No. _____

In the Supreme Court of the United States

SEAN REILLY,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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Appointed Pursuant to 18 U.S.C. § 3006A

June 13, 2024

QUESTION PRESENTED

In *Garlotte v. Fordice*, 515 U.S. 39, 45–46 (1995), this Court concluded that "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of the habeas statute." The Eleventh Circuit affirmed the dismissal of petitioner Sean Reilly's habeas corpus petition brought pursuant to 28 U.S.C. § 2254 on the grounds that Mr. Reilly was not "in custody" on the challenged judgment when he filed the petition, despite the fact Mr. Reilly served multiple sentences consecutively and without release from unconditional physical confinement from 2009 through the filing of the petition in 2020.

The question presented is as follows:

Whether a prisoner is "in custody" at the time of challenging a judgment under 28 U.S.C. § 2254 when the prisoner has completed the sentence for the challenged judgment but has continuously remained in custody thereafter, including for violations of probation that was imposed with the challenged judgment.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

RULE 29.6 STATEMENT

Petitioner is a not corporate entity.

STATEMENT OF RELATED PROCEEDINGS

- *State v. Reilly*, Second Judicial Circuit in and for Leon County, Florida, Case No. 2008-CF-4221. Judgment and sentence entered Sept. 22, 2009; re-sentenced Dec. 6, 2010 following violation of probation; re-sentenced June 18, 2015 following violation of probation.

- *State v. Reilly*, Second Judicial Circuit in and for Leon County, Florida, Case No. 2008-CF-781. Judgment and sentence entered Mar. 12, 2010; re-sentenced Dec. 6, 2010 following violation of probation.

- *Reilly v. State*, No. 1D09-5013, 75 So. 3d 725 (Fla. 1st DCA Nov. 28, 2011).

- *Reilly v. State*, No. 1D12-3594, 134 So. 3d 1012 (Fla. 1st DCA Sept. 18, 2012, reh'g denied Nov. 15, 2012).

- *State v. Reilly*, Second Judicial Circuit in and for Leon County, Florida, Case No. 2014-CF-17. Judgment and sentence entered June 18, 2015.

- *Reilly v. Sec'y, Fla. Dep't of Corrs.*, No. 4:20-cv-145-TKW-EMT, United States District Court for the Northern District of Florida (Tallahassee). Judgment entered Mar. 22, 2021.

- *Reilly v. Sec'y, Fla. Dep't of Corrs.*, No. 21-11565-CC, United States Court of Appeals for the Eleventh Circuit. Affirmed Feb. 5, 2024; Petition for Panel Rehearing denied Mar. 14, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sean Reilly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is found at 2024 WL 418794 (11th Cir. Feb. 5, 2024) and reproduced at App. 1–4. The district court's decisions are found at 2021 WL 1091519 (N.D. Fla. Feb. 2, 2021) and 2021 WL 1088434 (N.D. Fla. Mar. 2, 2021) and reproduced at App. 5–23 and App. 24–26, respectively. The district court's judgment is found at No. 4:20-cv-00145-TKW-EMT, ECF No. 29 (N.D. Fla. Mar. 22, 2021) and reproduced at App. 27. The Eleventh Circuit's denial of Mr. Reilly's Petition for Panel Rehearing is reproduced at App. 28.

JURISDICTION

The judgment of the Eleventh Circuit was entered on February 5, 2024. App. 1–4. On March 14, 2024, the Eleventh Circuit entered an order denying Mr. Reilly's petition for panel rehearing filed out of time with permission from the Eleventh Circuit. App. 28. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTES INVOLVED

28 U.S.C. §§ 2241 and 2254 are reproduced at App. 29–35.

STATEMENT OF THE CASE

Appellant Sean Reilly's 2020 habeas corpus petition, *see* 28 U.S.C. § 2254, sought to challenge a 2009 Florida conviction and judgment for criminal use of identification. The district court dismissed the petition for lack of subject-matter jurisdiction on two alternative grounds. First, it ruled that the petition was an unauthorized second or successive application. *See* 28 U.S.C. § 2244(b)(3). Second, it concluded that Mr. Reilly was not "in custody" on the 2009 judgment when he filed the petition. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a). Following oral argument and a review of the record, Eleventh Circuit affirmed, concluding Reilly was not "in custody" on the 2009 judgment when he filed the 2020 habeas corpus petition. App. 3–4.

The 2009 Judgment. For the 2009 criminal use of identification conviction ("2009 Judgment"), the state court sentenced Mr. Reilly on Count 1 to 11 months and 29 days of imprisonment, followed by two years of community control and two years of probation. App. 1. As to Count 5, the state court sentenced him to two years of community control followed by two years of probation, to run consecutive to the incarcerative portion of the sentence on Count 1 but concurrent with the supervisory portions of the sentence on Count 1. App. 2.

Mr. Reilly timely filed a direct appeal of the 2009 Judgment, which the First District Court of Appeal affirmed in November 2011. *See Reilly v. State*, 75 So. 3d 725 (Fla. 1st DCA 2011). The mandate issued on December 28, 2011. *See* Case No. 21-13668, *Reilly v.*

Sec'y, Fla. Dep't of Corr., Doc. 33 at pp. 56–58 of 225 (11th Cir. Feb. 20, 2023). On August 28, 2012, Reilly timely filed a motion to vacate or set aside the 2009 Judgment pursuant to Fla. R. Crim. P. 3.850. *Id.* at pp. 59–60 of 225. The 3.850 motion remained pending for nearly five years until the trial court held an evidentiary hearing on April 19, 2018 and denied the 3.850 motion that same day. *Id.* at pp. 194–96 of 225. Mr. Reilly timely appealed that denial, and the First District Court of Appeal affirmed the trial court's decision in an unpublished per curiam decision on May 24, 2019; following a denial of rehearing, the mandate issued on September 11, 2019. *Id.* at 197–200 of 225. Thus, the 2009 Judgment was not ripe for federal habeas review until September 11, 2019.

The 2010 Conviction and VOP Judgment. In March of 2010, Mr. Reilly was convicted of witness tampering, and in December of 2010, he was found to have violated the conditions of his supervision/probation for the 2009 Judgment. App. 1–2. The state court imposed a sentence of 60 months' imprisonment as to Count 1 of the 2009 Judgment and a split sentence of two years of community control followed by two years of probation as to Count 5 of the 2009 Judgment. App. 2.

The 2015 Conviction and VOP Judgment. In April of 2015, while he was serving the supervisory portion of the sentence as to Count 5 of the 2009 Judgment (imposed in December 2010), Mr. Reilly was convicted of aggravated stalking and found to have violated the conditions of his probation/supervision on the sentence the state court

had imposed as to Count 5 of the 2009 Judgment. App. 2. The state court imposed a sentence of five years' imprisonment for the aggravated stalking conviction and five years' imprisonment as to Count 5 of the 2009 Judgment, to be served consecutively. App. 2

The Eleventh Circuit affirmed. App. 4. The Eleventh Circuit determined that at the time Mr. Reilly filed his 2020 petition, he had "served the imprisonment portion of [the 2009 Judgment challenged in that petition] (i.e., the 11 months and 29 days initially imposed, and the five years imposed in the 2010 VOP judgment)," he was serving the five-year sentence imposed by the 2015 aggravated stalking conviction, but "had not begun to serve the consecutive five-year sentence imposed in the 2015 VOP judgment." App. 3–4 The Eleventh Circuit concluded that, therefore, Mr. Reilly was "in custody" for purposes of the 2015 conviction and the 2015 VOP judgment, but "that does not help him because the 2020 petition did not challenge the 2015 conviction or the 2015 VOP adjudication in any way." App. 4.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

a. *At the time he filed the Petition, Reilly was "in custody" under* Garlotte *for purposes of the 2009 Judgment.*

In *Garlotte v. Fordice*, 515 U.S. 39, 45–46 (1995), this Court concluded "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of the habeas statute." Because the Court does not "disaggregate" a prisoner's sentences, but rather "comprehend[s] them as composing a continuous stream," a prisoner "remains 'in custody' under all of his sentences until all are served," and may attack a sentence "already served." *Garlotte*, 515 U.S. at 41.

The Eleventh Circuit determined the judgments pursuant to which Mr. Reilly was "in custody" at the time he filed the 2020 petition were the 2015 VOP judgment and 2015 aggravated stalking judgment. App. 4. But Mr. Reilly served multiple sentences consecutively and without release from unconditional physical confinement from 2009 through the filing of the 2020 petition. Thus, even assuming the Eleventh Circuit's determination that Mr. Reilly "had served the imprisonment portion of [the 2009 Judgment]" is correct, that still should not preclude his seeking habeas relief as to the 2009 Judgment because he

"remain[ed] 'in custody' under all of his sentences until all [were] served." *See Garlotte*, 515 U.S. at 41.

That Mr. Reilly's consecutive sentences constituted a "continuous stream" as contemplated under *Garlotte* is supported by the fact that under Florida law, a violation of probation is not necessarily considered a separate offense but an element of the *original* sentence: "[I]f a defendant violates probation, the court can revoke the defendant's probation and may 'impose any sentence which it might have originally imposed before placing the probationer on probation.'" *Pagnotti v. State*, 821 So. 2d 466, 468 (Fla. 4th DCA 2002) (quoting *Fla. Stat. Ann.* § 948.06(2)(b)). Thus, although the state court imposed new sentences on Mr. Reilly in December 2010 and April 2015, and even though he also was subject to a sentence from another conviction, for habeas purposes Mr. Reilly was in custody pursuant to a sentence imposed as to Count 5 of the 2009 Judgment at the time he filed the 2020 petition. *See also Nwani v. Pennsylvania*, No. 2:17-cv-03679, 2018 WL 1354469 (E.D. Penn. Feb. 26, 2018) (report and recommendation adopted, 2018 WL 1327240, Mar. 15, 2018) (explaining that a prisoner "attacking his original conviction and sentence but is 'in custody' as a result of a probation violation is inconsequential," because under Pennsylvania law—like Florida law here—a "violation of probation is not considered a separate offense but an element of the original sentence.").

b. The Eleventh Circuit's decision conflicts with Lackawanna.

The Eleventh Circuit relied on this Court's decision in *Lackawanna County District Attorney v. Coss*. App. 3. Specifically, the Eleventh Circuit quoted the following holding from *Lackawanna*:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

532 U.S. 394, 403–04 (2001) (citation omitted).

Applying the above-quoted holding from *Lackawanna* necessarily presumes the existence of a critical factor not present in Mr. Reilly's case. Specifically, applying this holding from *Lackawanna* presumes the judgment being attacked "is no longer open to direct or collateral attack in its own right because the petitioner failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully)." *Id.* The 2009 Judgment here

is not like the original judgments being attacked in *Lackawanna*. In *Lackawanna* the petitioner did not pursue claims on his underlying convictions. *Id.* at 397–98 ("Coss' state postconviction petition has now been pending for almost 14 years"—which was more than 11 years after he served the full sentences for his underlying convictions—"and has never been the subject of a judicial ruling. Neither petitioners nor respondent is able to explain this lapse."). Here, Mr. Reilly unquestionably pursued his claims in state court, and through no fault of his own, those claims languished for several years before being ruled on. For these reasons, the Eleventh Circuit's decision conflicts with *Lackawanna*.

II. The Eleventh Circuit's decision conflicts with district court decisions from other circuits.

Mr. Reilly is not aware of a recognized circuit split on the issues raised herein. However, district court decisions from other circuits support Mr. Reilly's position that the Eleventh Circuit's decision conflicts with *Garlotte*. For example, in the Second Circuit, the United States District Court for the Eastern District of New York in *Davila-Bajana v. United States* was faced with determining whether a prisoner was "in custody" for habeas purposes. *Davila-Bajana v. United States*, No. 01 CV 7329(RR), 2002 WL 2022646, (E.D.N.Y. June 26, 2002). There, the prisoner had completed the sentence for a conviction but was serving a consecutive sentence for a violation of the supervised release portion of original sentence *Id.* Relying on *Garlotte*, the district court determined the

prisoner was "in custody" for habeas purposes under either of the sentences even though he had completed the original sentence:

> Although he has completed the original sixty-month sentence imposed in the *Reyes* case, he is presently incarcerated as a result of consecutive sentences imposed both for violating his supervised release in *Reyes* and for his 1996 conviction. A prisoner in custody on a violation of supervised release can challenge his original conviction pursuant to § 2255. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir.1994) (concluding that § 2255 petitioner under supervised release is "in custody" for purposes of habeas statute). Moreover, the Supreme Court has clearly held that a prisoner serving consecutive sentences is in custody under either one for purposes of habeas review. *See Garlotte v. Fordice*, 515 U.S. 39, 45–46 (1995) (citing *Peyton v. Rowe*, 391 U.S. 54, 67 (1968)).

Id. at *2.

Another example is found in the Tenth Circuit. In *Herrera v. Dorman*, the United States District Court for the District of New Mexico was faced with determining whether a prisoner was "in custody" for habeas purposes. *Herrera v. Dorman*, Case No. 13-1176 MV/SCY, 2015 WL 13662585 (D.N.M. Mar. 24,

2015). There, the prisoner had completed two sentences at issue in a complaint brought pursuant to 42 U.S.C. § 1983, but was not released from custody after completion of those sentences and was kept continuously in custody in connection with a separate conviction. *Id.* at *1. Relying on *Garlotte*, the district court determined the prisoner was "in custody" for habeas purposes under the completed sentences because he had remained in custody after he served the those completed sentences that were at issue in the case:

> Here, it is undisputed that Plaintiff remained incarcerated after he served the sentences at issue in this action. Specifically, although he was released from his custodial obligations in connection with the challenged sentences on August 24, 2012, he was not released from custody but rather "released to new charges pending and a probation violation case." Doc. 40-1. Plaintiff thus continues to serve a "continuous stream" or "one continuous sentence" in the custody of the NMCD. Under *Garlotte*, Plaintiff is "in custody" for purposes of habeas relief.

Id. at *4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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June 13, 2024

APPENDIX

APPENDIX A – Opinion of the Eleventh Circuit Court of Appeals, Feb. 5, 2024

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11565

Reilly v. Sec'y, Fla. Dep't of Corrs.

Before JORDAN, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

Sean Reilly's 2020 habeas corpus petition, *see* 28 U.S.C. § 2254, sought to challenge a 2009 Florida conviction and judgment for criminal use of identification. The district court dismissed the petition for lack of subject-matter jurisdiction on two alternative grounds. First, it ruled that the petition was an unauthorized second or successive application. *See* 28 U.S.C. § 2244(b)(3). Second, it concluded that Mr. Reilly was not "in custody" on the 2009 judgment when he filed the petition. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a). Following oral argument and a review of the record, we affirm.[1]

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[1] As we write for the parties, we set out only what is necessary to explain our decision. For a fuller procedural summary of Mr.

The 2009 Judgment. For the 2009 criminal use of identification conviction, the state court sentenced Mr. Reilly on Count 1 to 11 months and 29 days of imprisonment, followed by two years of community control and two years of probation. As to Count 5, the state court sentenced him to two years of community control followed by two years of probation, to run consecutive to the incarcerative portion of the sentence on Count 1 but concurrent with the supervisory portions of the sentence on Count 1.

The 2010 Conviction and VOP Judgment. In March of 2010, Mr. Reilly was convicted of witness tampering, and in December of 2010, he was found to have violated the conditions of his supervision/probation for the 2009 judgment. The state court imposed a sentence of 60 months' imprisonment as to Count 1 of the 2009 conviction and a split sentence of two years of community control followed by two years of probation as to Count 5 of the 2009 conviction.

The 2015 Conviction and VOP Judgment. In April of 2015, while he was serving the supervisory portion of the sentence from the 2010 violation judgment, Mr. Reilly was convicted of aggravated stalking and found to have violated the conditions of his probation/supervision on that judgment. The state court imposed a sentence of five years' imprisonment

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Reilly's judgments and habeas corpus petitions, *see Reilly v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 7179321 (11th Cir. Nov. 1, 2023). Most of the facts are taken from our summary in that case.

for the aggravated stalking conviction and five years' imprisonment for the violation of probation, to be served consecutively.

To satisfy the "in custody" requirement, a "habeas petitioner [must] be in custody under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) (holding that a petitioner was not in custody on a decades- old conviction, for which he had served the entirety of the sentence, just because that conviction was used to enhance his sentence) (citation and internal quotation marks omitted). In *Lackawanna County District Attorney v. Coss*, the Supreme Court held that:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so un- successfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

532 U.S. 394, 403–04 (2001) (citation omitted). And in *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995), the Court held that a state prisoner incarcerated under

consecutive sentences may apply for federal habeas relief from the conviction that ran first in the series even though he had already served that sentence and was serving the next in the series.

In his 2020 petition, Mr. Reilly sought to challenge the initial 2009 judgment. At the time he filed that petition, however, he had served the imprisonment portion of that judgment (i.e., the 11 months and 29 days initially imposed, and the five years imposed in the 2010 VOP judgment). He was serving the five-year sentence imposed in the 2015 aggravated stalking conviction and had not begun to serve the consecutive five-year sentence imposed in the 2015 VOP judgment. He was therefore "in custody" under *Garlotte* for purposes of both the 2015 conviction and 2015 VOP adjudication. But that does not help him because the 2020 petition did not challenge the 2015 conviction or the 2015 VOP adjudication in any way. *See Reilly*, 2023 WL 7179321, at *2 (explaining that the 2015 VOP adjudication was challenged in a different petition filed in 2021). As noted earlier, the judgment under attack in the 2020 petition was the 2009 judgment.

We conclude that Mr. Reilly was not "in custody" on the 2009 judgment when he filed the 2020 habeas corpus petition. The district court's dismissal of that petition for lack of subject-matter jurisdiction is therefore affirmed. *See Clement v. Florida*, 59 F.4th 1204, 1209 (11th Cir. 2023) ("in custody" requirement of § 2254(a) is jurisdictional).[2]

AFFIRMED.

APPENDIX B – Magistrate's Report and Recommendation, February 2, 2021

United States District Court for the Northern District of Florida

Sean P. REILLY, Petitioner,

v.

Mark S. INCH, Respondent.

Case No.: 4:20cv145/TKW/EMT

Signed 02/02/2021

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

ELIZABETH M. TIMOTHY, CHIEF UNITED STATES MAGISTRATE JUDGE

***1 This matter is before** the **court on Petitioner Sean P. Reilly's** (Reilly) petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 1). Respondent (the State) moved to dismiss the petition as an unauthorized successive petition (ECF No. 8).

Reilly filed a response in opposition to the motion to dismiss (ECF No. 13). The court directed the State to reply to Reilly's argument (*see* ECF No. 14). The State filed a reply, arguing an alternative jurisdictional basis for dismissal (ECF No. 17). The court directed Reilly to respond to the State's additional argument (*see* ECF No. 18). Reilly has now filed his response (ECF No. 19).

This case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district judge regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2(B); *see also* 28 U.S.C. § 636(b)(1)(B)–(C). After careful consideration of the filings and attachments presented by the parties, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, and that Reilly's § 2254 petition should be dismissed.

I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Reilly challenges a judgment rendered on September 22, 2009, in the Circuit Court in and for Leon County, Florida, Case No. 2008-CF-4221 (2009 Original Judgment) (ECF No. 1 at 1; ECF No. 13 at 1). The state court entered the 2009 Original Judgment after a jury found Reilly guilty of two counts of criminal use of personal identification information (Counts 1 and 5) (*see* 2009 Original Judgment, ECF No. 17-1 at 4–12). The court withheld adjudication of guilt (*id.*). As to Count 1, the state court sentenced Reilly to a "split" sentence of 11 months and 29 days in jail, with pre-

sentence credit of 226 days, followed by two years of community control and then followed by two years of probation (*id.*). As to Count 5, the court sentenced Reilly to a "split" sentence of two years of community control followed by two years of probation, to run consecutively to the incarcerative portion of the sentence on Count 1 but concurrently with the supervisory portions of the sentence on Count 1 (the community control and probation portions) (*id.*).

According to the record in another of Reilly's federal habeas cases, Case No. 4:18cv253/WS/GRJ, on March 4, 2010, a jury found Reilly guilty of tampering with a witness in Leon County Circuit Court Case No. 2008-CF-781(*see* ECF No. 12-13 at 3–9 in Case No. 4:18cv253/WS/GRJ). On March 12, 2010, the court sentenced Reilly, in Case No. 2008-CF-781, to a "split" sentence of ten months in jail, with credit for 107 days, followed by two years of community control and another two years of probation (*see* ECF No. 12-1 at 3–9 in Case No. 4:18cv253/WS/GRJ). The court ordered the incarcerative portion of the sentence to run consecutively to the jail sentence in Case No. 2008-CF-4221, and the court ordered the supervisory portions of the sentence to run concurrently with the supervisory portions of the sentences in Case No. 2008-CF-4221 (*see id.*).

***2** On September 10, 2010, while Reilly was serving the supervisory portions of his sentences in Case Nos. 2008-CF-4221 and 2008-CF-781, the Florida Department of Corrections (the supervising agency) filed a violation report charging Reilly with twelve counts of violating his supervision (*see* ECF No. 17-1

at 14–55). On December 6, 2010, the state court found Reilly guilty of violating the conditions of his supervision in both cases, and revoked his supervision (*see* ECF No. 17-1 at 57–66; *see also* ECF No. 12-1 at 18–25 in Case No. 4:18cv253/WS/GRJ).1 In Case No. 2008-CF-4221, the court sentenced Reilly on Count 1 to sixty months of imprisonment, with pre-sentence credit of 471 days (2010 VOP Judgment) (*see* ECF No. 17-1 at 57–66). On Count 5, the court sentenced Reilly to a "split" sentence of two years of community control followed by two years of probation, to run consecutively to the prison sentence on Count 1 (*id.*). In Case No. 2008-CF-781, the court sentenced Reilly to four years in prison, to run concurrently with the sentence in Case No. 2008-CF-4221 (*see* ECF No. 12-1 at 18–25 in Case No. 4:18cv253/WS/GRJ). The judgments (the 2010 VOP Judgment in Case No. 2008-CF-4221 and the judgment in Case No. 2008-CF-781) rendered on the date the court imposed the sentences (*see* ECF No. 17-1 at 57–66).2

According to the record in Case No. 4:18cv225/MW/CAS, on December 6, 2013, the State filed an "Emergency Motion to Revoke Probation and Order Defendant's Arrest and Hold Without Bond" (*see* ECF No. 26-15 at 73–74 in Case No. 4:18cv225/MW/CAS). At that time, Reilly's sentence in Case No. 2008-CF-781 had expired, and he was serving his supervisory sentence imposed by the 2010 VOP Judgment in Case No. 2008-CF-4221 (*see id.*). Reilly was charged with a new law violation of aggravated stalking in Leon County Circuit Court Case No. 2014-CF-17 and violating his supervision in

Case No. 2008-CF-4221 (*see* ECF No. 26-15 at 83–85 in Case No. 4:18cv225/MW/CAS). Following a combined nonjury trial on the new charge in Case No. 2014-CF-17 and VOP hearing in Case No. 2008-CF-4221, on April 6, 2015, the state court found Reilly guilty of aggravated stalking in Case No. 2014-CF-17 and guilty of violating his supervision in Case No. 2008-CF-4221 (imposed by the 2010 VOP Judgment) (*see* ECF No. 26-15 at 91–92 in Case No. 4:18cv225/MW/CAS). On June 18, 2015, the court sentenced Reilly to five years in prison in Case No. 2014-CF-17 (*see* ECF No. 26-15 at 110–66 in Case No. 4:18cv225/MW/CAS). The court sentenced Reilly on the VOP in Case No. 2008-CF-4221 to five years in prison, with pre-sentence credit of 786 days, to run consecutively to the sentence imposed in Case No. 2014-CF-17 (2015 Second VOP Judgment) (*see* ECF No. 26-15 at 93–101, 110–66 in Case No. 4:18cv225/MW/CAS).

The parties do not dispute that on April 27, 2018, Reilly filed a § 2254 petition in this court, Case No. 4:18cv225/MW/CAS (*see* ECF No. 8 at 1–2; ECF No. 13 at 1). *See Reilly v. Inch*, Case No. 4:18cv255/MW/CAS, Petition, ECF No. 1 (N.D. Fla. May 1, 2018). Reilly subsequently filed an amended petition in that case. *See id.*, Amended Petition, ECF No. 22 (N.D. Fla. Feb. 21, 2019). In both the initial and amended petitions, Reilly identified the 2010 VOP Judgment as the judgment he was challenging, and all of his claims related to the 2010 VOP Judgment. This district court denied Reilly's § 2254 petition on the merits in an order rendered on December 16, 2019. *See*

id., Order Accepting Report and Recommendation, ECF No. 44 (N.D. Fla. Dec. 16, 2019).

***3** Reilly commenced the instant § 2254 case on March 9, 2020, while he was still serving his five-year sentence in Case No. 2014-CF-17 and before he began serving his 2015 Second VOP sentence in Case No. 2008-CF-4221 (*see* ECF No. 1). In his § 2254 petition, Reilly identifies the 2009 Original Judgment as the judgment of conviction he is challenging (*see id.* at 1). All of the claims presented in the habeas petition challenge the 2009 Judgment (*see id.* at 3–13).

II. DISCUSSION

The State contends the court lacks jurisdiction to consider Reilly's § 2254 petition on two alternative grounds. First, Reilly's petition is a "second or successive" application which is subject to dismissal under § 2244(b) (*see* ECF No. 8). Second, Reilly was not "in custody" pursuant to the 2009 Original Judgment when he filed this habeas case (*see* ECF No. 17).

A. "Second or Successive" Analysis

The State contends Reilly previously challenged the Leon County judgment in Case No. 2008-CF-4221 in his first § 2254 action, Case No. 4:18cv225/MW/CAS (*see* ECF No. 8). Therefore, the instant § 2254 petition is second or successive (*see id.*).

Reilly contends two separate judgments were entered in Leon County Case No. 2008-CF-4221, the 2009

Original Judgment and the 2010 VOP Judgment, each of which followed a separate trial (*see* ECF No. 13). Reilly contends he challenged *only* the 2010 VOP Judgment in his first § 2254 action, and he is challenging *only* the 2009 Original Judgment in the instant habeas case (*see id.*). Reilly further asserts he *could not* challenge both the 2009 Original Judgment and the 2010 VOP Judgment in one habeas action, because Rule 2(e) of the Rules Governing Section 2254 Cases in the United States District Courts (Federal Habeas Rules) prohibits challenges to judgments from more than one state court in the same § 2254 petition (*id.* at 3). Reilly contends because his first § 2254 petition attacked a separate judgment than the instant § 2254 petition, the instant petition is not "second or successive" for purposes of section 22544(b) (*see id.*). Reilly cites *Harris v. Wainwright*, 470 F.2d 190 (5th Cir. 1972) in support of his argument.3

Section 2244 provides, in relevant part:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on

collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

*4 28 U.S.C. § 2244 (emphasis added); *see also* Rule 9, Rules Governing Section 2254 Cases in the United States District Courts (2015) ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."). A district court lacks jurisdiction to hear a second or successive § 2254 petition absent authorization from a Court of Appeals. 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147, 152 (2007) (holding that district court lacked jurisdiction to entertain second habeas petition because prisoner failed to obtain order

from court of appeals authorizing him to file it); *Fugate v. Dep't of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2002) (same).

The phrase "second or successive," however, does not simply refer to all habeas petitions filed second or successively in time. *See Magwood v. Patterson*, 561 U.S. 320 (2010). Instead, "the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Id.* at 2797. Where an intervening judgment comes in between the filing of two habeas petitions, the "application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 2802. "[T]he existence of a new judgment is dispositive." *Id.* at 2800. "[W]hen a habeas petition is the first to challenge a new judgment, it is not 'second or successive,' regardless of whether its claims challenge the sentence or the underlying conviction." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014)

Here, Reilly is not challenging a new, intervening judgment which rendered *after* he filed his first habeas petition in 2018, Case No. 4:18cv225/MW/CAS. Both the 2009 Original Judgment and the 2010 VOP Judgment rendered *before* he filed his 2018 habeas petition challenging the 2010 VOP Judgment; indeed, even the 2015 Second VOP Judgment had rendered by the time Reilly filed his first section 2254 petition. Further, all of the alleged defects in the 2009 proceedings were available to Reilly when he filed his 2018 federal petition; therefore, he could have, indeed should have, asserted challenges to any or all of the judgments (i.e.,

the 2009 Original Judgment, 2010 VOP Judgment, and 2015 Second VOP Judgment) in his 2018 federal petition. *Cf.* *Stewart v. United States*, 646 F.3d 856, 863–65 (11th Cir. 2011) (holding that there is "a small subset of unavailable claims that must not be categorized as successive," including instances where "the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous [federal] petition ...." (internal quotation marks and citation omitted)).

Additionally, Reilly's contention that the Federal Habeas Rules prohibited him from challenging both the 2009 Original Judgment and the 2010 VOP Judgment in his first § 2254 is without merit. Rule 2(e) of the Federal Habeas Rules provides, "A petitioner who seeks relief from judgments of *more than one state court* must file a separate petition covering the judgment or judgments of each court." Fed. Habeas Rule 2(e) (emphasis added). Here, the 2009 Original Judgment, the 2010 VOP Judgment, and even the 2015 Second VOP Judgment were not only rendered by the same state court, i.e., the Leon County Circuit Court, they were rendered in the same state court case. Therefore, Reilly could have challenged any or all of those judgments in his first § 2254 case. *See, e.g.*, *Stallworth v. McDonough*, No. 3:05cv427/RV/MD, 2007 WL 1789253 (N.D. Fla. June 19, 2007) (adjudicating merits of § 2254 petition which challenged judgments of same state court rendered in separate state criminal cases) (cited as persuasive authority); *Yeager v. Crosby*, No. 6:03CV10460RL-

18JGG, 2006 WL 1641914 (M.D. Fla. June 8, 2006) (same).

***5** Finally, Reilly's reliance upon *Harris* is misplaced. *Harris* was decided *before* the effective date of the AEDPA and its limitations on filing second or successive habeas corpus petitions. No court has applied *Harris* in the post-AEDPA context, and it should not be applied in this case.

B. "In Custody" Analysis

The State presents an alternative jurisdictional basis for dismissal, i.e., that Reilly was not "in custody" pursuant to the 2009 Judgment when he filed the instant § 2254 petition (*see* ECF No. 17). The State notes that Reilly concedes the instant petition "challenges a completely different judgment and sentence" than the one challenged in his first habeas case, Case No. 4:18cv225/MW/CAS (*id.* at 2). The State argues that as a result of the new 2010 VOP judgment and sentence, Reilly was not "in custody" under the 2009 Judgment and sentence when he filed the instant § 2254 petition (*id.* at 3–4). Therefore, the court lacks jurisdiction over the claims asserted in the instant petition (*id.* at 4). The State cites *Maleng v. Cook*, 490 U.S. 488, 490–92 (1989), *Diaz v. State of Fla. Fourth Judicial Cir. ex rel. Duval Cnty.*, 683 F.3d 1261, 1264 (11th Cir. 2012), and unpublished Eleventh Circuit cases in support of its position (*id.* at 3–4).

Reilly responded to the State's "in custody" argument, contending he is in custody under both the 2009

Original Judgment and the 2010 VOP Judgment (ECF No. 19 at 3–5). Reilly further contends Respondent's argument fails to acknowledge that he is actively serving the 2015 Second VOP Judgment imposed on June 18, 2015 (*id.*). Reilly attached a copy of his FDOC Inmate Population Information Detail, which states he is currently serving the 2015 Second VOP Judgment in Case No. 2008-CF-4421 and the Judgment in Case No. 2014-CF017, both of which were imposed on June 18, 2015 (*see id.* at 8). In support of Reilly's argument, he cites two Supreme Court cases, *Maleng* and *Garlotte v. Fordice*, 515 U.S. 39 (1995) (*id.*). Reilly also relies upon law of the Third Circuit, holding that, under Pennsylvania law and federal law, a VOP is not considered a separate offense but an element of the original sentence (*id.*). Reilly argues that because he is serving the sentence imposed by the 2015 Second VOP Judgment, he may challenge the 2009 Original Judgment (*id.*).

To bring a habeas petition, the petitioner must be "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), which the Supreme Court has interpreted as requiring the petitioner to be "in custody" under the conviction or sentence he seeks to attack at the time that he files his petition. *Maleng*, 490 U.S. at 490–91. This "in custody" requirement is jurisdictional. *See Stacey v. Warden, Apalachee Corr. Inst.*, 854 F.2d 401, 403 (11th Cir. 1988). To satisfy the "in custody" requirement, "the habeas petitioner [must] be 'in custody' under the conviction or sentence under attack

at the time his petition is filed." *Maleng*, 490 U.S. at 490–91.

In *Maleng*, the petitioner filed a § 2254 petition listing as the "conviction under attack" a 1958 state conviction for which he had already served the entirety of his sentence. 490 U.S. at 489–490. Maleng also alleged that the 1958 conviction had been "used illegally to enhance his 1978 state sentences" which he had not yet begun to serve because he was at that time in federal custody on an unrelated matter. *Id.* The Supreme Court determined that the petitioner was "in custody" on his 1978 sentences because the State had lodged a detainer against him with the federal authorities. *Id.* at 493. The Court further held that the petitioner was not "in custody" on his 1958 conviction merely because that conviction had been used to enhance a subsequent sentence. *Id.* at 492. The Court acknowledged, however, that because his § 2254 petition "[could] be read as asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction," the petitioner satisfied the "in custody" requirement for federal habeas jurisdiction." *Id.* at 493–494.

***6** In *Maleng*, the Court explicitly left unanswered the following question: "the extent to which the [prior expired] conviction itself may be subject to challenge in the attack upon the [current] senten[ce] which it was used to enhance." 490 U.S. at 494. The Court subsequently answered that question in *Lackawanna Cnty. Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001). In *Lackawanna*, the Court held:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

532 U.S. at 403–04 (citation omitted). The Court recognized an exception to this rule for cases in which the prior conviction (used to enhance the present sentence) was obtained without the benefit of counsel, in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Lackawanna*, 532 U.S. at 404.[4]

In *Garlotte*, the other Supreme Court case cited by Reilly, the Supreme Court held that a state prisoner incarcerated under consecutive state-court sentences may apply for federal habeas relief from the conviction and sentence that ran first in the consecutive series, even though he already served that sentence and was serving the next in the series. 515 U.S. at 41. The Court described its decision in *Garlotte* as the "complement" of *Peyton v. Rowe*, 391 U.S. 54 (1968) or "*Peyton* in reverse." 515 U.S. at 41. In *Peyton*, the Court held that a prisoner incarcerated under consecutive state-court sentences may apply for federal habeas relief from the sentence he had not yet begun to serve. 391 U.S. at 64–65.

When Reilly filed the instant habeas case, on March 9, 2020, he was serving his five-year sentence in Case No. 2014-CF-17 and had not yet begun to serve his consecutive five-year sentence on the 2015 Second VOP sentence in Case No. 2008-CF-4221. Reilly's § 2254 petition does not challenge either of those judgments, instead, his petition and claims challenge the 2009 Original Judgment (*see* ECF No. 1). Even if the court construed Reilly's § 2254 petition as challenging the 2015 Second VOP Judgment, Reilly may not collaterally attack the prior conviction and expired sentence from the 2009 Original Judgment unless he alleged he did not have counsel in the 2009 proceeding. *See Lackawanna*, 532 U.S. at 404. Reilly does not allege, nor can he demonstrate, he did not have counsel in the original 2009 case—in fact, Reilly admits he had counsel during that proceeding and argues, in all five of the claims presented in his § 2254 petition, that his counsel was ineffective during the 2009 proceedings (*see* ECF No. 1). Because Reilly cannot establish that he was convicted without counsel in the proceeding which culminated in the 2009 Original Judgment, he is precluded from challenging that conviction in the instant case. *Hubbard v. Haley*, 317 F.3d 1245, 1256 n.20 (11th Cir. 2003) (noting that the exception recognized in *Lackawanna* was not implicated where the petitioner was represented by counsel at trial); *see also, e.g., Jackson v. Sec'y for Dep't of Corr.*, 206 F. App'x 934, 937 (11th Cir. 2006) (holding that petitioner could not challenge expired conviction because he failed to show a "*Gideon*–type" violation).

III. CONCLUSION

*7 It appears that Reilly's § 2254 petition is an unauthorized second or successive petition. Additionally, *Lackawanna* precludes the court from reviewing the claims presented in Reilly's § 2254 petition. Therefore, his petition should be dismissed.

IV. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

"Section 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.' " *Miller-El v. Cockrell*, 537 U.S. 322 336 (2003) (quoting § 2253(c)(2)). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Buck v. Davis*, — U.S.—, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327). The petitioner here cannot make that showing. Therefore, the undersigned

recommends that the district court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Thus, if there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Accordingly, it is respectfully **RECOMMENDED** that:

1. The federal habeas petition (ECF No. 1) be **DISMISSED**.

2. A certificate of appealability be **DENIED**.

3. The clerk of court enter judgment accordingly and close this case.

At Pensacola, Florida, this 2nd day of February 2021.

/s/ Elizabeth M. Timothy

ELIZABETH M. TIMOTHY

CHIEF UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen

days of the date of the Report and Recommendation. Any different deadline that may appear on the electronic docket is for the court's internal use only and does not control. An objecting party must serve a copy of the objections on all other parties. A party who fails to object to the magistrate judge's findings or recommendations contained in a report and recommendation waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

All Citations

Not Reported in Fed. Supp., 2021 WL 1091519

Footnotes

1

The transcript of this hearing is part of the record in Case No. 4:18cv225/MW/CAS (*see* ECF No. 26-11 at 34–95 in that case)—another habeas case initiated by Reilly in this district.

2

Reilly challenged the judgment in Case No. 2008-CF-781 in a § 2254 petition filed in *Reilly v. State of Florida*, Case No. 4:18cv253/WS/GRJ, Petition, ECF No. 1 (N.D. Fla. May 23, 2018). The court dismissed the petition for lack of jurisdiction, because Reilly did not satisfy the "in custody" requirement for

challenging that judgment. *See id.*, Order (N.D. Fla. Mar. 21, 2019).

3

In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit Court of Appeals issued before the close of business on September 30, 1981.

4

Justice O'Connor also recognized that a possible exception might exist when a state court has, without justification, refused to rule on a properly presented constitutional claim or when the defendant has obtained compelling evidence of innocence after the time for direct or collateral review has passed. *Lackawanna*, 532 U.S. at 405. She noted that in such situations, a habeas petition directed at the enhanced sentence may be the first, and only, forum available for review of the prior conviction. Justice O'Connor, however, wrote only for a plurality with respect to her discussion of these latter two exceptions, neither of which is applicable here.

APPENDIX C – District Court Order Adopting Report and Recommendation, March 22, 2021

United States District Court for the Northern District of Florida

Sean P. REILLY, Petitioner,

v.

Mark S. INCH, Respondent.

Case No.: 4:20cv145/TKW/EMT

Signed 03/22/2021

Attorneys and Law Firms

Sean P. Reilly, South Bay, FL, pro se.

Michael B. McDermott, Office of the Attorney General, Tallahassee, FL, for Respondent.

ORDER

T. KENT WETHERELL, II, UNITED STATES DISTRICT JUDGE

*1 This case is before the Court based on the magistrate judge's Report and Recommendation (R&R) (Doc. 20), Petitioner's motion requesting an evidentiary hearing (Doc. 21), Petitioner's memorandum of law in support of motion to expand

the record (Doc. 22),1 and Petitioner's objections to the R&R (Doc. 27) The R&R recommends dismissal of Petitioner's habeas petition on jurisdictional grounds without reaching the merits, whereas Petitioner's post-R&R motions seek relief related to the merits of the petition.

The Court reviewed the issues raised in the objections de novo pursuant to Fed. R. Civ. P. 72(b)(3). Based on that review, the Court agrees with the magistrate judge's determination that Petitioner's habeas petition should be dismissed on jurisdictional grounds. That ruling renders Petitioner's post-R&R motions moot.

Accordingly, it is **ORDERED** that:

1. The R&R is adopted and incorporated by reference in this order.

2. Petitioner's habeas petition (Doc. 1) is **DISMISSED**.

3. A certificate of appealability is **DENIED**.

4. Petitioner's post-R&R motions (Docs. 21, 22) are **DENIED** as moot.

5. The Clerk shall close the case file.

DONE AND ORDERED this 22nd day of March, 2021.

/s/ T. Kent Wetherell, II

T. KENT WETHERELL, II

UNITED STATES DISTRICT JUDGE

All Citations

Not Reported in Fed. Supp., 2021 WL 1088434

Footnotes

1

The record does not contain a separate motion to expand the record, so the memorandum will be treated as a motion.

APPENDIX D – District Court Judgment, March 22, 2021

United States District Court for the Northern District of Florida

Sean P. REILLY, Petitioner,

v.

Mark S. INCH, Respondent.

Case No.: 4:20cv145/TKW/EMT

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petitioner take nothing and that this action be DISMISSED. A certificate of appealability is DENIED.

JESSICA J. L YUBLANOVITS

CLERK OF COURT

March 22, 2021 /s/ Monica Broussard
Date Deputy Clerk: Monica Broussard

APPENDIX E – Denial of Petition for Panel Rehearing, March 14, 2024

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11565

Reilly v. Sec'y, Fla. Dep't of Corrs.

Before JORDAN, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Sean P. Reilly is DENIED.

Appendix F – 28 U.S.C. § 2241

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28 U.S.C.A. § 2241

§ 2241. Power to grant writ

Currentness

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the

commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer,

treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Pub.L. 89-590, Sept. 19, 1966, 80 Stat. 811; Pub.L. 109-148, Div. A, Title X, § 1005(e)(1), Dec. 30, 2005, 119 Stat. 2741; Pub.L. 109-163, Div. A, Title XIV, § 1405(e)(1), Jan. 6, 2006, 119 Stat. 3477; Pub.L. 109-366, § 7(a), Oct. 17, 2006, 120 Stat. 2635; Pub.L. 110-181, Div. A, Title X, § 1063(f), Jan. 28, 2008, 122 Stat. 323.)

VALIDITY

<The United States Supreme Court has held a provision of this section, as added and amended by section 1005(e)(1) of Pub.L. 109-148 and section 7(a) of Pub.L. 109-366 (28 U.S.C.A. § 2241(e)), denying federal courts jurisdiction to hear habeas corpus action by an alien detained and determined to be enemy combatant, or awaiting such determination, an unconstitutional suspension of the writ of habeas corpus under the Suspension Clause, Art. I, § 9, clause 2. Boumediene v. Bush, U.S.2008, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41.>

Appendix G – 28 U.S.C. § 2254

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28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(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.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual

determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

No. _____

In the Supreme Court of the United States

SEAN REILLY,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondent,

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

CERTIFICATION OF WORD COUNT

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Counsel for Appellant
Appointed Pursuant to 18 U.S.C. § 3006A

June 13, 2024

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for a Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 2,191 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 13th day of June, 2024.

/s/ W. Chambers Waller IV

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No. _____

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SEAN REILLY,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondent,

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

DECLARATION OF SERVICE

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Counsel for Appellant
Appointed Pursuant to 18 U.S.C. § 3006A

June 13, 2024

I hereby declare under penalty of perjury that on this 13th day of June, 2024, I served the Petition for a Writ of Certiorari in the above-captioned matter upon the following counsel for Respondent by sending three copies of same via commercial mail carrier, to be delivered within three days:

Thomas H. Duffy
Assistant Attorney General
Florida Bar No. 470325
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

On the same date as above, I sent to this Court forty copies of the Petition for a Writ of Certiorari and three hundred dollar filing fee check via commercial mail carrier, to be delivered to the Clerk within three days. In addition, the brief has been contemporaneously submitted electronically through the Court's electronic filing system.

I declare under penalty of perjuy that the foregoing is true and correct.

DATED this 13th day of June, 2024.

/s/ W. Chambers Waller IV
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