No. _____

In the Supreme Court of the United States

In re Alfred Paul Centofanti, III

Alfred Paul Centofanti, III,
Petitioner,
v.
United States District Court, District of Nevada,
Respondent,
and
Dwight W. Neven and the Attorney General of Nevada,
Real parties in interest.

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

Petition for a writ of certiorari

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QUESTION PRESENTED

Mr. Centofanti is a state prisoner litigating a federal habeas petition under 28 U.S.C. §2254. He has substantial claims for relief. He also has substantial health issues, including recent cancer treatment, which put him at an elevated risk for negative health outcomes if he contracts the novel coronavirus.

Because the pandemic poses an imminent threat to his health while he remains in prison, Mr. Centofanti filed a motion in the district court seeking release on an interim basis while he continued to litigate his federal habeas petition. The district court denied the motion. Mr. Centofanti attempted to pursue an interlocutory appeal, but the Ninth Circuit refused to allow an appeal. Applying its prior precedent, the Ninth Circuit instead required Mr. Centofanti to challenge the district court's decision through a mandamus petition, not a normal appeal. As a result, the Ninth Circuit applied a more deferential standard of review to the district court's decision, and it accordingly denied the mandamus petition.

The Ninth Circuit is one of only two circuit courts of appeals that disallow interlocutory appeals of interim release decisions. By contrast, at least seven circuit courts of appeals treat interim release decisions as appealable collateral orders.

The question presented is:

> Is a district court's order granting or denying an interim release motion in a habeas case an appealable collateral order?

List of Parties

Alfred Paul Centofanti, III, is the petitioner. The United States District Court, District of Nevada, is the respondent to the mandamus petition. Dwight W. Neven (the former warden of High Desert State Prison) and the Attorney General of the State of Nevada are the real parties in interest in the mandamus proceedings and the respondents in the underlying habeas proceedings. No party is a corporate entity.

LIST OF PRIOR PROCEEDINGS

This mandamus proceeding arises from a federal habeas case challenging a state court judgment of conviction.

The underlying state trial proceedings took place in *State* v. *Centofanti*, Case No. C172534 (Nev. Eighth Jud. Dist. Ct.) (judgment of conviction issued Mar. 11, 2005). The direct appeal took place in *Centofanti* v. *Nevada*, Case No. 44984 (Nev. Sup. Ct.) (order issued Dec. 27, 2006).

The initial state collateral review proceedings took place in *Centofanti* v. *McDaniel*, Case No. C172534 (Nev. Eighth Jud. Dist. Ct.) (order issued June 6, 2011). An appeal took place in *Centofanti* v. *Nevada*, Case No. 58562 (Nev. Sup. Ct.) (order issued June 3, 2013).

A second round of state collateral review proceedings took place in *Centofanti* v. *McDaniel*, Case No. C172534 (Nev. Eighth Jud. Dist. Ct.) (order issued Jan. 29, 2019). An appeal is taking place in *Centofanti* v. *Nevada*, Case No. 78193 (petition for review pending in the Nevada Supreme Court).

There are no related federal proceedings besides the proceedings in the district court and the Ninth Circuit below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alfred Centofanti respectfully requests the Court issue a writ of certiorari to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit issued an unpublished memorandum opinion denying mandamus relief. Pet. App. 4-8; see *Centofanti* v. *Neven*, 820 F. App'x 555 (9th Cir. 2020). The federal district court's order denying interim release is likewise unpublished. Pet. App. 15-23; see *Centofanti* v. *Neven*, No. 2:13-cv-01080-JAD-PAL, 2020 WL 2114360 (D. Nev. May 4, 2020).

JURISDICTION

Mr. Centofanti is seeking habeas relief and challenging his state court judgment of conviction under 28 U.S.C. §2254. Pet. App. 36-37. Mr. Centofanti attempted to appeal the district court's decision denying interim release, but the court of appeals below incorrectly concluded it lacked jurisdiction over an interlocutory appeal and instead construed the appeal as a request for mandamus relief. The Ninth Circuit issued an order denying mandamus relief on July 20, 2020. Pet. App. 4-8. It denied rehearing on August 26, 2020. Pet. App. 2. This Court's March 19, 2020, standing order had the effect of extending the time within which to file a petition for a writ of certiorari in this case to January 25, 2021. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under 28 U.S.C. §2254(d), a federal court may grant relief on a claim a state court rejected on the merits if the state court's 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.

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, in relevant part guarantees a criminal defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

INTRODUCTION

This petition raises the question whether an order granting or denying interim release in a habeas proceeding is an immediately appealable collateral order, or instead an unappealable interlocutory order. As a threshold matter, all circuit courts of appeals that have reached the issue agree a habeas petitioner may request interim release on an emergency basis while a habeas petition is pending in the district court. See *Hall* v. *San Francisco Superior Court*, Case No. C 09-5299 PJH, 2010 WL 890044, at *2 (N.D. Cal. Mar. 8, 2010) (collecting "overwhelming authority"). An interim release request is akin to a preliminary injunction motion: interim release motions typically argue the petitioner has a strong case for relief on the merits and would suffer irreparable harm by remaining in prison pending a final decision. For example, Mr. Centofanti has a substantial juror bias claim and faces irreparable harm if he remains in prison during the pandemic, based on the elevated risk of viral transmission in correctional facilities, along with his own individual health vulnerabilities stemming from recent cancer treatment.

Although the circuit courts agree a petitioner may seek interim release, the courts are intractably split about whether and how petitioners and wardens may seek appellate review of district court decisions granting or denying release. Seven circuit courts have issued published opinions agreeing these decisions are appealable collateral orders. By contrast, two circuit courts have issued published opinions concluding these decisions are non-appealable interlocutory orders. In those circuits, an

aggrieved party must pursue mandamus relief, which triggers a daunting standard of review and places a heavy thumb on the scale of the district court's decision.

This Court's review is needed to resolve this split. The circuit courts have dug themselves into a deep, 7-2 split, and additional percolation is unlikely to resolve the disagreement. The issue is both recurring and significant, especially now when a dangerous pandemic places inmate lives at risk. The majority position is correct: a decision granting or denying interim release is sufficiently separate from the underlying merits that interlocutory review is appropriate. And this case poses an exceptional vehicle for resolving the question. The Court should grant certiorari.

STATEMENT

1. The underlying criminal case at issue in this habeas proceeding involves allegations Mr. Centofanti shot and killed his ex-wife. Mr. Centofanti went to trial and argued self-defense. The jury ultimately convicted Mr. Centofanti of first-degree murder, and the court sentenced him to life without the possibility of parole.

During voir dire, the trial court directly addressed potential jurors about their experiences with the criminal justice system. The court asked one prospective juror, Caren Barrs, "Have you or a close friend or family member ever been involved in the criminal justice process, either in prosecuting a case, or as a witness, or as a defendant?" Ms. Barrs answered, "My son is incarcerated in New York State on a burglary charge." She didn't directly answer whether she *personally* had ever been involved in the criminal justice process, including as a defendant herself. In truth, Ms. Barrs

had previously been convicted of a felony in Florida and was therefore ineligible to serve as a juror under Nevada law. See NRS 6.010.

After the verdict, Mr. Centofanti hired a new attorney who uncovered Ms. Barrs's undisclosed felony conviction and filed a corresponding motion for a new trial. The motion explained how before voir dire, Ms. Barrs would've received paperwork instructing her to call the jury commissioner's office, and the office's phone system would've prompted her to disclose whether she had any prior felony convictions. It also explained Ms. Barrs responded evasively during voir dire when the court asked her about her and her family's prior experiences with the criminal justice system: while she mentioned her son, she failed to disclose her own prior conviction.

The State filed a response attaching an affidavit from Ms. Barrs. In the affidavit, Ms. Barrs conceded she had a prior felony conviction, but she said she'd disclosed the felony to the jury commissioner twice, once on the telephonic survey, and once again in writing. Ms. Barrs also asserted she'd had her civil rights restored, which would make her an eligible juror.

Mr. Centofanti submitted a reply attaching an affidavit from the jury commissioner, who insisted Ms. Barrs hadn't disclosed her felony conviction to the office. The reply also included documentation from Florida confirming Ms. Barrs hadn't had her civil rights restored.

The trial court held argument on the new trial motion and denied it without conducting an evidentiary hearing.

On direct appeal, Mr. Centofanti raised a Sixth Amendment juror bias claim because Ms. Barrs had intentionally concealed her disqualifying felony conviction. The State ultimately conceded Ms. Barrs was ineligible to serve as a juror, and it separately admitted there was a genuine factual dispute about whether she had disclosed her conviction to the jury commissioner. In his reply brief, Mr. Centofanti faulted the state district court for failing to hold an evidentiary hearing before resolving the new trial motion.

The Nevada Supreme Court rejected the claim. As it explained, "it appears that Juror Barrs intentionally concealed her felony status" during voir dire. Pet. App. 30. Nonetheless, the court stated relief would be appropriate only if Mr. Centofanti had established "actual or implied bias," and it concluded he hadn't. *Ibid.*

2. In 2019, while still in prison and while continuing to seek post-conviction relief, doctors diagnosed Mr. Centofanti with stage four Hodgkin lymphoma. He received twelve rounds of chemotherapy ending in early 2020. As side effects from the chemotherapy, Mr. Centofanti developed diminished lung capacity and a serious cardiac condition.

Around the same time as his chemotherapy was ending, the novel coronavirus began to spread throughout the United States. Since then, the pandemic has continued to grow unabated, with average daily cases reaching almost 185,000 nationwide. See "Covid in the U.S.: Latest Map and Case Count," The New York Times (Jan. 21, 2021), *available at* https://nyti.ms/2H6pmvG (last visited Jan. 21, 2021) (hereinafter "U.S. Case Count"). The numbers are equally concerning in Nevada. See "Nevada

Covid Map and Case Count," The New York Times (Jan. 21, 2021), *available at* https://nyti.ms/2Uy7WLE (last visited Jan. 21, 2021).

As troubling as the pandemic has been for all Americans, it's posed an especially elevated risk to inmates, since jails and prisons face a high likelihood of experiencing outbreaks. See, e.g., "U.S. Case Count" (noting more than 510,000 people have been infected in jails and prisons across the country, and providing a list of jails and prisons that've experienced outbreaks). Correctional facilities face substantial institutional challenges when it comes to preventing and managing an outbreak. For example, the virus tends to spread when lots of people are indoors together for prolonged periods of time in poorly ventilated locations, especially when individuals are unable to socially distance. That's exactly the sorts of conditions inmates face daily. See, e.g., Letter from Sandro Galea, MD, DrPH, et al., to President Trump (Mar. 27, 2020), *available at* https://bit.ly/39uc7x5 (last visited Jan. 21, 2021). Likewise, a prison can't adequately stop the disease from entering a facility—while wardens can adopt certain screening measures for incoming staff members, they can't be sure a staff member won't enter the facility while being contagious but asymptomatic (or pre-symptomatic).

Thus, unlike individuals in the general public who can guard against contracting the virus—by self-isolating in a private residence, minimizing non-essential activities in public, and taking appropriate precautions while in public (like wearing a mask, using hand sanitizer, and washing hands frequently)—inmates are at the mercy of forces outside their control. Put another way, "inmates everywhere have

been rendered vulnerable and often powerless to protect themselves from harm" amid this extraordinary pandemic. See *Valentine* v. *Collier*, 140 S.Ct. 1598, 1601 (2020) (statement of Sotomayor, J.); see also *Valentine* v. *Collier*, 141 S.Ct. 57, 63 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay).

Nevada prisons in particular have struggled with recent outbreaks. Toward the end of 2020, a large outbreak at Warm Springs Correctional Center infected more than 80 percent of inmates. See Michelle Rindels, "More than 80 percent of inmates at Carson City prison test positive for COVID-19," The Nevada Independent (Nov. 13, 2020), *available at* https://bit.ly/2K7awGo (last visited Jan. 21, 2021). A similarly sized outbreak hit Northern Nevada Correctional Center around the same time. See Greg Hass, "COVID-19 cases explode at Nevada prisons, including 8 inmate deaths," 8 News Now (Dec. 16, 2020), *available at* https://bit.ly/3nLzhG8 (last visited Jan. 21, 2021). Other institutions within the Nevada Department of Corrections have suffered positive inmate cases, including at High Desert State Prison, where Mr. Centofanti is currently housed. *Ibid*.

Although the pandemic poses a grave risk to all inmates, it's particularly dangerous for inmates with the sorts of health conditions Mr. Centofanti is experiencing in the wake of his cancer treatment. See "People with Certain Medical Conditions," Centers for Disease Control and Prevention (Dec. 29, 2020), *available at* https://bit.ly/3f4G6A5 (last visited Jan. 21, 2021).

3. Worried about the danger the pandemic posed to him, Mr. Centofanti filed an emergency motion in the district court requesting interim release. The district court denied the motion.

Mr. Centofanti filed a timely notice of appeal. Once the court of appeals opened the case, he filed a petition for initial hearing en banc. He explained the court's prior precedent erroneously treated interim release decisions as non-appealable interlocutory orders. He therefore asked the court to take the case en banc from the outset to reconsider its appealability precedent. In the alternative, he requested the court construe the appeal as a mandamus proceeding, and he attached a proposed mandamus petition. The court denied the petition for initial hearing en banc but granted the alternative request to construe the appeal as a mandamus proceeding.

After full briefing, the court denied the mandamus petition, concluding Mr. Centofanti hadn't met the stringent standards governing mandamus relief. Pet. App. 4-8. The court then rejected a request for rehearing en banc. Pet. App. 2.

REASONS FOR GRANTING THE PETITION

I. There's a deep split over whether an interim release decision is an appealable collateral order.

The circuit courts of appeals have developed a wide, well recognized disagreement about whether interim release orders are immediately appealable, or whether they instead fail to satisfy the collateral order doctrine. This split in authority warrants this Court's intervention.

A. At least seven circuits treat interim release decisions as appealable collateral orders.

In at least seven circuit courts, petitioners and wardens may immediately appeal interim release decisions as collateral orders.

In *Pagan* v. *United States*, 353 F.3d 1343 (11th Cir. 2003), the Eleventh Circuit considered "whether an order denying or granting bond[1] in a post-conviction relief proceeding is immediately appealable." *Id.* at 1345. It noted "[t]he circuits that have addressed the precise question are split on the issue." *Ibid*; see also *id.* at 1345 n. 4 (collecting cases). It elected to "join the majority of circuits" that treat such orders as collateral orders, following "the well reasoned analysis in *Dotson* v. *Clark*, 900 F.2d 77, 78-79 (6th Cir. 1990)." In the court's view, an interim release order "meets all three elements for a final collateral order" because (1) the decision "conclusively resolves the disputed question"; (2) the issue "can be severed from the merits of the post-conviction relief proceeding"; and (3) the question becomes "moot" once a district court issues a final judgment on the petition. *Id.* at 1345-46. It therefore concluded "a bond order is a collateral and final determination of a prisoner's right to be released during the pendency of a post-conviction relief proceeding." *Id.* at 1346.

In *Grune* v. *Coughlin*, 913 F.2d 41 (2d Cir. 1990), the Second Circuit considered "the appealability of a district court's order denying bail pending habeas review." *Id.* at 43. It noted a split in authority, with at least three circuits finding appealability,

[1] Courts use various interchangeable terms to describe interim release, including "bond" and "bail." The meaning remains the same.

and with two circuits rejecting appealability. *Ibid.* It concluded "an order denying bail meets the requirements of the collateral order doctrine": an interim release request "only seeks release pending the disposition of the petition," and "[i]f there is no interlocutory review of a denial of such relief, the order denying bail is forever unreviewable." *Id.* at 43-44.

In *Dotson* v. *Clark*, 900 F.2d 77 (6th Cir. 1990), the Sixth Circuit considered whether "bail orders pending a review of habeas corpus petitions are appealable." *Id.* at 77. It noted "a significant split in the circuits on the issue" (*ibid*), with at least five circuits allowing an appeal, and two disallowing appeals (*id.* at 77-78). It elected to "join the circuits which hold that habeas corpus bail decisions are appealable." *Id.* at 78. In its view, a "bail order is severable from the merits, it conclusively determines the disputed question, and is effectively unreviewable on appeal from a prior judgment." *Ibid.*

In *United States* v. *Smith*, 835 F.2d 1048 (3d Cir. 1987), the Third Circuit considered "the appealability of an order denying bail pending disposition of a habeas corpus petition." *Id.* at 1049. It noted "[t]he circuits are not unanimous" and cited some of the relevant decisions. *Ibid.* It ultimately viewed "the bail order in a habeas corpus case as a collateral order: severable from the merits, conclusively determining the disputed question, and effectively unreviewable on appeal from a final judgment." *Ibid.*

In *Martin* v. *Solem*, 801 F.2d 324 (8th Cir. 1986), the Eighth Circuit considered "whether [a] release order is final and therefore appealable." *Id.* at 328. It agreed a

"release order, even though interlocutory, is final, and thus appealable, because it is a collateral order." *Ibid.*

In *Guerra* v. *Meese*, 786 F.2d 414 (D.C. Cir. 1986), the D.C. Circuit considered a challenge to an interim release decision; it concluded "[t]he bail decision falls within the collateral order doctrine and is thus immediately reviewable." *Id.* at 418.

In *Cherek* v. *United States*, 767 F.2d 335 (7th Cir. 1985) (Posner, J.), the Seventh Circuit considered whether an interim release order "is appealable, given that it is an interlocutory order." *Id.* at 336. The court reviewed a split of authority on the question. *Ibid.* It concluded a prior decision from this Court "resolves the issue in favor of appealability," and it expressly criticized the practice of other circuits that reject appealability and instead "relabel[] the appeal a petition for mandamus." *Id.* at 337.

Along with those seven circuits, other courts of appeals have issued unpublished decisions reaching the same conclusion. In *Vreeland* v. *Zupan*, 644 F. App'x 812, 813 (10th Cir. 2016) (Gorsuch, J.), the Tenth Circuit agreed "an order denying bail in habeas proceedings is 'severable from the merits,' determines the disputed question 'conclusively,' and (absent an interlocutory appeal) is 'effectively unreviewable,' so that it indeed constitutes a final collateral order sufficient to trigger our jurisdiction under §1291." *Id.* at 813. Likewise, while the Fourth Circuit has issued unpublished decisions reaching both conclusions, it recently surveyed the split and followed the majority in *United States* v. *Nesbitt*, 610 F. App'x 310 (4th Cir. 2015).

In sum, at least seven circuit courts of appeals have issued published decisions agreeing interim release decisions are appealable collateral orders, and at least two other circuit courts have issued unpublished decisions reaching the same conclusion.

B. At least two circuits treat interim release decisions as non-appealable interlocutory orders.

By contrast, at least two circuit courts have issued published opinions concluding interim release orders aren't collateral orders.

In *Land* v. *Deeds*, 878 F.2d 318 (9th Cir. 1989), the Ninth Circuit concluded an "order denying bail pending a decision on [a] petition for a writ of habeas corpus . . . is neither an appeal from a final judgment nor a valid interlocutory appeal under the collateral order exception." *Id.* at 318 (cleaned up). It therefore construed the appeal "as a petition for a writ of mandamus" (*ibid.*), which triggers a more onerous standard of review for the aggrieved party.

The Ninth Circuit recognized this holding more recently in *United States* v. *McCandless*, 841 F.3d 819 (9th Cir. 2016). As it explained, "Our precedent holds that a district court's order denying bail pending resolution of a habeas petition is not a final decision subject to review under 28 U.S.C. §1291 and is not otherwise appealable under the collateral order doctrine." *Id.* at 821. It recognized "a lopsided circuit split exists on this issue." *Id.* at 822 n. 1. "At least six circuits have held, contrary to *Land*, that an order denying bail pending resolution of a habeas petition is appealable under the collateral order doctrine; only the First Circuit shares our view (albeit with some ambivalence) that such orders are not appealable." *Ibid.* (citing *Dotson*, 900 F.2d at

77-78). "Nonetheless, as a three-judge panel," the court in *McCandless* "remain[ed] bound by *Land*'s holding on this point." *Ibid.*

In *Woodcock* v. *Donnelly*, 470 F.2d 93 (1st Cir. 1972), the First Circuit reached the same conclusion: it held "a district court's denial of bail to a state prisoner whose habeas corpus petition is pending . . . is neither an appeal from a final judgment nor an appeal from one of those interlocutory judgments specifically enumerated by statute." *Ibid* (cleaned up). It therefore construed the appeal "to be a petition for mandamus" (*ibid.*), which once again places a higher burden on the aggrieved party.

Thus, unlike the seven circuits on the majority side of the split, these two circuits refuse to consider appeals from interim release decisions and instead require parties to pursue mandamus, which is a vastly more deferential form of review.

C. The split is entrenched and well recognized.

Many of the circuit courts that have divided over this issue explicitly acknowledge this split, which demonstrates the severity of the disagreement.

For example, the Ninth Circuit has described "a lopsided circuit split [] on this issue," with at least six circuits on one side and two circuits on the other side. *McCandless*, 841 F.3d at 822 n. 1 (citing *Dotson*, 900 F.2d at 77-78).

Similarly, the Eleventh Circuit has recognized "[t]he circuits that have addressed the precise question are split on the issue." *Pagan*, 353 F.3d at 1345; see also *id.* at 1345 n. 4 (citing six circuit court decisions on one side of the split, and two circuit court decisions on the other side).

As the Sixth Circuit put it, "There is a significant split in the circuits on the issue presented in this case." *Dotson*, 900 F.2d at 77 (citing five circuit court decisions on one side of the split, and two circuit court decisions on the other side).

The well recognized nature of the split provides all the more reason to grant certiorari.

II. The issue is recurring and significant.

This Court should intervene to resolve this deep split because the issue arises frequently and is vitally important.

The issue often recurs. As the previous sections have explained, at least nine circuit courts of appeals have issued published decisions on point, and at least two other circuit courts of appeals have issued relevant unpublished decisions, for a total of 11 out of 12 regional circuits. Those decisions cover a broad timespan, starting as far back as 1972 and ending as recently as 2016, with opinions from every single decade in between. The depth of the split and the wide date range of relevant circuit court decisions illustrate the frequency with which this issue arises.

The issue has had particular salience over the past year. As the pandemic continues to ravage correctional institutions, some inmates have turned toward interim release as their only means to stay safe. Indeed, recent attempts to locate potentially relevant decisions in Westlaw over the past twelve months have turned up hundreds of potentially relevant decisions from the federal district courts and courts

of appeals. Given the number of filings, the courts of appeals need clear guidance about the rules governing appellate review of district court interim release decisions.

Resolving this split is critically important to petitioners and wardens alike. Petitioners who lose interim release motions will likely want to pursue appellate review, especially when exceptional circumstances—like a once-in-a-century pandemic—pose a critical threat to their health and safety. Likewise, wardens who unsuccessfully oppose interim release motions will likely want to appeal, given the substantial State interests at stake, such as comity, finality, and federalism. Thus, all the parties in a post-conviction proceeding would benefit from the Court settling the law about whether and how they can request review from the courts of appeals.

The two circuit courts that refuse to exercise appellate jurisdiction will nonetheless construe invalid appeals as requests for mandamus relief, but mandamus jurisdiction is an inadequate substitute for appellate jurisdiction because mandamus petitions invoke a daunting standard of review. Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (cleaned up). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Ibid.* (cleaned up). Among other stringent requirements, "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* at 381 (cleaned up). By contrast, courts exercising normal appellate review are much less hesitant to find district court error warranting relief.

Because the standards governing mandamus are so exceptionally hard to meet, the circuits that pigeonhole interim release appeals into mandamus petitions effectively load the dice in favor of the district court's decision. See, e.g., *McCandless*, 841 F.3d at 822 ("To be entitled to mandamus relief, a petitioner must show at a minimum that the district court's order was clearly erroneous as a matter of law."); *Woodcock*, 470 F.2d at 94 ("In considering a petition for mandamus, we may inquire only whether the court below acted without jurisdiction or grossly abused its discretion."). Thus, a petitioner who loses an interim release motion must satisfy an artificially high standard before convincing an appellate court to intervene. Likewise, a warden who unsuccessfully opposes an interim release motion must check a burdensome series of boxes to secure relief from a court of appeals.

By contrast, the circuits that exercise normal appellate jurisdiction provide a level playing field for both sides. A balanced standard of review is important in many cases, but all the more so for interim release motions. A successful interim release motion generally requires proof of an emergency situation (like a deadly global pandemic), and if a district court erroneously fails to treat a potentially dangerous situation as an emergency, then a petitioner should have a full and fair opportunity to litigate the issue on appeal. Likewise, an order granting interim release implicates important State interests in comity, finality, and federalism, so wardens should have access to normal appellate procedures to review district court orders granting interim release. The Court should exercise review to ensure both sides have an equal opportunity to secure relief in the courts of appeals.

III. The decision below is incorrect.

The majority view is correct: interim release orders are immediately appealable collateral orders.

Usually, circuit courts may consider appeals only following a district court's final order, i.e., an order that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978). Nonetheless, interlocutory orders are immediately appealable if they amount to "collateral" orders. *Cohen* v. *Beneficial Indus. Loan Co.*, 337 U.S. 541, 546 (1949). To qualify, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

Interim release orders fit these criteria. They "conclusively determine the disputed question" (*Coopers & Lybrand*, 437 U.S. at 468), namely whether the petitioner should be released while a post-conviction petition remains pending. Meanwhile, the issue is "effectively unreviewable on appeal from a final judgment" (*ibid.*), because once there's a final judgment, *pre*-decision release becomes moot. These factors support appealability.

While the final factor—whether the orders "resolve an important issue completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468)—is more complicated, it also supports appealability. An interim release order implicates the merits to some degree because release orders often analyze whether a

petitioner has "a high probability of success" on the merits. *In re Roe*, 257 F.3d 1077, 1080 (9th Cir. 2001) (cleaned up). But "a person's right to liberty pending disposition of his case on the merits is (somewhat) distinct from the merits." *Cherek*, 767 F.2d at 337. After all, deciding whether a petition "present[s] a substantial claim does not dispose of the merits of the petition." *Grune*, 913 F.2d at 44.

This Court's prior decision in *Stack* v. *Boyle*, 342 U.S. 1 (1951), is instructive. There, the Court treated a pre-trial bail order as immediately appealable. But a bail decision is necessarily "based on the charges against the defendant—i.e., based on the merits." *Dotson*, 900 F.2d at 78. Likewise, while an interim release motion may invite some consideration of the merits, a release decision is nevertheless "separate from the merits of the petition." *Id.* at 79; see also *Cherek*, 767 F.2d at 337 ("*Stack* v. *Boyle* resolves the issue in favor of appealability.").

Notably, a critical question for interim release is whether "special circumstances" (like a deadly public health emergency) support release. *Roe*, 257 F.3d at 1080. That prong has "nothing to do with a decision on the merits of the petition." *Dotson*, 900 F.2d at 79. Thus, even if courts consider the probability of success, the ultimate release decision depends heavily on whether extraordinary circumstances, unrelated to the merits, support release.

The circuits that reject appealabilty fail to provide persuasive analysis, instead reaching summary conclusions. See *Land*, 878 F.2d at 318; *Woodcock*, 470 F.2d at 94. By contrast, the courts on the majority side of the split provide well-reasoned decisions. This Court should grant review and follow those decisions.

IV. This case is an exceptional vehicle.

This petition presents an excellent opportunity to resolve the appealability issue. Mr. Centofanti filed a counseled interim release motion, and the district court solicited full briefing. After the district court denied the motion, Mr. Centofanti filed a timely notice of appeal and a petition for initial hearing en banc, preserving a challenge to the lower court's prior appealability precedent. The court denied the request for initial en banc review, construed the appeal as a mandamus petition, solicited full briefing and oral argument, and (after considering the demanding standards for mandamus) refused to issue a writ of mandamus. Mr. Centofanti then filed a petition for rehearing en banc, again preserving his challenge to the lower court's appealability precedent. Thus, Mr. Centofanti properly preserved this issue.

In addition, this case is an ideal vehicle in part because the mandamus standard of review likely influenced the lower court's decision.

Mr. Centofanti based his interim release request in part on his likelihood of success on the merits of a juror bias claim: one of the jurors in his case intentionally concealed a disqualifying felony conviction, a fact that appears largely undisputed in these proceedings. The juror's failure to answer honestly a material voir dire question created federal constitutional error. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984); see also *Warger* v. *Shauers*, 574 U.S. 40, 45 (2014). Meanwhile, this claim is timely, exhausted, and not defaulted, so there are no procedural obstacles to federal review.

Although the Nevada Supreme Court rejected this claim on the merits, its decision nonetheless isn't entitled to deference under both Section 2254(d)(1) and Section 2254(d)(2). The state court faulted Mr. Centofanti on appeal for failing to demonstrate the juror's dishonest response reflected actual or implied bias. Pet. App. 30. Mr. Centofanti will assume for the sake of argument here that the state court could reasonably require a showing of actual or implied bias in connection with this claim, even though the claim wasn't an actual or implied bias claim, but instead a separate voir dire dishonesty claim. See *United States* v. *Brugnara*, 856 F.3d 1198, 1211 (9th Cir. 2017) (distinguishing the "three forms" of juror bias claims). Nevertheless, the state court rejected this claim without holding an evidentiary hearing and without giving Mr. Centofanti an *opportunity* to question the juror about her reasons for lying during voir dire. Mr. Centofanti therefore lacked a fair chance to demonstrate the juror was motivated to lie by actual or implied bias. By resolving this claim adversely without allowing a hearing, the state court ran afoul of Section 2254(d).

The error implicates both Section 2254(d)(1) and Section 2254(d)(2). Under Section 2254(d)(1), resolving the issue without a hearing was contrary to (or an unreasonable application of) this Court's clearly established precedent. See *Williams* v. *Taylor*, 529 U.S. 420, 441-42 (2000) (stating that when a juror "misleading[ly]" "fail[s] to divulge material information in response to [a voir dire] question," there's a "need for an evidentiary hearing"); *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Under Section 2254(d)(2),

deciding the issue without first holding an evidentiary hearing caused the court to unreasonably determine the facts. See, e.g., *Earp* v. *Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005). When a criminal defendant discovers after trial the factual basis for a colorable juror bias claim, generally the defendant has no mechanism to affirmatively *prove* bias unless the state court authorizes the defendant to question the juror under oath. For either reason—because the state court misapplied this Court's binding precedent, or because the state court resolved a fact-bound issue without sufficient evidentiary development—the federal courts may consider this claim de novo.

In rejecting mandamus relief, the lower court mistakenly concluded Mr. Centofanti hadn't demonstrated a clear enough entitlement to relief on the merits. As the court recognized, a mandamus request requires demonstrating "[t]he district court's error is *clearly erroneous* as a matter of law." Pet. App. 5 (cleaned up and emphasis added). In the court's view, "the district court did not *clearly err* in holding that Centofanti had not demonstrated that his habeas petition made out a clear case for his release." Pet. App. 6 (emphasis added). After briefly discussing the merits of his juror bias claim, it concluded the district court hadn't "*clearly erred* in determining that Centofanti had not shown a high likelihood that his habeas petition would succeed." Pet. App. 8 (emphasis added). Thus, the lower court repeatedly invoked the daunting standard of mandamus review, which in the Ninth Circuit requires not just proof of legal error but proof of *clear* legal error. Had the court not relied on this standard, and had it instead applied normal appellate principles, it likely would've concluded instead that Mr. Centofanti established a high probability he's entitled to

relief on this juror bias claim, in part because the state court's decision fails to qualify for deference.

In addition to showing a high probability of success, Mr. Centofanti satisfied the other two requirements for interim release. First, he demonstrated an extraordinary circumstance supporting release: the coronavirus pandemic is an emergent threat to inmates because the virus is highly likely to spread among correctional facilities, and Mr. Centofanti has preexisting health conditions that put him at a high risk for negative outcomes if he contracts the virus. Second, he provided a viable release plan, which would allow him to self-isolate in a private residence while on interim release. The lower court declined to dispute either of those prongs.

In sum, if the lower court had correctly applied normal appellate standards of review, it likely would've concluded Mr. Centofanti had demonstrated a sufficiently high probability of success on the merits to warrant interim release. This case therefore poses an exceptional vehicle because the lower court's appealability error was likely outcome determinative.

CONCLUSION

The Court should issue a writ of certiorari.

Dated January 22, 2021.

Respectfully submitted,

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