<sup>56</sup> 390 U.S. 629 (1968).

[T]he mere possibility that the Commissioner of buildings of the Town of Hempstead, New York, might in his discretion attempt in the future to revoke a license to run a luncheonette because of a single conviction for selling relatively inoffensive 'girlie' magazines to a 16 year old boy was sufficient to preserve a criminal case from mootness.<sup>57</sup>

*Ginsberg* clearly indicates that the possibility of an adverse discretionary decision that imposes a disability will save a case from mootness. The only distinction between the *Pollard* and *Ginsberg* cases and *Lane* is that the former involved attacks on convictions rather than on parole terms. Nowhere does the Court in *Lane* indicate why the cases should be treated differently.

The distinction between statutory and non-statutory collateral consequences also makes no sense in light of the purpose of the *Carafas* and *Sibron* doctrine. The doctrine was designed to protect the criminally accused from disabilities or burdens flowing from a conviction regardless of whether they arise by statute or not. As Justice Marshall pointed out in *Lane*, "the existence of express statutory civil disabilities is not a prerequisite to holding that a habeas challenge to a criminal conviction is not moot."<sup>58</sup> The Court has focused its attention on both statutory and non-statutory disabilities in saving criminal cases from mootness.<sup>59</sup> Thus, the purpose of the *Carafas* and *Sibron* doctrine is to give those who have served a prison sentence the opportunity to use both statutory and non-statutory legal consequences as a basis for attacking their convictions.

Justice Stevens's argument that the possibility of a future parole revocation was not a sufficient collateral consequence because the respondents could avoid disobeying the law is also contrary to prior case law.<sup>60</sup> Although the Court has never specifically held that the possibility of future disabilities by itself is of sufficient consequence to save a case from mootness, the Court's holdings indicate that a finding of possible future consequences should be sufficient without a finding of a present disability.

In *United States v. Morgan*,<sup>61</sup> a convict sought to have a court set

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<sup>57</sup> *Sibron v. New York*, 392 U.S. at 54 n.14 (paraphrasing *Ginsberg v. New York*, 390 U.S. at 633 n.2).

<sup>58</sup> 102 S. Ct. at 1330 n.2 (Marshall, J., dissenting).

<sup>59</sup> See *Pollard v. United States*, 352 U.S. 394 (1957); *United States v. Morgan*, 346 U.S. 502 (1954); *Fiswick v. United States*, 329 U.S. 211 (1946).

<sup>60</sup> The majority never addressed the dissent's point that a judge can consider a parole violation in aggravation of a sentence. Both *Morgan* and *Sibron* held that the possibility of subsequent convictions carrying heavier penalties is enough of a collateral legal consequence to save a case from mootness. 346 U.S. at 512-13; 392 U.S. at 55-56. Thus both the possibility of being denied parole and the possibility of an aggravated sentence were sufficient collateral legal consequences to require the Court to deal with the merits of the case.

<sup>61</sup> 346 U.S. 502 (1954).

aside his federal conviction even though he had served his sentence. He subsequently had been convicted in a state court of another crime, and had been given a more severe sentence because of his prior federal conviction. There was no indication, however, that his sentence would be reduced upon invalidation of the prior federal conviction. Still, the Court held that the case was not moot because:

Although the term has been served, the results of the convictions may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.<sup>62</sup>

The Court spoke in terms of possibilities, rather than certainties, when it addressed the heavier criminal penalties and the impairment of civil rights. The possibility of a subsequent conviction carrying a heavier penalty is clearly a future consequence, while the possibility of civil rights being affected could be either present or future. Because the Court mentioned both a present and a future possible disability, it was not clear whether either standing alone would be sufficient to prevent a case from being declared moot.

In *Sibron v. New York*,<sup>63</sup> however, the Court found that a criminal case was not moot although petitioner Sibron had already served his sentence. *Sibron* was saved from mootness both because the conviction could be used for character impeachment if *Sibron* chose to put it in issue at any future criminal trial, and because the conviction would be considered in sentencing if Sibron were ever again convicted of a crime. Both consequences in *Sibron* were merely possibilities.<sup>64</sup> Moreover, either consequence would be contingent upon the future acts of the habeas corpus petitioner. Justice Stevens's argument in *Lane* that the petitioner can avoid possible future disabilities ignores *Sibron* as a precedent.

While ignoring *Sibron*, the majority in *Lane* focused upon *Carafas*, which dealt with present disabilities arising from convictions, and which implicitly held that present disabilities are more important than future contingent disabilities. The *Lane* majority concluded from this that present disabilities must be present for a petitioner to overcome mootness. Justice Stevens's distinction between present and future consequences, however, appears unjustified. Just because disabilities may be triggered in the future does not mean that they still are not disabilities. It should make no difference that future disabilities will be triggered only if an ex-convict commits another crime. Ex-convicts retain a suffi-

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<sup>62</sup> *Id.* at 512-13.

<sup>63</sup> 392 U.S. 40 (1968).

<sup>64</sup> See generally Comment, *supra* note 25, which supports the view that the *Sibron* doctrine applies to both specific and possible collateral legal consequences.

cient interest in their cases precisely because they are not on par with the rest of society in the treatment they will receive if they commit subsequent criminal offenses.

Under the Court's decision, however, defendants have no habeas corpus remedy if their disabilities can be triggered only in the future, whereas those who acquire present disabilities do have a remedy. Because Justice Stevens made the distinction in the context of habeas corpus challenges of sentences, it is unclear whether the Court will apply the distinction in cases involving habeas corpus challenges of convictions.

## V. CONCLUSION

Through *Lane*, the Supreme Court announced that a live controversy remains only so long as a habeas corpus petitioner who attacks his or her sentence can demonstrate that substantial present legal consequences stem from the sentence. If collateral consequences operate only *in futuro*, for example, at a discretionary decision-making procedure, then courts will declare the case moot. If collateral legal consequences are non-statutory, then a court following *Lane* is more likely to find that these disabilities are not significant enough to save the case from mootness. Finally, if the petitioner can avoid collateral legal consequences by living a crime-free life, then it is almost certain that a court will declare the case moot. It is not clear, however, whether the Supreme Court will adopt these principles in cases involving habeas corpus challenges of convictions.

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