No. 23-107

IN THE

Supreme Court of the United States

LOUIS MATTHEW CLEMENTS,

Petitioner,

v.

STATE OF FLORIDA;
FLORIDA ATTORNEY GENERAL; AND
SECRETARY, DOC,

Respondents.

On Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal courts may consider a habeas corpus petition filed by a state inmate only if the inmate is "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). The Court has expanded the meaning of "in custody" beyond "physical imprisonment." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). Instead, "what matters" is whether the conditions at issue "significantly restrain [the] petitioner's liberty to do those things which in this country free men are entitled to do." *Id.* at 243. In particular, the Court emphasizes the level of restraint on the individual's "freedom of movement." *Hensley v. Mun. Ct.*, 411 U.S. 345, 351 (1973).

The lower courts understand this test and have faithfully applied it when considering whether state sex offender registration and reporting requirements are custodial for purposes of Section 2254(a). Although the test is always the same, outcomes may differ because each state regime must be assessed based on its own unique features.

The question presented is whether Florida's sex offender registration and reporting requirements render sex offenders "in custody" within the meaning of Section 2254(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT

1. Since the Founding, Congress "has limited the federal courts' power to grant the writ of habeas corpus only to those who are 'in custody.'" *Corridore v. Washington*, 71 F.4th 491, 493 (6th Cir. 2023) (quoting Judiciary Act of 1789, 1 Stat. 73, 82 (1789)). This holds true today. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts have jurisdiction over a habeas petition filed by a state inmate *only if* the petitioner is "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).

For much of the writ's storied existence, habeas corpus was available only to those prisoners who were being physically detained. *See Wales v. Whitney*, 114 U.S. 564, 571–72 (1885) ("[T]o make a case for *habeas corpus* . . . . [t]here must be actual confinement or the present means of enforcing it."). This Court, however, expanded the reach of the "in custody" requirement in *Jones v. Cunningham*, 371 U.S. 236 (1963). Under *Jones*, "what matters" is whether the restrictions in question "significantly restrain [the] petitioner's liberty to do those things which in this country free men are entitled to do." 371 U.S. at 243; *see also Hensley v. Mun. Ct.*, 411 U.S. 345, 351 (1973) ("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."). The writ is now available, for example, to prisoners released on parole and personal recognizance. *Jones*, 371 U.S. at 242–43 (parole); *Hensley*, 411 U.S. at 346, 353 (personal recognizance).

This Court's precedents finding a severe restraint on liberty have "rel[ied] heavily on the notion of a *physical* sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement." *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) (emphasis added); *see also Jones*, 371 U.S. at 242 ("Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission."); *Hensley*, 411 U.S. at 351 (emphasizing that the petitioner "cannot come and go as he pleases" and that 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").

Despite this expansion of the meaning of "in custody," this Court has been clear on its limits: "[O]nce 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." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (providing as examples of collateral consequences the "inability to vote, engage in certain businesses, hold public office, or serve as a juror"). This is because the petitioner must be "in custody *pursuant to the judgment of a State court*." 28 U.S.C. § 2254(a) (emphasis added); *see also Maleng*, 490 U.S. at 490–91 ("We have interpreted the statutory language as requiring that

the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed.").

2. Under Florida law, sex offenders are subject to registration and reporting requirements for life. *See* Fla. Stat. § 943.0435(1)(h), (11). Designation as a sex offender, however, "is not a sentence or punishment but is simply the status of the offender which is the result of a conviction for having committed certain crimes." *Id.* § 943.0435(12). As sex offenders, registrants are required to:

- upon initial registration, which must be in-person, provide the state with their personal and identifying information, secure a state driver's license, take a photograph, and give a set of fingerprints, § 943.0435(2)–(3);
- report in-person to their local sheriff's office, at a minimum, every six months, § 943.0435(14);
- report in-person, within 48 hours, any changes with respect to a vehicle or residence, § 943.0435(2), (4);
- report online, within 48 hours, any changes to employment, telephone numbers, email addresses, or internet identifiers, § 943.0435(4)(e); and
- report in-person out-of-state travel plans, § 943.0435(7).

Failure to comply with these requirements is a felony. § 943.0435(9)(a).

3. In 2007, the State of Florida charged petitioner Louis Matthew Clements with one count of lewd and lascivious battery on a person between the ages of 12 and 16 years old. Pet. App. 39a. Petitioner subsequently pled guilty to the lesser charge of lewd or lascivious conduct in violation of Fla. Stat. § 800.04(6)(b). *Id.* at 3a. He was sentenced to five years of sexual offender probation. *Id.* Petitioner did not appeal his conviction or sentence. *Id.* at 39a.

Eight months later, on February 17, 2009, petitioner filed a motion to withdraw his plea. *Id.* After an evidentiary hearing, the circuit court denied the motion. *Id.* Petitioner appealed, but then voluntarily dismissed the action on December 2, 2009. *Id.* On November 25, 2009, petitioner filed a motion for post-conviction relief in state court under Rule 3.850 of the Florida Rules of Criminal Procedure. *Id.* at 40a. The court—again after holding an evidentiary hearing—denied relief on April 28, 2010. *Id.* Petitioner did not timely appeal. *Id.* By July of 2010, the one-year limitations period for filing a federal habeas petition had run. *See* 28 U.S.C. § 2244(d)(1).

It was not until July 9, 2012—over two years later—that petitioner requested a belated appeal. Pet. App. 40a. Florida's Second District Court of Appeal denied that request on January 29, 2015. *Id.*

Petitioner's probation ended in 2013. But, because petitioner qualifies as a sex offender under Fla. Stat. § 943.0435(1)(h)1.a.(I), he is required to "register with the Florida Department of Law Enforcement" for the rest of his life. Pet. App. 3a.

4. Nine years after entering his plea, in 2017, petitioner filed his first petition for a writ of habeas corpus under Section 2254 in the Middle District of Florida. *Id.* at 3a, 40a. The district court dismissed the petition, finding that it was without subject-matter jurisdiction because petitioner's "sentence had fully expired," and his "ongoing requirement to register as a sex offender did not render him 'in custody' for federal habeas corpus purposes." *Id.* at 39a. The court reasoned that the "overwhelming majority of circuit courts of appeals" had concluded that sex offender registration requirements "do not meet section 2254(a)'s in-custody requirement." *Id.* at 42a. Though the Third Circuit had deemed a sex offender "in custody" in *Piasecki v. Ct. of Common Pleas, Bucks Cty.*, 917 F.3d 161, 177 (3d Cir. 2019), it emphasized that Pennsylvania courts considered the state's sex offender registration scheme to be "punitive, not remedial"—in contrast to "the courts in nearly every other state." Pet. App. 44a. Because the "in custody" question is jurisdictional, *see Maleng*, 490 U.S. at 490, 493–94, the district court did not reach the State's argument that the petition was time-barred.

5. Petitioner appealed, and the Eleventh Circuit affirmed. Pet. App. 1a–37a. The court explained that the "proper inquiry under *Jones*" is whether "Florida's registration and reporting requirements substantially limit [petitioner's] actions or movement." *Id.* at 16a–17a. And, under Florida law, "[t]he restrictions on freedom of movement are not severe enough." *Id.* at 20a. Petitioner is required to report in-person only twice per year at specified times, and he does not "require permission or approval" to travel, hold a job, live in a certain community, or drive a car. *Id.* at 18a–19a.

He thus can "'come and go as he pleases[,]' and his 'freedom of movement' does not 'rest[] in the hands' of state officials." *Id.* at 19a (quoting *Hensley*, 411 U.S. at 351). Though the court acknowledged the Third Circuit's decision in *Piasecki*, it concluded that the case was "distinguishable on its facts because Pennsylvania imposes more onerous reporting and registration requirements on sex offenders than Florida." *Id.* at 21a; *see also Munoz v. Smith*, 17 F.4th 1237, 1244 (9th Cir. 2021) ("*Piasecki*'s analysis was consistent with our own precedent, but simply confronted far more severe restrictions than those we have addressed in our past cases.").

Judge Newsom concurred, as the majority "faithfully applie[d] current doctrine" to reach "the correct result." Pet. App. 22a. But, in his view, *Jones* "marked a radical departure" from the "ordinary meaning" of custody. *Id.* at 22a. On a clean slate, he would read "custody" to require "close physical confinement." *Id.* at 30a, 37a.

The Eleventh Circuit subsequently denied petitioner's en banc petition. *Id.* at 48a.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

Petitioner contends (at 8) that the Eleventh Circuit split with the Third Circuit in concluding that "Florida's lifetime registration and reporting requirements for sex offenders did not place [those offenders] 'in custody' under § 2254(a)." Pet. App. 22a. But every circuit to have addressed the question presented—including the Third Circuit—has faithfully applied this Court's test for "custody" in *Jones*. Petitioner points

only to the fact that the Third Circuit, addressing a state registration regime much more restrictive than Florida's, reached the conclusion that Pennsylvania's law meets that test. That the courts of appeals are applying the *same* legal test in the *same* way to materially distinguishable state registration regimes—with one circuit concluding that one such state law places offenders "in custody" for purposes of Section 2254—does not warrant this Court's review. In any event, this case is a poor vehicle for addressing this question and the Eleventh Circuit's decision is correct. Review is unwarranted.

I. THE LOWER COURTS ARE NOT SPLIT ON THE QUESTION PRESENTED.

The Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all considered this question and determined that the state registration requirements for sex offenders before them were insufficient to render those offenders "in custody" for habeas purposes.[1] Seven different circuits, having considered the sex offender registration laws of twelve

[1] *See Wilson v. Flaherty*, 689 F.3d 332, 335–39 (4th Cir. 2012) (Texas and Virginia); *Sullivan v. Stephens*, 582 F. App'x 375, 375 (5th Cir. 2014) (Texas); *Johnson v. Davis*, 697 F. App'x 274, 275 (5th Cir. 2017) (Texas); *Lempar v. Lumpkin*, No. 20-50664, 2021 WL 5409266, at *1 (5th Cir. June 8, 2021) (Texas); *Leslie v. Randle*, 296 F.3d 518, 521–23 (6th Cir. 2002) (Ohio); *Hautzenroeder v. DeWine*, 887 F.3d 737, 740–41 (6th Cir. 2018) (Ohio); *Corridore v. Washington*, 71 F.4th 491, 500–01 (6th Cir. 2023) (Michigan); *Virsnieks v. Smith*, 521 F.3d 707, 719–20 (7th Cir. 2008) (Wisconsin); *Williamson v. Gregoire*, 151 F.3d 1180, 1183–84 (9th Cir. 1998) (Washington); *Henry v. Lungren*, 164 F.3d 1240, 1241–42 (9th Cir. 1999) (California); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (Oregon); *Munoz v. Smith*, 17

different states, have all concluded that sex offenders required to register under those schemes are not "in custody" under Section 2254. Only the Third Circuit, analyzing Pennsylvania's unique registration scheme, has found a sex offender "in custody." *See Piasecki*, 917 F.3d at 177.

Petitioner is wrong to characterize this as a circuit split. He suggests that behind these differing outcomes "lurks more fundamental confusion among the lower courts about how properly to construe and apply the in-custody requirement." Pet. 10. Not so.

1. Every circuit that has addressed the issue agrees on the test to apply and how to apply it.[2] *Jones* teaches that custody occurs only where the restrictions in question "*significantly restrain* [the] petitioner's liberty to do those things which in this country free men are entitled to do." 371 U.S. at 243 (emphasis added). If the petitioner's "freedom of movement rests in the hands of state judicial officers," he is subject to "severe restraints on individual liberty" that are "not shared by the public generally." *Hensley*, 411 U.S. at 351 (cleaned up). But "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."

F.4th 1237, 1244–46 (9th Cir. 2021) (Nevada); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1073–74 (10th Cir. 2014) (Colorado); *Dickey v. Allbaugh*, 664 F. App'x 690, 692–94 (10th Cir. 2016) (Oklahoma).

[2] The Fifth Circuit has not explained in detail the reasoning behind its (unpublished) decisions.

Maleng, 490 U.S. at 492. The circuits have adhered to these principles.

Applying "*Jones* and its progeny," the Eleventh Circuit below asked whether Florida's registration and reporting requirements "substantially limit" an offender's "actions or movement." Pet. App. 16a–17a. The other circuits are in accord. *See, e.g.*, *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012) ("[T]he constraints of this law lack the discernible impediment to movement that typically satisfies the 'in custody' requirement."); *Corridore*, 71 F.4th at 496 (asking "whether a petitioner's movement is limited because of direct government control and therefore amounts to a severe restraint on liberty"); *Virsnieks v. Smith*, 521 F.3d 707, 719 (7th Cir. 2008) ("[T]he Wisconsin sexual offender registration statute . . . does not impose any significant restriction on a registrant's freedom of movement."); *Munoz*, 17 F.4th at 1244 (focusing on whether the restrictions "amounted to a significant, severe, and immediate restraint on physical liberty"); *Dickey v. Allbaugh*, 664 F. App'x 690, 693 (10th Cir. 2016) ("[C]ollateral consequences of conviction which have only a negligible effect on liberty or movement, do not satisfy the 'custody' requirement."). That includes the Third Circuit. *See Piasecki*, 917 F.3d at 170 ("[T]he Supreme Court has emphasized the physical nature of the restraints when defining custody." (cleaned up)).

The circuits also agree that "[e]ven an onerous restriction cannot support habeas jurisdiction if it is nothing more than a 'collateral consequence' of a conviction." *Id.*; *see also* 28 U.S.C. § 2254(a) (requiring

that the petitioner be "in custody *pursuant to the judgment of a State court*" (emphasis added)). Rather, "the custody that is a condition precedent to [the court's] habeas jurisdiction must be a direct result of 'the conviction or sentence under attack' when the petition is filed." *Piasecki*, 917 F.3d at 170; *see also* Pet. App. 11a (quoting *Maleng*, 490 U.S. at 491–92); *Wilson*, 689 F.3d at 333 ("[T]he sex offender registration requirements of Virginia and Texas are collateral consequences of his conviction that are independently imposed on him because of his status as a convicted sex offender and not as part of his sentence."); *see Lempar v. Lumpkin*, No. 20-50664, 2021 WL 5409266, at *1 (5th Cir. June 8, 2021) ("Just because a petitioner is subject to the collateral consequences of a conviction does not mean the petitioner meets § 2254's custody requirement."); *Corridore*, 71 F.4th at 496 ("[T]he collateral consequences of a conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." (cleaned up)); *Virsnieks*, 521 F.3d at 718 ("[T]he collateral consequences of a conviction . . . are insufficient to satisfy the custody requirement."); *Williamson*, 151 F.3d at 1183 ("[T]he boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence of a conviction.'"); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) ("[T]he Colorado sex-offender registration requirements at issue here are collateral consequences of conviction that do not impose a severe restriction on an individual's freedom. Therefore, they are insufficient to satisfy the custody requirement of § 2254.").

In other words, all eight circuits that have grappled with this question assiduously follow this Court's precedent by assessing the registration regime's impact on an offender's "freedom of movement," *Hensley,* 411 U.S. at 351, whether it "significantly restrain[s] [the offender's] liberty to do those things which in this country free men are entitled to do," *Jones*, 371 U.S. at 243, and whether the restrictions are collateral consequences or part of the sentence, *Maleng*, 490 U.S. at 492; *see also Stanbridge v. Scott*, 791 F.3d 715, 719 (7th Cir. 2015) ("[A] habeas petitioner is not 'in custody' pursuant to a particular conviction unless his physical liberty of movement is limited in a non-negligible way, and that limitation is a direct consequence of the challenged conviction.").

2. The decision below is a straightforward application of that test. Florida's restrictions did not significantly limit petitioner's actions or movement. *See infra* at 12–13. Because the restrictions were not severe enough to render petitioner "in custody," the court did not reach whether that (nonexistent) custody was "pursuant to the judgment of a State Court." 28 U.S.C. § 2254(a); *see also Munoz*, 17 F.4th at 1246 ("Because it is sufficient to conclude under *Williamson*'s first factor that Munoz's conditions of lifetime supervision are not a severe, immediate restraint on his physical liberty, we need not resolve whether the conditions are regulatory or punitive under *Williamson*'s second factor."). But if the Eleventh Circuit had considered this question, it would still have come out the same way. *See infra* at 14–16.

Petitioner's claim that the circuits are split rests solely on *Piasecki*. Pet. 7–11. There, the Third Circuit

concluded that Pennsylvania's registration regime was custodial, but it applied this same test. Nothing indicates that any of the other circuits—applying the identical test—would have reached a different conclusion. In other words, the Third Circuit's holding was a function not of "fundamental confusion" (Pet. 10) but merely of differing state registration regimes.

The Third Circuit's analysis is consistent with the Eleventh Circuit's: If the Third Circuit considered Florida's registration requirements (as opposed to Pennsylvania's), it would reach the same conclusion as the Eleventh Circuit—and vice versa. Indeed, its analysis of the "two components" of the custody jurisdictional requirement—"[1] 'custody' that [2] arises 'pursuant to the judgment of a state court' that is under attack"—reflect that it would have found jurisdiction lacking here. *Piasecki*, 917 F.3d at 166.

First, the "in custody" inquiry applied by both courts focuses on "the severity—the degree—of the restraints." Pet. App. 21a. And the two statutes simply do not restrict freedom of movement to the same degree.

Pennsylvania places significantly more onerous restrictions on an offender's "liberty of movement" than does Florida. *Compare* Fla. Stat. § 943.0435 *with* 42 Pa. Stat. and Cons. Stat. Ann. §§ 9799.10–9799.42 (West 2018). Under Pennsylvania law, Piasecki was required to register in-person with the state police every three months for the rest of his life. *See* §§ 9799.15(a)(3), (e)(3). By contrast, Florida's sex offender registration and reporting statute requires petitioner to report in-person only every six months. *See*

§ 943.0435(14)(a). Though Pennsylvania's statute required in-person reporting at a registration site for any changes to an offender's name, address, employment, enrollment as a student, telephone number, vehicle ownership, email address, or professional licenses, *see* § 9799.15(g)(1)–(9), many of these updates can be reported online under Florida's law, *see* § 943.0435(4)(e) (providing that any changes to employment, telephone numbers, email addresses, or internet identifiers must be made online or in-person within 48 hours). The Third Circuit also pointed to the fact that Piasecki was to have "no computer internet use."[3] *Piasecki*, 917 F.3d at 170. No such requirement exists under Florida's statutory scheme. In fact, only two of the five restraints that the Third Circuit held to "severely conditio[n] [Piasecki's] freedom of movement" are present under Florida law: (1) in-person reporting of changes of address and vehicle ownership, and (2) felony charges for failure to comply. *Id.* at 170–71; s*ee* § 943.0435.

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[3] This appears to have been an error on the Third Circuit's part—but one it nonetheless relied upon. The question before the court was "whether a habeas corpus petitioner who was subject *only to registration requirements under Pennsylvania's Sex Offender Registration and Notification Act ('SORNA') when he filed his petition* was 'in custody pursuant to the judgment of a State Court,' as required for jurisdiction." *Piasecki*, 917 F.3d at 163 (emphasis added). But a prohibition on internet use was not a requirement under Pennsylvania's SORNA. *See generally* § 9799.15. Rather, the trial court imposed internet-use restrictions as part of Piasecki's sex offender supervision and probation. *See Piasecki*, 917 F.3d at 164 (quoting from the transcript of Piasecki's sentencing). And Piasecki was no longer subject to the conditions of his probation at the time he filed his habeas petition.

Second, unlike Florida's, Pennsylvania's registration requirements were "imposed as part of [the offender's] sentence." *Piasecki*, 917 F.3d at 173. Pennsylvania courts have held that the "registration requirements are punitive, not remedial—unlike the courts in nearly every other state." *Id.* at 175. And they "have historically treated sex offender registration requirements as part of the judgment of sentence." *Id.* To challenge his registration status, a sex offender must bring "a challenge to the judgment of sentence itself." *Id.* In the judgment entered by the state court, Piasecki was "sentenced to 'Registration' for '10 yrs.'" *Id.* at 173. As a result, the Third Circuit concluded that Pennsylvania's requirements are not mere collateral consequences of an offender's sentence but "are imposed pursuant to the state court judgment of sentence." *Id.* at 175–76.

By contrast, Florida's registration requirements are "nothing more than a 'collateral consequence' of a conviction." *Id.* at 173 (quoting *Maleng*, 490 U.S. at 492). Both the Florida Legislature and Florida courts consider Florida's sex offender registration statute to be remedial—not punitive. *See* Fla. Stat. § 943.0435(12) ("The designation of a person as a sexual offender is not a sentence or a punishment but is simply the status of the offender which is the result of a conviction for having committed certain crimes."); *see also State v. Partlow*, 840 So. 2d 1040, 1043 (Fla. 2003) (recognizing that "the requirement to register [as a sex offender] is not punishment at all" and "is merely a collateral consequence of the plea"); *Brinson v. State*, 291 So. 3d 620, 624 n.2 (Fla. Dist. Ct. App. 2020) ("[Florida's] [s]tatutory sexual offender notification and registration requirements are not intended

to be punitive. They are designed to be remedial in nature by protecting the public from sexual offenders and protecting children from sexual activity.").

Sex offenders in Florida, moreover, are not "sentenced" to registration. *See State v. Hernandez*, 278 So. 3d 845, 849 (Fla. Dist. Ct. App. 2019) ("[I]t is well-settled that the sexual offender registration requirement is not punishment and is not part of a sentence."); *State v. Whitt*, 96 So. 3d 1125, 1126 (Fla. Dist. Ct. App. 2012) (holding that "the requirement that [the defendant] register as a sexual offender was unrelated to his sentence and was a collateral consequence of his judgment and sentence," and that because "the sexual offender designation was not part of the plea or sentence, the [trial] court did not have postconviction jurisdiction to consider [the] matter"). Rather, sex offender status "automatically attaches if the defendant is convicted" of one of the enumerated offenses in Florida's sex offender registration statute. *Brinson*, 291 So. 3d at 624.

And the judgment entered by the state court in this case makes no mention of the sex offender registration requirements. *See Clements v. State of Florida*, No. 2:17-cv-00396 (M.D. Fla. Jan. 19, 2018), ECF No. 25-1 at 80–83; *see Lempar*, 2021 WL 5409266, at *1 ("In concluding that Pennsylvania's sex offender registration regime was imposed as part of the judgment, the Third Circuit relied on court documents listing sex offender registration as part of the sentence. The sentencing documents in this case, however, list only Lempar's term of imprisonment . . . ."). In Florida, then, sex offender registration requirements are not

imposed "pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).

The Eleventh Circuit thus correctly concluded that *Piasecki* "is distinguishable on its facts because Pennsylvania imposes more onerous reporting and registration requirements on sex offenders than Florida." Pet. App. 21a; *see also Munoz*, 17 F.4th at 1244 ("*Piasecki*'s analysis was consistent with our own precedent, but simply confronted far more severe restrictions than those we have addressed in our past cases.").

3. At best, any shallow 7-1 split does not merit review. As the Eleventh Circuit explained below, "sex offender and registration statutes differ (sometimes greatly) from state to state and change over time." Pet. App. 13a; *see* Wendy R. Calaway, *Sex Offenders, Custody and Habeas*, 92 St. John. L. Rev. 755, 780 (2018) ("[T]he statutory schemes at issue across the states vary markedly in their restrictions and requirements."). Nevada and Michigan, for example, subject registered sex offenders to lifetime electronic monitoring ("LEM"),[4] while Washington allows sex offenders

[4] Both the Ninth and Sixth Circuits have held that the lifetime electronic monitoring condition is "non-custodial." *See Munoz*, 17 F.4th at 1245 (concluding with "little difficulty" that the electronic monitoring requirement did not place a sex-offender "in custody" under § 2254 because "it does not limit his physical movement, nor does it require him to go anyplace"); *Corridore*, 71 F.4th at 498 ("LEM requirements fail to meet the 'in custody' requirement [because] . . . they're collateral consequences of conviction rather than severe restraints on liberty.").

to register by mail.[5] Courts necessarily will reach different conclusions depending on the unique state registration requirements that they examine. That is not a true lack of uniformity.[6]

II. THIS CASE IS A POOR VEHICLE.

Nor is this case a "suitable vehicle for review." Pet. 7. That is so for two reasons.

1. This Court generally avoids deciding legal issues when doing so will have no effect on the litigants in the case. *See* Stephen M. Shapiro et al., Supreme

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[5] *See Williamson*, 151 F.3d at 1184 ("The Washington sex offender law does not require Williamson even to personally appear at a sheriff's office to register; registration can be accomplished by mail."); *see also* Wash. Rev. Code § 9A.44.135.

[6] Petitioner (at 10 n.3) makes much of the fact that some of the circuits considered "pre-SORNA" statutes. *See* Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. §§ 20901–62. But this only underscores that the statutes vary greatly between states, as well as over time. As petitioner points out, only 18 states have "substantially implemented all aspects of the federal SORNA." Pet. 4; *see* Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, *SORNA Implementation Status*, SMART.org (last accessed Oct. 20, 2023), https://smart.ojp.gov/sorna/sorna-implementation-status. What is more, some courts have acknowledged this distinction but have concluded that SORNA-compliant laws were not significantly more burdensome than pre-SORNA laws. *See*, *e.g.*, *Hautzenroeder*, 887 F.3d at 741, 743 ("[O]bligations under Ohio's SORNA differ from those under Ohio's previous regime only in degree, not in kind. . . . [W]e held that the old law did not render a convicted sex offender 'in custody.' Ohio's SORNA is not meaningfully different in this regard.").

Court Practice § 4.4(f), at 4–18 (11th ed. 2019) (observing that where the question presented "is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied"). And here, even if the Court found the petitioner to be "in custody" under Section 2254, he would still not be entitled to habeas relief as his petition is time-barred.[7]

Under AEDPA, "a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Here, the petition came *seven years* too late.

In Florida, "[t]he relevant date for finality of a sentencing order is the date the written order is filed." *Boyd v. State*, 106 So. 3d 11, 12 (Fla. Dist. Ct. App. 2013). Petitioner's judgment and sentence were filed with the clerk on June 11, 2008. *See* Order of Sex Offender Probation, *Clements v. State of Florida et al.*, No. 2:17-cv-00396 (M.D. Fla. Jan. 19, 2018), ECF No. 25-1 at 80. And "[w]here a defendant does not file a direct appeal, the judgment and sentence become final thirty days after rendition." *Mondeja v. State*, 241 So. 3d 907, 908 (Fla. Dist. Ct. App. 2018). Petitioner did not appeal. Pet. App. 39a. As a result, his judgment of

[7] Neither the district court nor the Eleventh Circuit reached this "merits-related matter[]" because the "'in custody' requirement of § 2254(a) is jurisdictional." Pet. App. 8a (citing *Maleng*, 490 U.S. at 490, 493–94).

conviction became final on July 11, 2008. His federal limitations period therefore commenced on that date.

More than 7 months passed between this date and when petitioner first sought to attack his conviction by moving to withdraw his plea on February 17, 2009. *See id.* Even assuming the federal limitations period was tolled while petitioner's motion to withdraw his plea—and subsequent motion for postconviction relief under Fla. R. Crim. P. 3.850—was pending, both motions were disposed of by April 28, 2010. *Id.* at 40a. At this point, petitioner had only three months left before the limitations period ran. But *two years* passed before petitioner filed his belated appeal request on July 9, 2012. *Id.* Because the limitations period had already expired in July of 2010, there was nothing left for that request to toll. *See Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) ("[A] state court petition . . . that is filed following the expiration of the federal limitations period cannot toll that period because there is no period remaining to be tolled." (quotation omitted)). And petitioner's belated appeal request was denied on January 29, 2015—more than two years before he filed his § 2254 petition with the district court on July 13, 2017. Pet. App. 40a. The petition is therefore decidedly outside the one-year limitations period.

Indeed, petitioner conceded below that his petition is untimely without equitable tolling. *See* Amended Petition, *Clements v. State of Florida et al.*, No. 2:17-cv-00396 (M.D. Fla. July 31, 2017), ECF No. 6 at 14–15 (arguing that § 2244(d)'s statute of limitations did not bar his petition because of "equitable tolling" and

"his continuing efforts 'in good faith' to continue the 9 year challenge to this Florida conviction"). But for a court to apply equitable tolling, the petitioner must show he untimely filed "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citation omitted). "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Id.*

This case does not qualify for this extraordinary remedy. Petitioner did not identify *any* exceptional circumstances, let alone exceptional circumstances that would warrant equitable tolling. His petition is therefore time-barred even if it clears the jurisdictional "custody" requirement. In other words, even if the Court were to grant the petition and decide the jurisdictional issue in petitioner's favor, he would still face an insurmountable merits hurdle. That makes this a poor vehicle for deciding the question presented.

2. This Court also "do[es] not reach" issues that the court below did not address. *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 415 (2017). Here, petitioner gives much weight to Florida's residency restrictions for sex offenders, contending that their existence "resolve[s] all doubt" and "makes . . . all the more clear" that he is "in custody." Pet. 17. But the Eleventh Circuit properly declined to consider those restrictions, as they "were not litigated below and [were] not properly before" the court. Pet. App. 6a. Because petitioner argued for the first time on appeal that he was "in cus-

tody" by reason of "separate residency restrictions imposed by his sex offender status and by state and local laws," the issue had not been briefed and the Eleventh Circuit had only an "undeveloped record" from which to consider the issue. *Id.* Beyond the lack of a record and "empirical evidence as to how much land [petitioner] was practically excluded from," the Eleventh Circuit also noted that it was "unclear whether local residency restrictions, imposed not by the state but by its municipalities, are properly considered in determining whether a person is 'in custody' pursuant to a judgment of a state court." *Id.* at 7a. Without the benefit of briefing on this potentially significant legal issue, the Eleventh Circuit declined to take it up. *Id.* at 8a. As a "court of review, not of first view," this Court should do the same. *McWilliams v. Dunn*, 582 U.S. 183, 200 (2017) (quotation omitted).

That renders this case an exceedingly poor vehicle. Were the Court to grant certiorari and affirm, it would not truly resolve the question of whether Florida's registration scheme imposes "custody"—left for another day would be the import of Florida's residency restrictions on the *Jones* analysis. Thus, even if the question presented were otherwise certworthy, it should await a case featuring the full panoply of arguments in favor of the habeas petitioner.

III. THE DECISION BELOW IS CORRECT.

Finally, review is unwarranted because the decision below is correct.

1. *Jones* and its progeny stressed that habeas is a remedy for "severe restraints" on liberty, and that the "custody" requirement "preserve[s]" this historical function of the writ. *Hensley*, 411 U.S. at 351. Habeas relief is "limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Id.*

The Eleventh Circuit's "'in custody' inquiry," Pet. App. 21a, is consistent with this Court's decisions in *Jones*, *Hensley*, and *Maleng*. The court focused on "the severity—the degree—of the restraints" on petitioner's "personal liberty" and found that Florida's sex offender registration requirements do not rise to the level of custodial restraints for three reasons. Pet. App. 16a–21a. *First,* although petitioner is required to report in-person two times a year, he "is not at the beck and call of state officials." *Id.* at 18a. Petitioner knows when he is required to report in-person, and state officials cannot "demand his presence at any time and without a moment's notice." *Hensley*, 411 U.S. at 351. Instead, he is free to "come and go as he pleases." *Id. Second*, unlike the petitioner in *Jones*, petitioner is "not required to live in a certain community or home and does not need permission to hold a job or drive a car." Pet. App. 18a. And *third*, petitioner is not required to get "permission or approval" from state officials to travel outside of the state or internationally (though he must provide in-person advance *notice* of any trips). *Id.* at 19a. The Eleventh Circuit's

decision is therefore an unremarkable and faithful application of this Court's precedent.[8]

Petitioner's theory asks the Court to extend *Jones* and its progeny—themselves an extension of the writ's historical scope—even further. The Court recognized in *Jones* that, traditionally, the writ was invoked to "reach behind prison walls and iron bars." 371 U.S. at 243. And the Court has emphasized that *Jones* and later decisions have worked a "dramatic change" on the "functions of the writ." *Hensley*, 411 U.S. at 349. But, at the same time, the Court cemented the limits on this expansion: To be in custody, the petitioner must be subject to "*severe* restraints." *Id.* at 351 (emphasis added). In doing so, the Court sought to "preserve the writ of habeas corpus," rather than totally unmoor the writ from its historical scope. *Id.* The Court should ignore petitioner's invitation to erase even that limitation.

2. Even if petitioner were "in custody," that custody would not be "pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). Though this Court has "very liberally construed the 'in custody' requirement," it has also been wary of "stretch[ing] [this jurisdictional boundary] too far." *Maleng*, 490 U.S. at 491. Indeed, the Court has "never held" that "a habeas petitioner may be 'in custody' under a conviction when

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[8] Petitioner (at 17) attempts to cast doubt on the Eleventh Circuit's analysis by pointing to Florida's residency restrictions for sex offenders. But, as discussed above, *supra* at 20–21, the impact of those restrictions on the "in custody" analysis is not properly before the court.

the sentence imposed for that conviction has fully expired at the time his petition is filed." *Id.* (emphasis omitted). It is undisputed that petitioner's sentence—five years of sex offender probation—had "fully expired" when he filed his petition in 2017. In Florida, "it is well-settled that the sexual offender registration requirement is not punishment and is not part of a sentence." *Hernandez*, 278 So. 3d at 849; *see also* Fla. Stat. § 943.0435(12) ("The designation of a person as a sexual offender is not a sentence or a punishment but is simply the status of the offender which is the result of a conviction for having committed certain crimes."). A ruling that "a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas" would "read the [pursuant-to] requirement out of the statute." *Maleng*, 490 U.S. at 492.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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