No. ______

In the

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

DAVID SHINN, DIRECTOR;
MARK BRNOVICH, ATTORNEY GENERAL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), which addressed the standard for vacating a judgment for lack of subject-matter jurisdiction, this Court expressly left open the question of what are the circumstances in which a jurisdictional error will render a judgment void under Fed. R. Civ. P. 60(b)(4). This case now presents this important question of federal law:

> Whether a judgment rendered after a habeas petitioner has been unconditionally released with no collateral consequences – and where the state *does not dispute* that the petitioner was no longer "in custody" pursuant to 28 U.S.C. § 2254 – is void for lack of subject-matter jurisdiction.

Parties to the Proceeding

All parties appear in the caption of the case on the cover page.

On October 17, 2017, Arizona Attorney General Mark Brnovich was substituted for former Arizona Attorney General Thomas C. Horne.

On March 27, 2020, Director of the Arizona Department of Corrections David Shinn was substituted for former Director of the Arizona Department of Corrections Charles L. Ryan.

Statement of Related Proceedings

May v. Ryan (Shinn), Nos. 17-15603, 17-15704 (9th Cir.) (Aug. 19, 2022 order denying rehearing; June 10, 2022 order denying motion to recall mandate).

May v. Shinn, No. 20-1080 (S. Ct.) (Mar. 29, 2021 order denying certiorari).

May v. Ryan (Shinn), Nos. 17-15603, 17-15704 (9th Cir.) (Sept. 9, 2020 order staying mandate; Sept. 2, 2020 order denying rehearing; Mar. 27, 2020 opinion and memorandum disposition on rehearing reversing District Court's habeas corpus grant; Mar. 27, 2020 order withdrawing the memorandum affirming habeas; Mar. 26, 2019 memorandum affirming District Court's grant of habeas).

May v. Ryan, No. CV 14-409-NVW (D. Ariz.) (Jan. 5, 2023 order denying motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) and accepting

magistrate's Nov. 14, 2022 Report and Recommendation; Mar. 28, 2017 order granting habeas and adopting in part magistrate's Sept. 15, 2015 Report and Recommendation).

May v. Arizona, No. 13-102 (S. Ct.) (Oct. 7, 2013 order denying certiorari).

State v. May, No. CR-12-416-PR (Ariz.) (Apr. 23, 2013 order denying petition for review).

State v. May, No. 2 CA-CR 2012-257-PR (Ariz. Ct. App., Div. 2) (Sept. 7, 2012 memorandum decision granting review and denying relief).

State v. May, No. CR2006-30290-001 SE (Ariz. Sup. Ct., Maricopa Cnty.) (Nov. 7, 2011 order denying post-conviction post-hearing relief; Jan. 3, 2011 order partially denying post-conviction relief).

May v. Arizona, No. 08-1393 (S. Ct.) (Oct. 5, 2009 order denying certiorari).

State v. May, No. CR-12-416-PR (Ariz.) (Mar. 27, 2009 order denying reconsideration; Feb. 10, 2009 order denying review).

State v. May, No. 1 CA-CR 07-144 (Ariz. Ct. App., Div. 1) (July 24, 2008 memorandum affirming judgment and sentence).

State v. May, No. CR 2006-30290-001 SE (Ariz. Sup. Ct., Maricopa Cnty.) (Feb. 16, 2007 judgment and sentence).

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Petitioner Stephen Edward May respectfully requests a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered on June 10, 2022.

Opinions and Orders Below

The Ninth Circuit's opinion denying Petitioner's motion to recall the mandate (App.3), upon which certiorari is sought, is reported. 37 F.4th 552. The Ninth Circuit's order denying rehearing is unpublished. App.1.

The District Court decision (App.114) granting habeas corpus is reported. 245 F.Supp.3d 1145. The Ninth Circuit's decision affirming the grant of habeas corpus is unpublished. App.69; 766 Fed. App'x 505. The Ninth Circuit's opinion after rehearing is reported. App. 29; 954 F.3d 1194. The court's memorandum decision is unpublished. App.91; 807 Fed. App'x 632. The Ninth Circuit's order denying rehearing and staying the mandate is unpublished. App.98. The magistrate judge's Report and Recommendation is unpublished. App.167; 2015 WL 13188352. This Court's order denying certiorari on habeas review is published. 141 S. Ct. 1740.

The District Court's order denying Petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) is unpublished. App.408; 2023 WL 112785. The magistrate judge's Report and Recommendation is unpublished. App.411; 2022 WL 18135253.

Arizona's Court of Appeals' affirmance of the conviction and 75-year sentence on direct appeal is unpublished. App.391; 2008 WL 2917111. Arizona's Supreme Court's denial of review is unpublished. App.389. This Court's order denying certiorari on direct appeal is published. 130 S. Ct. 80.

Arizona's Superior Court's decisions dismissing post-conviction relief are unpublished. App.373. Arizona's Court of Appeals' decision affirming denial of post-conviction relief is unreported. App.363; 2012 WL 3877855. Arizona's Supreme Court's denial of review is unpublished. App.361. This Court's denial of certiorari on post-conviction review is published. 134 S. Ct. 295.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Petition is timely. The Ninth Circuit's decision denying Petitioner's motion to recall the mandate was issued on June 10, 2022. App.3. The Ninth Circuit's order denying rehearing and rehearing *en banc* was issued on August 19, 2022. App.1. On October 26, 2022, Justice Kagan granted Petitioner's timely filed motion to extend the filing deadline until January 16, 2023.

Constitutional and Statutory Provisions Involved

The Due Process Clause provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." *See* U.S. Const. amends. V and XIV.

Rule 60(b)(4) of the Federal Rules of Civil Procedure provides in relevant part that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... the judgment is void."

Section 13-1410(A) of the Arizona Revised Statutes provides, in relevant part, that a "person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact." Pursuant to A.R.S. § 13-1401(3), "sexual contact" includes "any direct or indirect touching" of the genitals. A.R.S. § 13-1407(E), in effect at the time of Petitioner's trial but subsequently repealed, provided "[i]t is a defense to a prosecution pursuant to . . . § 13-1410 that the defendant was not motivated by a sexual interest."

Statement of the Case

A federal court cannot "proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U.S. 378, 390 (1900). Federal courts have subject-matter jurisdiction over habeas claims "in behalf of a person *in custody* pursuant to the judgment of a State court *only* on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). The "in custody" requirement, which is repeated twice in the 60-word habeas statute, is *the* basis for federal jurisdiction.

Typically, "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events," *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam). However, this Court has long recognized an exception for habeas jurisdiction. *See Johnson v. Hoy*, 227 U.S. 245, 248 (1913) ("The defendant is now at liberty, and having secured the very relief which the writ of habeas was intended to afford to those held under warrants issued on indictments, the appeal must be dismissed."). The "in custody" mandate is more than just a statutory precondition for federal jurisdiction—it is a historical artifact that long predates the Constitution.

In 1968, to safeguard petitioners' rights, this Court established the "collateral consequences" doctrine, pursuant to which federal courts retain subject-matter jurisdiction over a habeas proceeding even though the petitioner was physically released from all state custody and control. *Carafas v.*

LaVallee, 391 U.S. 234, 238 (1968). The continuing basis for federal jurisdiction was that, despite being physically released, the petitioner "will continue to suffer, serious disabilities" as a result of the collateral consequences of his conviction. *Id*. at 239.

This case now presents the important federal question left open by *Carafas* and its progeny as to whether a judgment rendered after a habeas petitioner has been unconditionally released with *no collateral consequences*—and where the state does not dispute that the petitioner was no longer "in custody" pursuant to 28 U.S.C. § 2254—is void for lack of subject-matter jurisdiction.

This case also presents the related question expressly left open by this Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010), regarding the proper legal standard to be applied in determining whether a federal judgment is void for lack of subject-matter jurisdiction.

Finally, review by this Court is warranted in this case to restore public confidence in our legal system. This is particularly true where Petitioner, who has no prior criminal history, has been condemned to spend the rest of his life in prison even though

(1) he was convicted under Arizona's unique burden-shifting statute, which was *subsequently amended and disavowed* by the state legislature, that considered any person who touches a child's genitals, including a parent changing diapers, to be a felonious child molester unless *defendant* proves the touching had no sexual intent;

(2) the District Court, recognizing the obvious due process violation—and that, but for the constitutional error, it was "reasonably probable" that Petitioner would not have been convicted—issued an *unconditional* habeas grant;

(3) the federal courts lost subject-matter jurisdiction over the habeas proceeding when Petitioner was unconditionally released from state custody *without any collateral consequences*; and

(4) the Ninth Circuit's decision overturning the District Court's habeas grant—and remanding Petitioner, who had been at liberty for years without incident—back into state custody, was void and ultra vires because there was *no federal jurisdiction* to entertain the appeal from the unconditional release.

Now is the time and this is the case to resolve these important questions of federal law.

1. Arizona's Molestation Statutory Scheme in Effect at the Time of Petitioner's Conviction--Which was Subsequently Abandoned and Disavowed by the Legislature--Required Defendants to Shoulder the Burden of Disproving Sexual Intent

"This case, and in particular [Stephen] May's sentence, reflects poorly on our legal system." App.60. Those words were written by the Circuit Judge responsible for vacating the District Court's unconditional grant of habeas relief and reinstating Stephen's 75-year sentence based upon allegations that, in public places, he momentarily touched a few children over their clothing.

There was never any evidence that Petitioner had any sexual interest in children or met the typical profile of a child molester. For example, there was no evidence of child pornography or so-called "grooming behavior," including acts undertaken to gain the children's trust. There was no forensic or physical evidence to support the claims of sexual touching. Instead, the entire case was a credibility debate between the Petitioner—who suffers from a neurological condition and whom jurors admitted to finding "odd" —and the child witnesses who were the purported victims. Moreover, the alleged touching was brief and over clothing, with no claim of fondling. Even though adults were always nearby, no one claimed to have seen anything. App.40-41. When Petitioner was tried, Arizona was the only state in the nation to presume guilt of molestation based on a showing of non-accidental contact, and to put the burden on defendants to disprove that presumption by

establishing a lack of sexual intent. A.R.S. § 13-1407(E).[1] However, as recognized by the Senior District Judge who granted unconditional habeas relief to Petitioner, this statutory scheme shifts the burden to defendants to disprove criminal intent, which is the most important element of the crime. App.114-15.

Unfortunately, Petitioner's trial counsel never lodged a due process objection to the statute. The judge invited briefing on the issue; the prosecution submitted a brief but the defense did not. App.162. Had counsel researched the burden-shifting issue, he would have found cases holding that a state "may not shift the burden of proof" on intent to defendants. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *State v. Jensen*, 153 Ariz. 171, 176 (1987).

The burden-shifting scheme not only violated due process, but also had the practical effect of forcing the defendant to give up his Fifth Amendment right to remain silent in order to prove his lack of criminal intent. Petitioner testified that any momentary touching—such as while playfully tossing children in the community pool in the presence of other adults—was not sexually motivated. However, Petitioner suffers from a neurological condition resulting in an abnormally large head, movement disorder, and other manifestations. Jurors perceived him to be "odd" and the "perfect profile of someone to do such a crime." App.196.

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[1] *See* Ariz. HB2283 (2018) (amending A.R.S. §§ 13-1401(A)(3) and 13-1407(E)).

2. The Jurors Were Allowed to Continue Their Deliberations After a Mistrial was Declared and Jurors Made Cellphone Calls

After deliberating for two full days, the jurors submitted a note stating "[w]e are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." App.498. After the judge delivered an *Allen* charge and the jurors continued deliberating, they sent a note seeking clarification of "reasonable doubt" because some jurors still believed there was reasonable doubt while others did not. App.499.

Recognizing the continued deadlock, the judge conferred with counsel and then declared a mistrial. App.6. No party raised any objection to a mistrial, and there is no indication defense counsel thought a mistrial was premature, unwarranted, or disadvantageous. The judge excused the jurors and thanked them for their service. App.62. She also advised the discharged jurors to wait back in the jury room if they were willing to speak with the lawyers about the case. The trial was over. App.63. The judge continued Petitioner's release and bail conditions. *Id.* At that moment Petitioner had "won not with an acquittal" but by "liv[ing] and fight[ing] another day." App.67-68.

Then something remarkable happened. The discharged foreman, who believed Petitioner was guilty,[2] gave a "pep talk" to the other discharged jurors

[2] A holdout juror later revealed that "the minute he was elected foreman [he] said there is only one way I'm going to vote and that is guilty."

to press them to recommence deliberations and reach a verdict. One of the holdouts later described the foreman's efforts to reassemble the jury as "coercion." App.232. She added, "[a]bsolutely every one of us" got on their cellphones after the discharged jurors—who had been relieved of their oath—were excused from the courtroom. App.69-70.

The former foreman then had an oral conversation with the bailiff.[3] The bailiff reported something to the judge, who went back on the record—out of the presence of the discharged jurors—and said:

> The bailiff has received a communication from the jury that they do not wish to have a hung jury and wish to continue deliberating and communicate that to the counsel.

App.43. Why the jurors wanted this and what the bailiff and foreman discussed were never revealed. The judge never received a note or had any direct communication with the former jurors. She never polled them to see whether each discharged juror wanted to return to deliberations. She never inquired as to the circumstances giving rise to the surprising request including any improper communication or influence, the jurors' interactions with the bailiff, or their observations of people in the courtroom after the mistrial was declared.

[3] Prior to the mistrial, the jurors only communicated with the court through written notes. The court had directed that "[n]o member of the jury should ever attempt to communicate with me except by a signed writing." The jurors wrote over 100 notes to the judge during the trial.

When recalling the discharged jurors, the judge did nothing to "determine whether any juror ha[d] been directly tainted" or to consider "factors that can indirectly create prejudice." *See Dietz v. Bouldin*, 579 U.S. 40, 49 (2016) (even in a civil trial there is a "potential for taint" that "looms even larger when a jury is reassembled after being discharged").

The judge did, however, ask the prosecutor and counsel whether they had any objection. App.63. Counsel made no attempt to learn additional information about what had changed or possible influences on the jurors. He sought no re-affirmation of the jurors' oath. He conducted no research on whether discharged jurors actually can be reconvened as a "jury" at all. He did not ask for time to investigate the facts or law, to analyze the proper course of action, or to conduct a meaningful consultation with his client.

Instead, counsel had a "very, very brief" conversation with Petitioner—about 20 to 30 seconds— before stating he had no objection. App.482. Counsel later stated, in a sworn declaration, that the judge's "declaration of a mistrial on the record, then her subsequent decision to allow the jury to resume deliberating, caught everyone in the case by surprise." App.496.

Four days later, after continued deliberations and a holiday weekend, the discharged jurors "finally came to a settlement." App.322. They acquitted Petitioner on allegations relating to one child but convicted him on counts regarding the three others. Stephen May, who had been free to leave the courtroom after the

mistrial, was remanded into custody and ultimately sentenced to 75 years' imprisonment.

3. Direct Appeal

On direct review, new counsel raised the preserved issue—that the "jury instructions unconstitutionally placed the burden of proof on the defendant"—but did not challenge the statutory scheme itself on due process grounds, nor did the Arizona Court of Appeals *sua sponte* consider the issue. It held the "superior court did not abuse its discretion in instructing the jury that [Petitioner] had the burden to prove he was not motivated by sexual interest." App.395. The Arizona Supreme Court denied review. App.389.

4. This Court Requests the Prosecution to Respond to the Certiorari Petition

New counsel sought certiorari. The petition argued that Arizona's molestation statute is unconstitutional because it places the burden on the defendant to prove he had no sexual motivation when the alleged touching occurred. SCOTUS Blog featured Petitioner's case as a "Petition to Watch."[4]

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[4] *See* Kristina Moore, SCOTUSblog (2009), http://www.scotusblog.com/2009/09/petitions-to-watch-conference-of-9-29-09-part-iii (last visited Jan. 10, 2023).

This Court requested the State's response. Although acknowledging that the "constitutional validity of Arizona's child-molestation statutes is a matter of great importance,"[5] the State urged denial of the petition, arguing it was "based upon arguments . . . never properly presented to the state courts." Certiorari was denied.

5. Post-Conviction Proceedings

A post-appeal investigation revealed that serious improprieties and significant potential outside influences occurred after the discharged jurors, who had been freed from their oath, were allowed to resume deliberations, including (1) the jurors' cellphone use; (2) oral communications with the bailiff; and (3) the foreman's speculation to a holdout that Petitioner would probably "only get a year or two." App.207-12. This misinformation—Petitioner was actually sentenced to 75 years' imprisonment—was the "biggest thing" the foreman used to convince a holdout to change her vote. *Id. See* William E. Nelson, *Political Decision Making by Informed Juries*, 55 Wm. & Mary L. Rev. 1149, 1159 (2014) (finding Petitioner's conviction to be "deeply unjust" because a "compromise based on a one to two year sentence" resulted in, effectively, a life sentence).

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[5] *See* Respondent's Brief in Opposition to the Petition for Certiorari in *May v. State of Arizona*, No. 08-1393, 2009 WL 2524209, *30 (Aug. 14, 2009).

Petitioner's post-conviction petition raised a number of critical issues under the state and federal constitutions. The Arizona Superior Court dismissed some claims without a hearing.[6] The court held an evidentiary hearing on the remaining three claims; (1) the jurors' use of extrinsic evidence—the foreman's daughter's teddy bear—to resolve questions about intent; (2) the jury traded votes; and (3) counsel was ineffective. Following the hearing,[7] the court denied relief. App.378-83.

The Arizona Court of Appeals granted review but denied relief. The court assumed—"without deciding"—that counsel's performance was deficient for failing to object to the resumption of deliberations, but found no prejudice because, on direct appeal, the court had rejected the underlying claim of error. App.368-72. Amici curiae including the ACLU Foundation of Arizona, Arizona Attorneys for

[6] Those claims included: (1) Petitioner was deprived of his right to trial by jury when unsworn jurors were allowed to pass judgment on his guilt; (2) the judge coerced guilty verdicts by allowing jurors to continue deliberations after a mistrial; (3) the court's failure to properly instruct the jurors denied Petitioner his jury trial rights and violated Arizona's command that judges shall declare the law; (4) Petitioner's convictions violated due process because Arizona's child molestation statute does not require the state to prove every element of the crime beyond a reasonable doubt; (5) no reasonable trier of fact could have found Petitioner guilty of child molestation because the statute unconstitutionally relieves the state of its burden to prove intent; and (6) cumulative errors violated due process. App.384-88.

[7] Dr. Phillip Esplin, a prominent expert in child psychology and child witnesses, testified that in his 30 years of experience, he had never seen a complex multi-complainant case, such as this, where experts were not at least consulted. App.378.

Criminal Justice, and the Maricopa County Public Defender's Office supported Petitioner's petition for Arizona Supreme Court review. The Arizona Supreme Court (App.361-62) and this Court declined review.

6. The U.S. District Court Grants Unconditional Release From Custody Through Habeas Based on Burden-Shifting

In a thorough opinion, United States District Judge Neil V. Wake granted habeas relief based on the burden-shifting law's violation of Petitioner's due process rights. App.117.[8] The court found that counsel's ineffectiveness provided cause and prejudice to overcome the procedural default of failing to object to that issue at trial. App.163. Counsel's performance was deficient where it "should have been obvious that the burden-shifting scheme presented a serious constitutional question that could have been dispositive" for Petitioner. App.161. There were "no reasons, tactical or other, for failing to preserve the federal constitutional claim." *Id.* "Given how close it was under the prejudicial instruction actually given

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[8] Judge Wake rejected the State's "absolutist" approach in "maintaining that *legislatures have unbounded capacity to shift to defendants the burden of disproving anything*," subject only to the specific examples listed in *Patterson v. New York*, 432 U.S. 197, 215 (1977). App.134-45. These examples are that a legislature cannot "command that the filing of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." 432 U.S. at 210. Judge Wake also adopted without comment the magistrate judge's Report & Recommendation on counsel's failure to object to reconstituting the jury. App.116.

and the two deadlocks on reasonable doubt" there was also clear prejudice. App.157.[9]

7. The Petitioner is Released Unconditionally from the State's Custody

In granting the petition, District Judge Wake found that, "[m]easured against the Supreme Court's standards and criteria, the burden-shifting scheme in Arizona's child molestation law violates due process plain and simple." App.144. He determined that the scheme violated Petitioner's "right to be convicted of a crime only if the State proves each element beyond a reasonable doubt and to have the jury so instructed." App.165 And, based on the facts of this case, there was a "significant likelihood" Petitioner "would not have been convicted had constitutional instructions been given" to the jury. *Id.*

Judge Wake ordered Petitioner released "forthwith." *May v. Ryan*, 245 F.Supp.3d 1145, 1172 (D. Ariz. 2017). This was not the "typical relief granted in federal habeas corpus" cases, which is "a conditional order of release." *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Rather, Judge Wake issued an unconditional or "absolute" writ. *See Phifer v. Warden*, 53 F.3d 859, 865 (9th Cir. 1995) (describing the difference between a conditional and unconditional writ).

Pursuant to Fed. R. Civ. P. 62(a), the District Court's judgment would have been automatically stayed for thirty days – meaning that the State had at least that amount of time to file a notice of appeal and

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[9] Judge Wake also analyzed AEDPA deference rules at length. App.87, 91, 111, 117, 120-21.

seek a stay pending appeal. Fed. R. Civ. P. 62(d). The State, however, did not avail itself of the automatic stay or seek a further stay. Instead, the Attorney General's office directed the Arizona Department of Corrections ("ADC") to release Petitioner from its custody the following day. App.446. Petitioner walked out of prison a free man; he was not subject to any supervision from ADC or the State of Arizona. He was not subject to the order of a state court or supervision by the District Court.[10] After serving 10 years in custody, Petitioner was unconditionally released. App.90.

8. The Ninth Circuit Affirms Habeas Relief Based on Counsel's Failure to Object to Reconvening the Discharged Jurors

The State filed a notice of appeal after Petitioner was unconditionally released from state custody. The Ninth Circuit (2-1) affirmed habeas relief based on different deficient conduct by counsel. The court found it was "not 'sound trial strategy'" for counsel "not even

[10] The parties later entered into a stipulation intended to ensure Petitioner's return to court if needed. App.446. Judge Wake requested briefing as to whether the court had jurisdiction to issue an order pursuant to the parties' stipulation. The State responded that (1) "the Arizona judiciary is no longer exercising personal jurisdiction over" Petitioner; (2) the State's filing of a notice of appeal did not divest the District Court of jurisdiction to issue orders regarding Petitioner's custody; and (3) "the stipulated conditions of release presently pending before this Court actually contemplate that the Maricopa County Attorney's Office will not invoke the superior court's personal jurisdiction over Petitioner while Respondents' appeal is pending." App.448. No one addressed subject-matter jurisdiction and Judge Wake adopted the terms of the stipulation.

to attempt to preserve the mistrial based on a hung jury, because a mistrial here would have been a clearly advantageous result" for Petitioner, and the "State's case turned entirely on the jury's believing the testimony of several child victims who all . . . struggled to provide details of the alleged molestation on the stand, including failing to remember whether some of the incidents even took place." App.104.

The panel found a "reasonable chance that, if the mistrial had remained in place, the State would not have pursued a second trial at all, or that the State would have pursued fewer charges if it did re-try" Petitioner. App.73. The panel also recognized several other reasons why "competent counsel would have objected" and why failing to object "could not have been considered a 'sound trial strategy.'" App.104-05.

The court noted that the normal deference due to state court decisions was inapplicable because the state court did not rule on the merits of the ineffectiveness claim. App.103. Because the Arizona Court of Appeals "assum[ed], without deciding, that counsel's performance was deficient," the panel's review was *de novo*. App.103-04. The panel reviewed the second ineffectiveness prong—prejudice—*de novo* as well because it found the Arizona Court of Appeals' decision was contrary to and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). App.106.[11]

[11] The panel found counsel's failure to object to the burden-shifting statutory scheme was not objectively unreasonable because an Arizona intermediate appellate court previously endorsed an earlier variation of the scheme. App.102.

9. The Ninth Circuit Reverses Itself a Year Later and a Judge Dissents

The State moved for panel rehearing. A full year later—March 27, 2020—the divided panel reversed itself, without explaining what facts or law it had overlooked or misconstrued. App.61; FRAP 40(a)(2). Rather than seriously consider trial counsel's actual thought process, and the matters counsel did not consider, which were developed in the record, the majority hypothesized a series of reasons why a lawyer *could have thought* "that sticking with the current trial record and jury would better serve May's interests than would a new trial."[12] The majority concluded that its hypothetical strategy, which was *contrary to the actual facts*, would be reasonable. App.49-59.

The Circuit Judge who authored the rehearing majority's decision concurred separately to express her "dismay at the outcome of this case." App.60. She

[12] The opinion noted the prosecution's case was weak, riddled with inconsistencies, gaps, and admissions favorable to the defense; the prosecution didn't call an expert; the prosecution didn't argue for an instruction on permissible propensity evidence, which might occur in a retrial; and the prosecution might improve its case in various ways hypothesized by the State—proffered for the first time *in its rehearing petition*. App.50. Except that on retrial the prosecution would have a transcript of Petitioner's testimony, the record evidence belied any actual consideration of these factors by counsel. App.496-97. In light of the "long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation," the majority also found no ineffectiveness in counsel's failure to object to the statutory burden-shifting. App.93.

noted the evidence against Petitioner was "very thin." *Id.* His conviction was "based almost entirely on the testimony of the children," which "had many holes." *Id.* And, the "potential that [Petitioner] was wrongly convicted is especially concerning because he was sentenced to seventy-five years in prison—a term that all but ensures he will be incarcerated for the rest of his life." *Id.*

The dissent stated the panel's original decision affirming habeas relief "was correct then" and "correct now," and stressed that courts need only defer to counsel's "informed strategic decisions." App.60-61 & n.1, citing *Strickland*, 466 U.S. at 681. The dissent found counsel's split-second surrender of the mistrial was "the antithesis of an informed decision." App.61. The dissent also pointed out that counsel's true thinking was demonstrated by the record evidence.[13]

The Ninth Circuit denied rehearing *en banc* but stayed its mandate. App.402, 404. This Court declined review. The Ninth Circuit issued its mandate on March 30, 2021. Petitioner, who had been at liberty without incident for more than four years, was returned to ASPC-Eyman, where he is still incarcerated. He has approximately 65 years left on his sentence.

[13] Other than "his awareness that the trial transcript would obviously be available at a retrial," trial counsel "gave no thought whatsoever to the wisdom of allowing the jury to engage in further deliberations after it had been discharged." App.67

10. New Counsel Realizes that the Ninth Circuit Did Not Have Subject-Matter Jurisdiction

On February 9, 2022, less than one year after the mandate issued, new counsel—who was not part of Petitioner's original defense team—recognized that the federal courts had lost subject-matter jurisdiction when Petitioner was released from state custody without any collateral consequences pursuant to the District Court's unconditional habeas grant. App.451. Counsel filed a Motion to Recall the Mandate based on lack of subject-matter jurisdiction.

The motion was denied on June 10, 2022, in a four-sentence published order which stated that "'motions that assert a judgment is void because of a jurisdictional defect generally' must show that 'the court that rendered judgment lacked even an 'arguable basis' for jurisdiction" and Petitioner "has not met that standard in arguing that the statutory 'in-custody' requirement was unsatisfied." App.5-6 (citations omitted). Judge Block issued a 21-page concurrence, where he wrote "justice compels that May's sentence be commuted by the State of Arizona." App.6-28.[14]

[14] On January 5, 2023, the District Court denied Petitioner's timely-filed motion, pursuant to Fed. R. Civ. P. 60(b)(1), for relief from the final order entered by that court on January 21, 2021, and related orders requiring Petitioner to appear, remanding Petitioner into custody, and directing the Clerk to terminate the case. App.408.

Because subject-matter jurisdiction can be raised at any time,[15] the timely-filed Motion to Recall the Mandate fully raised and preserved this issue for this Court's review. App.422.

Reasons for Granting Certiorari

This Court should grant the writ to reverse the decision of the Court of Appeals, recall the mandate filed on March 30, 2021, vacate the Court of Appeals' opinion, and reinstate the District Court's release order because the Court of Appeals lacked subject-matter jurisdiction to hear the appeal. Its order reversing the District Court was ultra vires.

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[15] *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011) (objections to subject-matter jurisdiction "may be raised at any time. ... Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction"). A "litigant generally may raise a court's lack of subject matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004), citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question sua sponte); *Capron v. Van Noorden*, 2 Cranch 126, 127 (1804) (judgment loser successfully raised lack of diversity jurisdiction for the first time before the Supreme Court).

I. This Case Presents an Important Question Regarding the Jurisdiction of Federal Courts to Preside Over Habeas Claims When the State No Longer has Custody Over a State Inmate and There are No Collateral Consequences From the Vacated State Conviction

This Court has long held that a federal court cannot "proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Baez*, 177 U.S. at 390. In this case, when Petitioner was released from state custody after the District Court granted him an unconditional writ of habeas corpus, the federal courts lost jurisdiction over the case under the terms of the habeas statute. *See Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam) ("The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are 'in custody in violation of the Constitution or laws or treaties of the United States'" (quoting 28 U.S.C. § 2254(a)).

While, in a typical case, "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events," *Freeport-McMoRan*, 498 U.S. at 428, this Court has long recognized an exception for habeas jurisdiction. It has held that the requirement a habeas petitioner be "in custody" is continuing such that the unconditional release of the petitioner at any time during the proceeding divests the federal courts of jurisdiction to consider a habeas petition. *See Johnson*, 227 U.S. at 248 ("The defendant is now at liberty, and having secured the very relief which the writ of habeas was

intended to afford to those held under warrants issued on indictments, the appeal must be dismissed."); *see also Carafas*, 391 U.S. at 238 n.12 ("If there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction.").

The habeas exception to this general rule is founded on the unique statutory, constitutional, and historical underpinnings of the "great writ." The "in custody" requirement of 28 U.S.C. § 2254 is more than just a statutory precondition for federal jurisdiction–it is a historical artifact that long predates the Constitution. Because the common law writ took the form of a directive to the jailer to bring forth his prisoner, the element of custody was an inherent requirement of the writ's operation. If the prisoner was no longer in custody, the courts lost jurisdiction because they could no longer order his release–the single remedy available under habeas.[16]

As the writ developed to one protective of individual liberty, it became "united with the judicial inquiry seeking the cause of the prisoner's detention," which created the "procedural requirement that the writ…be directed 'to him who hath custody of the body.'" William F. Duker, *A Constitutional History of Habeas Corpus*, 287 (1980) (quoting *Anon.*, 78 Eng. Rep. 27 (1586)). For this reason, "custody was intrinsic

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[16] In medieval England, the writ "was fundamentally an instrument of judicial power derived from the king's prerogative, a power more concerned with the wrongs of jailers than the rights of prisoners." Paul D. Halliday, *Habeas Corpus: From England to Empire*, 14 (2010).

to the function, nature, and purpose of the writ." *Id.* "The heart of habeas, as it pertains to judicial review, requires a custodian to produce an individual under its custody or control." *Wright v. Alaska*, 47 F.4th 954, 961 (9th Cir. 2022). Today, it is well-established that either the voluntary release of a petitioner or vacating the underlying conviction deprives an appellate court of jurisdiction to consider an appeal from the grant or denial of a writ. *See, e.g., Johnson*, 227 U.S. at 248.

This Court has read the "in custody" requirement of section 2254 broadly to include situations where the prisoner is free from physical restraint but is still subject to "collateral consequences" of that restraint. In other words, he is still being wrongfully restrained, though not behind bars. In 1968, this Court announced the "collateral consequences" doctrine in *Carafas*, 391 U.S. at 238. As this Court explained, although the petitioner's sentence had expired and he was discharged from parole, he "will continue to suffer, serious disabilities" as a result of his conviction. *Id.* at 239. "Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id.* (alteration in original).

The collateral consequences doctrine does not apply here. The District Court's order did not merely release Petitioner from custody; it granted an unconditional writ of habeas corpus and invalidated his state conviction altogether. He was subject to no state restraint and was subject to no collateral consequences. This Court anticipated this precise situation in *Carafas:* "If there has been, or will be, an

unconditional release from custody before inquiry can be made into the legality of detention…there is no habeas corpus jurisdiction." 391 U.S. at 238 n.12.

When Petitioner was released, he was not merely free from physical restraint; he was free from all consequences of a conviction that had become a legal nullity. He was not barred from any business or office, or from voting or serving as a juror. He was not required to register as a sex offender. In the words of *Carafas*, he lost any "substantial stake in the judgment of conviction." As a result, judges bound by Article III lost subject-matter jurisdiction to make any further rulings in his case.

In opposing Petitioner's Motion to Recall the Mandate in the Court of Appeals, the State has never disputed the fact that Petitioner was unconditionally released and suffered no further collateral consequences from the state-court conviction. That Petitioner was no longer "in custody" following his unconditional release is therefore not in dispute.

II. This Case Presents the Question Left Open by *United Student Aid Funds, Inc. v. Espinosa*: When is There a "Total Want of Jurisdiction" and Not Merely an "Error in the Exercise of Jurisdiction"

The basis for the Court of Appeals' denial of the Motion to Recall the Mandate was that "motions that assert a judgment is void because of a jurisdictional defect generally" must show that "the court that rendered judgment lacked even an 'arguable basis' for

jurisdiction." App.5, quoting *Espinosa*, 559 U.S. at 271 (citations omitted).

In *Espinosa*, this Court distinguished between two types of jurisdictional challenges, noting that "'[t]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction,'" and only the former will be sufficient to render a judgment void. *Id.* (quoting *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990)).

At that time, this Court declined to elaborate on the distinction between these two types of jurisdictional error, simply stating "[t]his case presents no occasion to engage in such an 'arguable basis' inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void." *Id.*

This case squarely presents the question of whether the unconditional release of a habeas petitioner from custody—without collateral consequences—presents a "total want of jurisdiction," or if there remains some "arguable basis" for jurisdiction despite this Court's repeated declarations that a federal court loses jurisdiction over a habeas petition upon the unconditional release of the petitioner.

This Court's reference in *Espinosa* to *Boch Oldsmobile* and *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986), provides some context as to the difference between a "total want of jurisdiction" and an "error in the exercise of jurisdiction." In *Boch Oldsmobile*, the First Circuit held that a consent decree issued by a District Court in excess of its statutory authority was

not void. 909 F.2d at 662 ("Consent decrees that run afoul of the applicable statutes lead to an erroneous judgment, not to a void one."). The *Boch Oldsmobile* court was very clear that the challenge to the court's "jurisdiction" was not a claim of "total want of jurisdiction" because "[i]n the instant case there is no claim of lack of personal jurisdiction, *and it is clear that the court had subject matter jurisdiction over the action*." *Id.* (emphasis added). Thus, a mere error in determining the *scope* of a federal court's power to act does not render the action void for lack of subject-matter jurisdiction.

Similarly, in *Nemaizer*, the party seeking Rule 60(b)(4) relief argued that the federal court erred when it removed the case from the state courts to federal court, and hence (the party argued) anything that happened after the federal court erroneously removed the case occurred without that federal court's jurisdiction. 793 F.2d at 60. The Second Circuit declined to grant the requested relief, noting that the federal court's exercise of jurisdiction had been based on its determination that a claim raised under New York labor law had been preempted by ERISA and therefore "arose under" federal law—a holding which might have been erroneous, but was not void. *Id.* at 65. *Nemaizer* thus stands for the same unremarkable proposition that underlies *Espinosa* and *Boch Oldsmobile*—a court's error of law when rendering a decision does not render a judgment void.

Petitioner's case presents something fundamentally different from the type of "error" described in *Espinosa*, *Boch Oldsmobile,* and *Nemaizer*: The State's opposition offers no theory

under which the Court of Appeals even arguably had subject-matter jurisdiction; the State's arguments are limited to claiming the appeal was not moot. With no plausible theory articulated by the State or the Court of Appeals as to how it might have had subject-matter jurisdiction, this is a case "where the assertion of jurisdiction is truly unsupported." *Hoffman v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019) (citing *Espinosa* and *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984)).

The Court of Appeals held that Petitioner had not adequately refuted that there was an arguable basis for jurisdiction. However, neither it nor the State have ever articulated what that arguable basis might be. The Second Circuit in *Nemaizer* did precisely that: It explained that the state cause of action might have been preempted by federal law, which provided an arguable basis for subject-matter jurisdiction. 793 F.2d at 65. Here, neither the Court of Appeals nor the State have provided *any* theory under which a federal court might have had jurisdiction over the State's appeal after Petitioner was unconditionally released by the District Court.

Petitioner's case much more closely resembles a series of Fifth Circuit cases which have applied the "total want of jurisdiction" standard to vacate judgments entered without subject-matter jurisdiction. In *Mitchell L. Firm, L.P. v. Bessie Jeanne Worthy Revocable Tr.*, 8 F.4th 417 (5th Cir. 2021), the Fifth Circuit vacated a District Court judgment for lack of subject-matter jurisdiction because the parties to the case were not completely diverse. Although the lack of diversity was not discovered until after judgment because of incorrect allegations on the face

of the Plaintiff's complaint, the Fifth Circuit nonetheless held that a District Court judgment premised on diversity between the parties could not stand when it was discovered that diversity was lacking, and that this premise was "equally true when a party notices the jurisdictional defect before judgment, when a party notices it after judgment in Rule 60(b)(4) proceedings, and when no party notices it." *Id.* at 422.

Similarly, in *Brumfield v. Louisiana State Bd. of Educ.*, 806 F.3d 289 (5th Cir. 2015), the Fifth Circuit held that a District Court's order enjoining a state's school voucher program in a decades-old school desegregation case was void for lack of subject-matter jurisdiction. There, the Fifth Circuit held that "[t]he [district] court's order, imposing a vast and intrusive reporting regime on the State without any finding of unconstitutional conduct related to the *Brumfield* litigation, much less the filing of a proper lawsuit, 'was so affected by fundamental infirmity'" that the infirmity was properly raised after judgment. ...'" *Id.* at 303 (quoting *Espinosa,* 559 U.S. at 270). Even in that case, however, the Fifth Circuit recognized that this Court "has not definitively interpreted" the "arguable basis" standard this Court set forth in *Espinosa*. *Id.* at 301.

The circuit court cases interpreting *Espinosa* thus fall into two categories. First are those where the basis for jurisdiction is "arguable" —such as those where the dispute is over the *scope* of a court's power to act, *Boch Oldsmobile*, 909 F.2d at 662, or over the *interpretation* of federal law in a case where jurisdiction is premised on a federal question, *Nemaizer*, 793 F.2d at 60.

Second, there are the cases where the lack of jurisdiction is indisputable and therefore the judgments suffer from a "total want of jurisdiction," such as where diversity is unquestionably incomplete, *Mitchell*, 8 F.4th at 422, or where an order unquestionably falls outside the scope of continuing jurisdiction in an "institutional reform" case, which "only goes so far as the correction of the constitutional infirmity." *Brumfield*, 806 F.3d at 298 (quoting *United States v. Texas*, 158 F.3d 299, 311 (5th Cir.1998)).

The former are "arguable" only in the sense that the exercise of jurisdiction is premised on an unsettled question of law. But the latter presents a binary choice —either there is diversity jurisdiction or there isn't; either there is an existing case where a District Court has authority to enter judgment or there isn't. This case clearly falls in the latter category—either Petitioner was "in custody" upon his unconditional release or he wasn't. Because the State has never argued that Petitioner's custody continued after his unconditional release, we can conclusively say that he *was not* "in custody." There no "arguable" contrary basis.

This Court's review is necessary to elaborate upon and resolve confusion regarding the "arguable basis" standard found in *Espinosa*, as illustrated by the divergent Ninth and Fifth Circuit cases. Because Petitioner has alleged a "total want of jurisdiction" and not a mere "error in the exercise of jurisdiction," there is no "arguable basis" for jurisdiction.

Extending the sweep of *Espinosa* and permitting the judgment of a court that lacked jurisdiction to stand in a situation like this one—where the State

does not even argue that the “in custody” jurisdictional requirement was met once Petitioner was released unconditionally—would effectively eliminate the continuing requirement that a prisoner seeking habeas relief be “in custody” and would render the “collateral consequences” doctrine dead letter.

III. Certiorari Review is Warranted to Restore Public Confidence in Our Legal System

Now is the time and this is the case to resolve these important questions. As indicated, two members of the Ninth Circuit panel recognized that this case “reflects poorly on our legal system.” App.60.

It reflects poorly on our legal system to presume that someone is a child molester and then shift the burden to the defendant to prove that he is not a child molester.

It reflects poorly on our legal system for someone with no criminal history to be imprisoned for the rest of his life for alleged over-the-clothing momentary touching in public places when adults were present–especially when the evidence was “very thin” and based exclusively on testimony that “had many holes.” App.11.[17]

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[17] It reflects poorly on our legal system for hung jurors, who were discharged and used their cellphones after a mistrial, to be allowed to resume deliberations. And, it reflects poorly on our legal system for neither the judge nor defense counsel to question why the hung jurors wanted to resume deliberations or whether they were tainted. It also reflects poorly on our legal system for

It reflects poorly on our legal system for that person to be locked away forever even though the Senior District Judge who reviewed the record granted habeas relief and recognized the probability that Petitioner would not have been convicted if the jury had been properly instructed that the prosecution bears the burden.

It reflects poorly on our legal system for that person to be denied even a new trial when Arizona's former and current Chief Justices agree that the burden shifting law is unconstitutional.[18]

It reflects poorly on our legal system for Stephen May to languish behind bars for an additional 65 years when Arizona amended its law–based in large part–on Stephen's case and his efforts to shift the burden back where it belongs.

And, it certainly reflects poorly on our legal system for someone who was unconditionally released from prison and state custody without any collateral consequences to be forced to return to prison for the rest of his life where the federal courts had no subject-matter jurisdiction to direct his remand.

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an attorney not to introduce important medical evidence because he thought his client's doctor was dead–when the doctor was very much alive.

[18] In *State v. Holle*, Arizona's then Chief Justice and another Justice—who is now the Chief Justice—dissented and found that the majority's burden-shifting approach "renders the statutes unconstitutional." 240 Ariz. 300, 311 (2016) (Bales, C.J. & Brutinel, J., dissenting).

Review by this Court is urgently needed to restore public confidence in our legal system and correct a grave injustice.

Conclusion

For all of these reasons, this Court should issue a writ of certiorari and set the case for argument or summarily reverse.

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Respectfully submitted,

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