NO. 19-7861

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

SEAN P. REILLY,

Petitioner,

VS.

STATE OF FLORIDA,
ASHLEY MOODY, ATTORNEY GENERAL, STATE OF FLORIDA
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sean P. Reilly DC#N21886
SOUTH BAY CORRECTIONAL FACILITY
P.O. BOX 7171
SOUTH BAY, FLORIDA 33493

ORIGINAL

Provided to South Bay Cor. and Rehab. Facility
on _____ for mailing.

QUESTIONS PRESENTED

Sean P. Reilly was convicted of witness tampering in 2010 for which served four (4) years in prison. Reilly's state postconviction motion was pending when his sentence expired, and his claims were never adjudicated on their merits in state court. Reilly filed a § 2254 habeas petition seeking to have his constitutional claims heard for the first time in federal court. He contended that the *in dicta* exceptions outlined in *Lackawanna County Dist. Attorney v. Cross*, 532 U.S. 394, 404-06, 121 S. Ct. 1567 (2001)—where a petitioner either makes a claim of actual innocence based on new reliable evidence or demonstrates that the conviction for which the sentence is expired had an adverse affect on a sentence the petitioner is currently serving—should be extended to § 2254 petitioners pursuing redress of federal constitutional claims for the first time in a federal court. The district court disagreed with Reilly and dismissed his petition. For purposes of clarifying the *Lackawanna* holding, Reilly asks this Court the following two questions:

QUESTION ONE

Whether the "actual innocence" gateway to federal habeas review applied in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and further explained *in dicta* in *Lackawanna* allows a federal habeas petitioner to overcome the "in custody" requirement of 28 U.S.C. § 2254?

QUESTION TWO

Whether the adverse affect exception explained *in dicta* in *Lackawanna* allows a federal habeas petitioner to overcome the "in custody" requirement of 28 U.S.C. § 2254?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[ ] reported at _____; or

[✓] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[ ] For cases from state court:

The opinion of the of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

JURISDICTION

[✓] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 23, 2019. A copy of that decision appears at Appendix A.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeal on the following date: November 18, 2019 and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____.

[ ] For cases from state court:

[ ] The date on which the highest state court decided my case decided my case was _____. A copy of that decision appears at Appendix _____

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was thereafter denied on the following date _____ and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The issue in this case is whether the Court should clarify and expressly adopt the *in dicta* exceptions mentioned in *Lackawanna.* The *in dicta* opinion provided an example affording § 2254 federal habeas petitioners, whose sentences have expired, a legal avenue to the federal court. Elucidation from the High Court is necessary.

A.

Sean Reilly was charged with tampering with a witness. He represented himself at trial. Mr. Reilly was convicted and sentenced to ten (10) months confinement in the county jail followed by two years of community control and then two years of probation. Eventually, Mr. Reilly's community control and probation were revoked, and he was sentenced to four (4) years in state prison. ECF No. 1. Mr. Reilly appealed the conviction and sentence to the First District Court of Appeal in Florida. The state appellate court upheld the conviction and sentence.

After his appeal became final, Mr. Reilly learned, for the first time, about an email sent from Florida State University Police Department Sergeant Marie Clark to the putative witness Adriana Kawa and her parents. The email informed Kawa that she would not be "in any type of trouble as long as she cooperates" and assists in the prosecution of Mr. Reilly. [*See* Appendix E]

Mr. Reilly presented this undisclosed evidence in a state postconviction motion. While the postconviction motion was pending, Mr. Reilly's sentence expired. The *Brady* claim was not heard in the state court. He then filed a § 2254 federal habeas petition.

The State of Florida moved to dismiss the § 2254 petition for lack of jurisdiction because Mr. Reilly's sentence for the challenged witness-tampering conviction had fully expired at the time the habeas petition was filed, and therefore Mr. Reilly was not "in custody" pursuant to that sentence for purposes of 28 U.S.C. § 2254. ECF No. 12.

In the federal court, Mr. Reilly argued that he met the threshold of proving actual innocence so as to activate the *Lackawanna* exception to § 2254's in custody requirement. In case no. 2008-CF-781, Mr. Reilly was accused of influencing Adriana Kawa to testify untruthfully in an official proceeding.

After he was convicted of witness tampering, Mr. Reilly obtained an e-mail from Adriana Kawa, the witness he allegedly tampered with, revealing that FSU Police Sgt. Marie Clark had offered Ms. Kawa immunity from criminal liability to assist in the prosecution of Mr. Reilly [*see* Appendix E]. Sgt. Clark's e-mail was directed to the parents of Ms. Kawa, and Sgt. Clark not only failed to disclose the e-mail to Mr. Reilly; she destroyed it when Mr. Reilly tried to obtain it from the FSU Police Department through a public records request. Mr. Reilly was only able to recover the e-mail upon his release from the county jail when he checked his own personal e-mail account. While Mr. Reilly was in jail, Ms. Kawa sent Mr. Reilly a copy of Sgt. Clark's e-mail. She did so because she felt compelled to come forward with the truth to clear her conscience. Quite candidly, if it weren't for Ms. Kawa's integrity, compassion, and concern for justice, the truth in this case may still be buried. This new compelling and reliable evidence demonstrated that he is actually innocent of

this witness tampering charge.

As Mr. Reilly explained in his federal habeas petition, the e-mail from FSU Police Sgt. Marie Clark to Ms. Kawa's parents proves that Mr. Reilly is actually innocent of witness tampering because it reveals that Sgt. Clark orchestrated a plot exempting Ms. Kawa from prosecution in order to secure an arrest and conviction of Mr. Reilly. The undisclosed email reveals that Ms. Kawa was coerced to issue a false statement against Mr. Reilly and that she had an incentive to lie at Mr. Reilly's trial. The email also shows that Ms. Kawa was instructed on how to proceed in order to assist the state in securing Mr. Reilly's subsequent arrest and conviction.

Mr. Reilly contended in his § 2254 federal habeas petition that no reasonable juror would have found him guilty of witness tampering had they been aware of the e-mail that was withheld by FSU Sgt. Marie Clark. Mr. Reilly's defense at the witness tampering trial was that Ms. Kawa initially lied to police about her role in a prank phone call to Mr. Reilly's ex-girlfriend in order to avoid her own arrest and that Mr. Reilly encouraged Ms. Kawa to tell the truth in court. The email reveals that law enforcement motivated Ms. Kawa to blame Mr. Reilly for her actions, and that Mr. Reilly was framed. FSU Sgt. Clark destroyed the e-mail in bad faith because she knew that if a jury found out that Ms. Kawa was motivated by police to lie, then Mr. Reilly would have been exonerated.

Reilly asserted that his underlying constitutional claim violated *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the state deprives a criminal defendant of his right to due process when it suppresses or

withholds evidence that is both favorable to the defendant and material to his defense. *See also Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (holding that the rule encompasses evidence "known only to police investigators and not to the prosecutor.").

Here, FSU Sgt. Clark's actions were a sheer violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because she intentionally deprived Mr. Reilly of exculpatory evidence with which he could have proved his innocence. Thus, Mr. Reilly argued that he met the threshold of proving actual innocence so as to activate the *Lackawanna* exception to § 2254's in custody requirement.

The United States District Court dismissed Reilly's federal habeas petition because Reilly is not "in custody" within the meaning of 28 U.S.C. § 2254(a). Noting that "[t]he exceptions to the 'in custody' requirement are very limited," the United States District Court concluded that Reilly's case did not trigger any of the recognized exceptions [DE# 26 at 5] (citing *Lackawanna County Dist. Attorney v. Cross*, 532 U.S. 394, 404-06, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001) (holding that a petitioner, in a federal habeas proceeding, can challenge the validity of an expired conviction and satisfy the "in custody" requirement, even if he is no longer in custody for the prior conviction, where he obtains "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner," or where the prior conviction was used to enhance his current sentence for a later offense)).

According to the Magistrate, the e-mail Reilly attached to his petition, demonstrating that "the witness-tampering charge against him was 'orchestrated' by a police officer," does not "amount to evidence that [he] is 'actually innocent' of the witness tampering charge ... such that the instant Petition would fall within any exception to the 'in custody' requirement" [DE# 26 at 6]. The Magistrate also concluded that even though "the witness-tampering conviction and sentence [in case no. 2008-CF-781] may have had 'adverse effect' [sic] on the sentence he is presently serving in the subsequent case," it "affords [Reilly] no relief" [DE# 26 at 6].

Reilly respectfully objected to the Magistrate's position. He contended that he was "in custody" for purposes of federal habeas review since his case falls squarely within both of the recognized exceptions outlined by the Supreme Court in *Lackawana*. He obtained compelling new evidence proving his innocence of the witness tampering charge, and he had shown that the witness tampering conviction had an adverse affect on the sentence he is presently serving in case no. 2008-CF-4221. Thus, pursuant to both exceptions outlined in *Lackawanna*, he should be permitted to challenge the validity of the witness tampering conviction in case no. 2008-CF-781, even though that sentence has expired.

i. The Compelling New Evidence of Innocence

In his § 2254 petition and supporting memorandum of law, Reilly argued, *inter alia*, that he obtained compelling new evidence that proves he is actually innocent of the witness tampering charge in case no. 2008-CF-781 [DE# 1 at 10-12; DE# 2 at 7-9].

In case no. 2008-CF-781, Reilly was accused of influencing Adriana Kawa to testify untruthfully in an official proceeding, and this formed the basis of the witness tampering charge. In his response to Respondent's motion to dismiss, Reilly explained the circumstances surrounding his obtaining the new evidence:

> After he was convicted of witness tampering, Mr. Reilly obtained an e-mail from Adriana Kawa, the witness he allegedly tampered with, revealing that FSU Police Sgt. Marie Clark had offered Ms. Kawa immunity from criminal liability to assist in the prosecution of Mr. Reilly [*see* Appendix E]. Sgt. Clark's e-mail was directed to the parents of Ms. Kawa, and Sgt. Clark not only failed to disclose the e-mail to Mr. Reilly; she destroyed it when Mr. Reilly tried to obtain it from the FSU Police Department through a public records request. Mr. Reilly was only able to recover the e-mail upon his release from the county jail when he checked his own personal e-mail account. While Mr. Reilly was in jail, Ms. Kawa sent Mr. Reilly a copy of Sgt. Clark's e-mail. She did so because she felt compelled to come forward with the truth to clear her conscience. Quite candidly, if it weren't for Ms. Kawa's integrity, compassion, and concern for justice, the truth in this case may still be buried.

[DE# 25 at 7]

The e-mail from FSU Police Sgt. Marie Clark to Ms. Kawa's parents—which Reilly could not have obtained at the time of his trial for witness tampering—proves that Reilly is actually innocent of witness tampering. Indeed, the e-mail reveals that Sgt. Clark "orchestrated a plot exempting Ms. Kawa from prosecution in order to secure an arrest and conviction of Mr. Reilly" [*Id.*]. It also reveals that Sgt. Clark coerced Kawa to give a false statement against Reilly, and that Kawa had an incentive to lie at Reilly's trial in order to assist the State in securing Reilly's conviction [*Id.*]

Nonetheless, the Magistrate concluded—without offering any specifics—that the e-mail did not prove Reilly's innocence, suggesting that it would not have made a difference at Reilly's witness tampering trial. *See* ECF# 26 at 6 (concluding that the email written to Adriana Kawa's family, but withheld by FSU Police Sergeant Marie Clark, "does not amount to evidence that Reilly is 'actually innocent' of the witness tampering charge ... such that the instant Petition would fall within any exception to the 'in custody' requirement.").

Simply put, the Magistrate's casual downplaying of the significance of the e-mail should not be adopted by this Court. Ms. Kawa was the *only* real witness against Reilly at the witness tampering trial, and the State's case hinged on her credibility. The ultimate issue before the jury was whether she was actually telling the truth about Reilly persuading her to make the prank call to Jennifer Davis. If the e-mail from Sgt. Clark had been available at the time of Reilly's trial, any reasonably competent defense attorney would have thoroughly discredited Ms. Kawa through cross examination, thus resulting in Reilly's exoneration. After all, what jury would have convicted Reilly after reading the contents of that e-mail and discovering that FSU Sgt. Clark not only offered Kawa immunity to assist in the prosecution of Reilly, but also coerced Kawa to give a false statement against Reilly, lest she would be subjected to prosecution and possible jail time herself?

Accordingly, Reilly maintained that the email—which was not disclosed to the defense before trial in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963)—would have put the only real witness's credibility in question in a case

that hinged on credibility. Reilly argued that because reasonable jurors likely would have rejected Ms. Kawa's testimony after reviewing the e-mail from Sgt. Clark, the e-mail constitutes compelling new evidence of actual innocence. ECF #25; *See Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (holding that a petitioner asserting his actual innocence must show "it is more likely than not that no reasonable juror would have convicted him" in light of the new evidence presented in his habeas petition). The *Lackawana* exception to § 2254(a)'s "in custody" requirement, concerning new compelling evidence of actual innocence, thus applies in this case.

ii. The Adverse Affect of the Witness Tampering Conviction on the Sentence Reilly Is Presently Serving.

The Magistrate concluded that, even though the witness tampering conviction "may have had an 'adverse effect' [sic] on the sentence [Reilly] is presently serving," Reilly still cannot satisfy 2254(a)'s "in custody" requirement [ECF# 26 at 6]. Reilly respectfully disagreed.

As Reilly explained in his response to the motion to dismiss, when the state trial court imposed the sentence in case no. 2008-CF-4221—*i.e.*, the sentence he is presently serving—the sentencing court used Reilly's witness tampering conviction against him as an aggravating factor [ECF# 25 at 4-5] (citing the scoresheet listing case no. 2008-CF-781 as prior record). Also significant is that, without the judgment of conviction for the witness tampering conviction in case no. 2008-CF-781, the revocation proceedings on December 6, 2010, would have been centered on the

convictions in case no. 2008-CF-4221 *only*.

Thus, because the state court record reveals that the sentencing court, in case no. 2008-CF-4221, used Reilly's witness tampering conviction against him, as an aggravating factor under the prior record category, Reilly's case falls squarely within the other *Lackawana* exception to the "in custody" requirement. *See id.*, 532 U.S. 394, 404-06. Therefore, the District Court should not have dismissed Reilly's petition since he could overcome the "in custody" requirement under § 2254(a).

The Petitioner respectfully requests the United States Supreme Court accept this case to clarify and expressly adopt the *in dicta* exceptions mentioned in *Lackawanna.*

REASONS FOR GRANTING THE PETITION

The Supreme Court's decision in *Lackawanna County Dist. Attorney v. Cross*, 532 U.S. 394, 404-06, 121 S. Ct. 1567 (2001), outlines two potential exceptions to § 2254's "in custody" requirement: (1) if he obtains "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner," or (2) if he can show that the prior conviction was used to enhance his current sentence for a later offense. *Id.* However, this Court's opinion was *in dicta*. Thus, it is time for this Court to clarify and expressly adopt these exceptions.

A.

The issue in this case concerns the "actual innocence" gateway to federal habeas review applied in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and further explained in *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. Here, the question arises in the context of 28 U.S.C. § 2254(a), the "in custody" requirement for jurisdiction of federal habeas petitions. Specifically, if the petitioner does not file his or her federal habeas petition, until their sentence expires for the wrongful conviction being challenged, can the "in custody" requirement be overcome by a convincing showing that he committed no crime?

In 2013, the United States Supreme Court decided in *McQuiggin v. Perkins*, 133 S Ct 1924 (2013) that "actual innocence, if proved, held to be gateway through which state prisoner petitioning for federal habeas corpus relief might pass, regardless of whether impeded by procedural bar or expiration of 28 U.S.C.S. § 2244(d)(1)'s limitations period." *Id.*

The actual innocence exception of *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) and *McQuiggin v. Perkins*, 133 S Ct 1924 (2013) should be extended to § 2254 petitioners, like Reilly, whose sentences have expired.

The Supreme Court must decide whether actual innocence exception, similarly decided in *Schlup, House and McQuiggin*, serves as a gateway through which a petitioner may pass the impediment created by § 2254's "in custody" requirement.

I.

This case concerns a former convict's access to the federal court, where he has continued to assert his rights in the state court, but where habeas relief is unavailable to challenge the constitutionality of his conviction due to the expiration of his state prison sentence.

In concluding that Reilly was "no longer in custody pursuant to his sentence in Leon County Circuit Court Case No. 08-CF-781 for purposes of federal habeas corpus jurisdiction" [DE# 28 at 2], the District Court did not mention the holding in *Lackawana*, much less address the applicability of the exceptions outlined therein. Reilly submits that reasonable jurists would find the District Court's assessment of

the constitutional claims debatable and wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Reilly maintains he is in custody for federal habeas purposes because his case falls squarely within not just one but both of the exceptions recognized by the Supreme Court in *Lackawana*. Below, Reilly shows this Court, in detail, why the procedural issue in this case deserves encouragement to proceed further. *Cockrell*, 537 U.S. at 336.

A. Whether The District Court Erred in Failing to Apply the Actual Innocence Exception Outlined in *Lackawanna*, to Allow Reilly to Bypass the "In Custody" Requirement of § 2254?

When adjudicating Reilly's federal habeas petition, the District Court apparently overlooked the fact that Reilly's case falls squarely within the first exception to § 2254's" in custody" requirement outlined in *Lackawana*. Indeed, Reilly has obtained compelling new evidence proving his innocence of the witness tampering charge in case no. 2008-CF-781. And this new evidence—*i.e.*, an email revealing a plot to frame Reilly—was unavailable to Reilly at the time of trial, and it would almost certainly produce an acquittal at re-trial. The first *Lackawana* exception is activated when a habeas petitioner obtains new and "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." *Id.*, 532 U.S. at 405.

In case no. 2008-CF-781, Reilly was accused of tampering with a witness named Adriana Kawa, by supposedly influencing Kawa to testify untruthfully in an official proceeding. Following a jury trial, Reilly was convicted as charged of witness tampering.

After his conviction, Reilly obtained an email from Ms. Kawa revealing that Florida State University (FSU) Police Sergeant Marie Clark had offered Kawa immunity from criminal liability to assist in Reilly's prosecution [*see* Exhibit A]. The email was directed to the parents of Ms. Kawa, but it was never disclosed to Reilly or his counsel. And when Reilly tried to obtain the email from the FSU Police Department through a public records request, it was not available because Sergeant Clark destroyed it.[1]

Reilly was only able to obtain the email upon his release from the county jail when he checked his own personal email account. Come to find out, when Reilly was in jail, Ms. Kawa had sent him a copy of Sergeant Clark's email because, as she put it, she wanted Reilly to know the "truth" about Sergeant Clark's offer of immunity and her efforts to wrongly convict Reilly of witness tampering.

It is not insignificant that the State's entire case hinged on the credibility of Adriana Kawa. The email at issue effectively destroys her credibility; indeed, it actually demonstrates that Ms. Kawa was motivated to testify against Reilly by FSU Police Sergeant Marie Clark's offer of immunity. Mr. Reilly contends that evidence of Ms. Kawa's cooperation deal and offer of immunity would lead any juror to see that she was not a credible witness and that she was being untruthful so as to avoid prosecution herself. Simply put, the email diminishes the credibility of

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[1] A corollary to this issue is that law enforcement appears to have violated Reilly's due process rights by failing to disclose the email. *See Brady v. Maryland*, 373 US 83, 83 S Ct 1194 (1963) (holding the prosecutions failure to disclose material evidence violates due process and deprived the criminal defendant of a fair trial).

Adriana Kawa, and if a jury was permitted to view the email, reasonable doubt, with respect to the charge of witness tampering, would easily follow.

As it stands, the District Court did not thoroughly address Reilly's contention that the email proves his actual innocence of the witness tampering charge. And yet the merits of this actual innocence claim are central to the Court's determination as to whether Reilly's case triggers the *Lackawana* exception to the § 2254(a)'s in custody requirement. *Lackawana* makes clear that where a federal habeas litigant seeks to challenge an otherwise expired state court conviction, such litigant can overcome any procedural bar if he obtains "compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." *Lackawanna*, 532 U.S. at 405.

The evidence Reilly has uncovered is compelling, to say the least. It reveals that Sergeant Clark was willing to do anything, including induce Kawa to lie under oath, just to see Reilly convicted. What is even more egregious is that Sergeant Clark then destroyed the email so her efforts to frame Reilly would not come to light. Certainly, this new evidence is compelling enough to trigger the actual innocence exception outlined in *Lackawana*. If the email is not enough to trigger the exception, it is difficult to imagine what would be.

Nonetheless, the District Court adopted the Magistrate's report, which merely states, in cursory fashion, that the email does not prove Reilly's innocence [DE# 26 at 6]. Without addressing the merits of Reilly's actual innocence claim, the Magistrate simply stated that the email "does not amount to evidence that Reilly is

'actually innocent' of the witness tampering charge ... such that the instant Petition would fall within any exception to the 'in custody' requirement." [*Id.*].

But how can the District Court sanction such a finding, when the email actually reveals that Sergeant Clark set the whole thing up, including extending an offer of immunity to Kawa if she testified untruthfully at Reilly's trial?

Kawa knew what she did was wrong; and that is why she provided the email to Reilly. If the email from Sergeant Clark had been available at the time of Reilly's trial, any reasonably competent defense attorney would have thoroughly impeached and effectively discredited Ms. Kawa through cross examination, thus resulting in Reilly's exoneration.

Accordingly, because reasonable jurors likely would have rejected Ms. Kawa's testimony after reviewing the email from Sergeant Clark, the email constitutes compelling new evidence of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (holding that a petitioner asserting his actual innocence must show "it is more likely than not that no reasonable juror would have convicted him" in light of the new evidence presented in his habeas petition); *see also House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) ("A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.").

In sum, the *Lackawana* exception to § 2254(a)'s "in custody" requirement, concerning new compelling evidence of actual innocence, operates to excuse Reilly of

the procedural default employed by the District Court in this case. Reasonable jurists would find the District Court's application of the procedural bar debatable or wrong, *Slack*, 529 U.S. at 484, and this procedural issue deserves encouragement to proceed further, *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, (2003).

B. Whether the District Court Erred in Failing to Apply the Adverse Affect Exception to the "In Custody" Requirement of § 2254?

Lackawana provides yet another exception to § 2254(a)'s in custody requirement. This second exception concerns whether the federal habeas petitioner can show that the prior conviction he is challenging had an adverse affect on, or was used to enhance, his current sentence for a later offense. *Lackawana*, at 406.

Here, the record reveals that Reilly's prior conviction for witness tampering unquestionably had an adverse affect on the sentence he is presently serving. Reilly provided the District Court with a scoresheet in case no. 2008-CF-4221 reflecting that the witness tampering conviction was scored as prior record, thus increasing both his total sentence points and the lowest permissible sentence he could receive absent a departure.

Prior to the District Court's dismissal of his petition, Reilly also obtained the State's notice of intent to introduce similar fact evidence in case no.'s 2008-CF-4221 and 2014-CF-017, revealing that the State also used Reilly's prior conviction in case no. 2008-CF-781 as similar fact evidence to prove Reilly's guilt in case no.'s 2008-CF-4221 and 2014-CF-017—the cases for which he is currently in custody.

And finally, the State also used his prior conviction in case no. 2008-CF-781

to give him an enhanced sentence as a Prison Releasee Reoffender (PRR).

Yet somehow, the Magistrate Judge and the District Court found that even though the witness tampering conviction "may have had an 'adverse effect' [sic] on the sentence [Reilly] is presently serving," Reilly still cannot satisfy 2254(a)'s "in custody" requirement [DE# 26 at 6]. But this finding completely disregards Supreme Court precedent, that is to say, *Lackawana* and the recognized exception therein.

The exception in *Lackawana* exists for a reason: to permit a federal habeas litigant an opportunity to challenge an otherwise expired conviction where that conviction was used by the State to enhance his or her current sentence. Reilly's case fits squarely within this exception. However, the District Court may have overlooked the applicability of this exception when it was adjudicating Reilly's § 2254 petition.

In sum, the record is clear that the state sentencing court, in case no. 2008-CF-4221, (1) used Reilly's witness tampering conviction in case 2008-CF-781 against him as an aggravating factor under the prior record category; (2) used his witness tampering conviction as similar fact evidence to prove his guilt in case no.'s 2008-CF-4221 and 2014-CF-017; and (3) used his witness tampering conviction to give him a mandatory PRR sentence. Thus, Reilly's case falls squarely within the second *Lackawana* exception to the "in custody" requirement. *See id.*, 532 U.S. at 406. Reilly prays that this Court decide whether these exceptions apply to the "in custody" requirement within the meaning of § 2254(a).

a. Whether It Would Be A Fundamental Miscarriage Of Justice To Dismiss Mr. Reilly's Constitutional Challenge To The March 12, 2010, Judgment

As a final point, Mr. Reilly submits that it would be a fundamental miscarriage of justice to dismiss his constitutional challenge to the March 12, 2010, judgment based on the in custody requirement of § 2254. Because court-appointed post-conviction counsel abandoned Mr. Reilly's claim of newly discovered evidence, Mr. Reilly never had a fair opportunity in the state court to have his *Brady*/actual innocence claim heard. Against Mr. Reilly's wishes and over his vehement objections, post-conviction counsel abandoned the claim because Mr. Reilly's rule 3.850 motion sat idle in the state court for 4 years, and his sentence expired before the court entered an order on the motion. Counsel told Mr. Reilly that he wanted to pursue claims that would get him out of prison, not a claim that would simply cancel a conviction for which the sentence had already been served in its entirety. Mr. Reilly expressed his frustration with counsel's position, explaining that he wanted to challenge the conviction because he was innocent and did not want the conviction on his record. But counsel abandoned the claim nonetheless.

Consequently, due to postconviction counsel's decision to forgo pursuing the claim, Mr. Reilly was deprived of an opportunity to be heard in the state court. This Court, therefore, has become the only court where his claim can be heard. *See Lackawanna*, 532 U.S. at 406 (explaining that an exception to the in custody requirement arises where "a habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction.").

Here, due to post-conviction counsel's decision to abandon the claim, Mr. Reilly's challenge to the March 12, 2010, judgment in the instant federal habeas proceeding has become the only forum available for him to challenge that judgment. Mr. Reilly was diligent in his attempt to challenge the March 12, 2010, judgment in the state court; it was his counsel that abandoned the claim, over his vehement objections. It would be fundamentally unfair to penalize Mr. Reilly for his counsel's decision to forgo the claim in the state court, especially where (1) the conviction he is challenging in case no. 2008-CF-781 adversely affected the sentence in case no. 2008-CF-4221 for which he is currently in custody, and (2) he has compelling and reliable evidence to prove his innocence.

As a matter of equity, this Court should decide this issue to clarify the *in dicta* exceptions summarized in *Lackawanna*. This case will have a significant impact on federal habeas law and will provide § 2254 petitioners, whose sentences have expired, a legal avenue to have their claims fairly adjudicated in a § 2254 petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Mr. Reilly respectfully requests that this court to clarify and expressly adopt the exceptions mentioned *in dicta* in *Lackawanna County Dist. Attorney v. Cross,* 532 U.S. 394, 121 S. Ct. 1567 (2001) to similar § 2254 federal habeas petitioners whose sentenced have expired.

The exception to § 2254's "in custody" requirement outlined in *Lackawanna* must be applied in this case. Because Mr. Reilly has presented new, reliable, and compelling evidence demonstrating that he is actually innocent of the witness tampering charge in case no. 2008-CF-781, he is therefore "in custody" for purposes of federal habeas review under the *Lackawanna* exception. Applying the *Lackawanna* exception would not only afford Mr. Reilly a meaningful opportunity to be heard on his *Brady*/actual innocence claim in case 2008-CF-781; it would also prevent a fundamental miscarriage of justice. Contrary to Respondent's position, dismissal is not proper in this case.

Dated this 17th day of February 2020.

Respectfully Submitted,

Sean P Reilly DC#N21886
South Bay Corr. Facility
P.O. Box 7171
South Bay, Florida 33493