No. 20-6957

IN THE

Supreme Court of the United States

ALFRED PAUL CENTOFANTI, III,

Petitioner,

v.

DWIGHT W. NEVEN, WARDEN, *et al.*,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should resolve a split of authority on the standard for reviewing a habeas petitioner's pre-decision release when (1) the petitioner conditioned his request for relief on the administration of a now-available vaccine; (2) the federal district court had stayed the federal proceeding to allow for exhaustion of state remedies; and (3) the petitioner has not identified an appreciable difference between the two approaches taken in the lower courts, let alone one that matters to his case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The federal circuits agree that they may immediately review a district court's order resolving a motion seeking release pending review of a habeas petition. But they disagree on the proper procedural mechanism that allows for such review—an interlocutory appeal under the collateral order doctrine or a petition for writ of mandamus.

Petitioner Alfred Paul Centofanti, III, insists that his case is an "exceptional vehicle" for resolving that disagreement. Yet his case is riddled with procedural issues that prevent review or make it unnecessary. And he fails to show that there is any practical difference between the different approaches taken by the circuit courts, let alone one that matters in his case.

First, this case no longer presents a live controversy. Centofanti requested release pending the satisfaction of one of two conditions: (1) review of his federal petition, or (2) administration of a COVID-19 vaccine. The Nevada Department of Corrections (NDOC) has begun administering vaccines to Nevada's inmate population. Thus, Centofanti's underlying request for relief is moot.

Second, any authority to grant pre-decision release springs from the federal courts' authority to grant habeas relief generally. Even so, principles of comity preclude a federal court from reviewing, let alone granting, a petition filed under 28 U.S.C. § 2254 before the petitioner has exhausted his state remedies. Those same principles should apply in this context. Because Centofanti's federal petition

remained stayed while he pursued state remedies when he moved for release, the district court should have been without authority to grant the motion altogether.[1]

Third, Centofanti fails to identify a practical difference between the two approaches, let alone one that would change the outcome of his case. The Ninth Circuit denied Centofanti's mandamus petition for the same rationale the circuits applying the collateral order doctrine rejected a claim for pre-decision release: his underlying federal claim is unlikely to succeed on the merits.

Fourth, Centofanti's attempt to establish that this case is an "extraordinary vehicle" shows that the issue is too intertwined with the merits of his federal claims for relief to fit within the narrow confines of the collateral order doctrine. The Ninth Circuit determined that Centofanti had no right to pre-decision release because binding circuit precedent foreclosed his ability to prevail on his underlying federal claim. This point strongly suggests that it is the First and Ninth circuits that have this issue right.

Fifth, although the Ninth Circuit focused only on the lack of a likelihood of success, this case remains a poor vehicle to resolve the split because the district court denied relief on two alternative grounds that independently support the judgment: (1) even if Centofanti could prevail on his underlying claim, "it remains to be seen" whether release would be a proper remedy, and (2) Centofanti failed to establish extraordinary circumstances warranting release from his sentences of life without a

[1] Centofanti's state-court challenge recently concluded. Remittitur, *Centofanti v. State*, No. 78193 (March 3, 2021). But that does not change the fact he had not exhausted his state remedies when he sought pre-decision release from the lower federal courts.

possibility of parole. And Centofanti remains a danger to the community and a flight risk.

STATEMENT OF THE CASE

After a grand jury returned a true bill, the State of Nevada charged Centofanti by indictment with the murder of his ex-wife. At trial, a jury rejected Centofanti's theory of self-defense and found him guilty of first-degree murder. And the trial judge sentenced Centofanti to two consecutive life sentences without a possibility of parole. Centofanti later filed a motion for new trial. In particular, he asserted that a juror had been dishonest about her prior criminal history by failing to disclose a decades-old felony conviction from Florida.

The trial court denied the motion, and the Nevada Supreme Court affirmed. App. 29-31. In its order, the Nevada Supreme Court acknowledged that juror misconduct during voir dire implicates Sixth Amendment interests, but that reversible error only occurs where "the juror intentionally concealed information" and the defendant shows "actual or implied bias. App. 30-31. After presenting specific definitions for actual and implied bias, the court noted that it "appears" the juror had "intentionally concealed her felony status." App. 30. But the court ultimately concluded that Centofanti had not shown actual or implied bias related to the juror's failure to disclose a stale felony conviction "for obtaining property in exchange for a worthless check." App. 31.

After unsuccessfully pursing an initial round of state post-conviction relief, Centofanti filed a federal habeas petition. But when the federal district court

appointed counsel, it also granted a motion for stay to allow for exhaustion of state remedies. App. 15.

When the COVID-19 pandemic hit, Centofanti's federal petition remained stayed while he continued to pursue his state remedies. App. 15. But Centofanti moved to temporarily lift the stay and requested an order releasing him from custody pending the occurrence of one of two conditions: (1) an order disposing of Centofanti's federal petition, or (2) the administration of a vaccine. App. 15.

The district court denied the motion for many reasons. First, the district court determined that Centofanti failed to show a high likelihood of success on the merits of his claim. App. 18. The court also noted that if Centofanti could prevail on his claim, "whether release would be the appropriate remedy for that alleged error remains to be seen." App. 18. Second, the district court made specific findings based on the evidentiary record before it that Centofanti had failed to show extraordinary circumstances warranting release. App. 19-22. In particular, the district court noted Respondents' arguments that (1) Centofanti provided no medical records or expert opinions to support his claim, and (2) he had not shown that NDOC could not provide him with appropriate care, before concluding that Centofanti had failed to establish extraordinary circumstances. App. 20-22.

Centofanti then sought review from the Ninth Circuit. He began by filing an appeal while seeking immediate en banc review, but he also presented the court with an alternative request that the court convert the appeal to a writ proceeding and a proposed petition for writ of mandamus. App. 013. The Ninth Circuit denied the

request for en banc review. App. 013. But the court granted Centofanti's request to convert the appeal to a mandamus proceeding. App. 10-11.

After full briefing and argument on the petition, the Ninth Circuit denied relief. App. 4-8. In particular, noting that the Nevada Supreme Court rejected Centofanti's underlying federal claim on the merits, squarely placing review of that claim under AEDPA's deferential lens, the court determined that Centofanti's underlying federal claim failed under prevailing circuit precedent. App. 6-8. After analyzing its decisions identifying the relevant clearly established federal law, the Ninth Circuit determined that Centofanti had not shown that the Nevada Supreme Court unreasonably applied the clearly established federal law in affirming the trial court's denial of his motion for new trial. App. 8.

Centofanti sought en banc review a second time around, but the Court denied that request without a judge calling for a vote on the petition. App. 2.

REASONS FOR DENYING THE PETITION

I. CENTOFANTI'S CLAIM IS MOOT BECAUSE NDOC IS IN THE PROCESS VACCINATING ITS INMATE POPULATION.

In his motion, Centofanti requested an order that for his release until one of two conditions is met: (1) resolution of his petition on the merits, or (2) administration of a vaccine for COVID-19. App. 5, 16. Nevada has started inoculating its inmate population.[2] As a result, Centofanti's request for relief no longer presents a live

[2] NDOC began administering vaccines to its inmate population at the beginning of March. *See* Jeff Munson, *COVID-19 vaccine rollout underway at Nevada prisons*, Carson Now (March 4, 2021), https://carsonnow.org/story/03/04/2021/covid-19-vaccine-rollout-underway-nevada-prisons?page=6. Inmate eligibility for vaccination tracks with eligibility requirements for the general public. *Id.* Last

controversy; the administration of vaccines moots his underlying request for relief. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (noting that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate"). And while Centofanti notes that this is a commonly recurring issue that has been reviewed by nearly every circuit, Pet. at 15, that argument now cuts against him: if this issue occurs and is reviewed by the appellate court as frequently as Centofanti asserts, this Court can, and should, wait to resolve the split in a case in which the issue remains a live controversy, assuming this Court's intervention is necessary at all.

II. PRINCIPLES OF COMITY LEFT THE DISTRICT COURT WITHOUT AUTHORITY TO GRANT RELEASE BECAUSE CENTOFANTI HAD NOT EXHAUSTED HIS STATE REMEDIES.

Whether the district court had authority to grant release at all is a primary hurdle that Centofanti must overcome before this Court should reach the issue of the appropriate standard for reviewing the district court's order. Because the lower courts have recognized that the authority to grant pre-decision release springs from the federal courts' authority to grant release as a habeas remedy, release on bail pending review of the petition depends on the district court's power to grant release as a remedy in general. *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986); *see also In re Roe*, 257 F.3d 1077 (9th Cir. 2001) (assuming without deciding that federal

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week, Nevada's governor announced that all Nevadans over the age of sixteen with an underlying health condition are eligible for vaccination starting March 22, 2021, and that all Nevadans above sixteen are eligible for vaccination by April 5. *See* Megan Messerly and Jasmine Orozco Rodriguez, *Sisolak: All Nevadans 16 and older will be eligible for the COVID-19 vaccine starting April 5*, The Nevada Independent (March 17, 2021), https://thenevadaindependent.com/article/sisolak-all-nevadans-16-and-older-will-be-eligible-for-the-covid-19-vaccine-starting-april-5.

courts can grant pre-decision release); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985) (citing cases on inherent authority to grant pre-decision release).

But this Court established long ago that principles of comity leave federal courts without authority to review federal habeas petitions, let alone grant release, before the exhaustion of state remedies. *Rose v. Lundy*, 455 U.S. 509 (1982) (requiring dismissal of a federal habeas petition that includes unexhausted claims); *see also Rhines v. Weber*, 544 U.S. 269 (2005) (permitting a district court to stay a petition containing unexhausted claims). Here, when he moved for pre-decision release in the federal district court, Centofanti's federal petition remained stayed while he continued to litigate a second state post-conviction petition. App. 15. As a result, Centofanti had not totally unexhausted his state remedies when he moved for pre-decision release.

Principles of comity leave a federal district court without the authority to review, let alone grant, a petition containing unexhausted claims. Those same principles should constrain the district court's inherent authority to grant pre-decision release, no matter what standard of review applies on appeal.

III. CENTOFANTI FAILS TO IDENTIFY A RELEVANT SPLIT OF AUTHORITY.

No Court has held that an order disposing of a motion for pre-decision release is unreviewable. The circuits merely disagree on the procedural mechanism for pursuing review.

Centofanti asserts that the difference is important because of the resulting standard of review. Pet. at 16-17. But conspicuously absent from the petition is any

effort to make a comparison of the actual standards of review, let alone an explanation of why the difference—if any—matters in resolving this case. Instead, Centofanti singles out the mandamus standard, vaguely defining the standards in the other circuits as "normal appellate principles." Pet. at 16-17.

This shortcoming in the petition is telling. While characterizing the mandamus standard as "load[ing] the dice" in favor of the party that prevailed in the district court, Centofanti cites authority acknowledging that mandamus relief is available for clear errors of law and gross abuses of discretion. Pet. at 17. But he says nothing of the actual standard of review applied by the circuit decisions that proceed under the collateral order doctrine.

The other circuits apply an abuse of discretion standard. *See*, *e.g.*, *Lee v. Jabe*, 989 F.2d 869, 871 (6th Cir. 1993) ("We review a district court's denial of bail under an abuse of discretion standard."); *Landano v. Rafferty*, 970 F.2d 1230 (3d Cir. 1992) ("The grant of bail is discretionary with the district judge; this court's review is under the abuse of discretion standard."); *Iuteri v. Nardoza*, 662 F.2d 159, 162 (2d Cir. 1981) (reversing award of pre-decision release for abuse of discretion). A district court abuses its discretion when its decision is based on a mistaken view the law or a clearly erroneous factual findings. *Highmark, Inc. v. Allcare Health Management Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014).

Consequently, the petition fails to identify an appreciable difference between the procedures the circuits apply to review orders like the one here. *Cf. Monasky v. Taglieri*, 140 S. Ct. 719, 735 (2020) (Alito, J. concurring in part and concurring in

judgment) (noting that the difference between abuse of discretion and clear error "may be no more than minimal" but an important aspect of the abuse of discretion standard "is that great deference should be accorded to the District Court's determination"). But even assuming there is some daylight between the two standards that may matter in some cases, Centofanti has not shown the difference between the two standards matters here.

The Ninth Circuit undertook a legal analysis of the claim Centofanti relied on to support his request for pre-decision relief failed on the merits. App. 4-8. The Court recognized that the Nevada Supreme Court resolved Centofanti's claim on the merits, rendering it subject to deferential review under AEDPA. App. 6-7. The court then identified Ninth Circuit authority on the relevant clearly established principles that govern Centofanti's claim before determining that its reading of circuit precedent foreclosed Centofanti's ability to prevail on his challenge to the Nevada Supreme Court's decision. App. 7-8.

Some decisions Centofanti cites from circuits applying the collateral order doctrine look no different. The Sixth Circuit's opinion in *Dotson*, which Centofanti (and the Eleventh Circuit) points to for its "well-reasoned analysis" on application of the collateral order doctrine, is the perfect example. There, just as the Ninth Circuit did here, the Sixth Circuit expressly declined to reach the extraordinary circumstances prong of the test for pre-decision release because the petitioner's underlying federal constitutional claim failed on the merits. *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir 1990).

Similarly, in *Vreeland* the Tenth Circuit did not get beyond the petitioner's likelihood of success on the merits. There, the district court declined to reach the extraordinary circumstances prong of the test. *Vreeland v. Zupan*, No. 161013, 644 Fed. App'x. 812, 813 (10th Cir. Mar. 22, 2016) (unpublished). On appeal, while denying a certificate of appealability, the court of appeals went so far as to say "we would willingly adopt the district court's bail order as our own," confirming that there was no need to reach the issue of extraordinary circumstances due to the lack of "'a clear case on the merits of the habeas petition.'" *Id*. (*quoting Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981)).

Thus, Centofanti fails to show that there is an appreciable difference that results in disparate treatment of petitioners under the different approaches. But even if a difference exists, he has not shown that the Ninth Circuit's analysis would have looked different if reviewing the district court's order under the collateral order doctrine, perhaps save for the lower court (1) exchanging its recitation of the mandamus standard with the standard for an abuse of discretion, and (2) substituting the phrase "we cannot conclude that the district court clearly erred" with "we cannot conclude that the district court abused its discretion."

For these reasons, the petition does not identify an appreciable split of authority that warrants this Court's review.

IV. CENTOFANTI'S ANALYSIS STRONGLY SUPPORTS THE NINTH CIRCUIT'S POSITION BECAUSE IT IS INTERTWINED WITH THE MERITS OF HIS FEDERAL CLAIM FOR RELIEF.

The collateral order doctrine is narrow and requires that an order be "conclusive," "resolve important questions separate from the merits," and "effectively unreviewable on appeal. . . ." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation and internal quotation marks omitted). But the legal test for deciding a motion seeking pre-decision relief focuses, in part, on whether a petitioner has shown high likelihood of success on the merits. As a result, many of the circuit court decisions Centofanti relies on to support his position on appealability recognize tension between that test for evaluating a request for pre-decision release and the collateral order doctrine's requirement that the challenged order be independent of the merits. *See*, *e.g.*, *Pagan v. United States*, 353 F.3d 1343, 1345 n.5 (11th Cir. 2003) (*quoting Dotson*, 900 F.2d at 78).

While those cases come down in favor of appealability, Centofanti's own analysis of why his case is an "exceptional vehicle" shows why the First and Ninth circuits are right on this issue. In trying to persuade this Court to take his case, Centofanti spends multiple pages arguing that his juror bias claim is a winner. Pet. at 20-23. Whether or not he is right—he is not for the reasons explained by the Ninth Circuit—his ability to prevail in obtaining pre-decision release is inextricably intertwined with the merits of his claim, which conflicts with the narrow nature of the collateral order doctrine.

V. THIS CASE IS NOT AN "EXCEPTIONAL VEHICLE" TO RESOLVE THE SPLIT.

In addition to everything above, this case remains a poor vehicle for resolving the split. As Respondents have argued throughout this case, Centofanti cannot show a

high likelihood of success on the merits; the best-case scenario for him is that AEDPA does not apply to his claim and he can show that he is entitled to an evidentiary hearing on his claim. Respondents-Appellees' Response to Petition for Writ of Mandamus at 9-14, *Centofanti v. Neven*, 20-16039 (9th Cir., June 18, 2020) (Dkt. 11-1). But at that point, he is still going to have to show that the juror had an improper motive indicative of bias against him for his theory of juror bias to prevail. *Id.* So, while Respondents certainly do not concede that Centofanti can meet the prerequisites of overcoming AEDPA and showing entitlement to an evidentiary hearing, whether he can ultimately prevail on his claim is speculative at best.

Additionally, while the Ninth Circuit narrowed its focus to Centofanti's inability to show that he was likely to prevail on the merits, the district court denied relief on two alternative grounds: (1) even assuming Centofanti can prevail on his claim, release may not be the proper remedy for the alleged federal violation, and (2) Centofanti failed to present sufficient evidence showing extraordinary circumstances. App. 18-22. Neither of those conclusions amounts to an abuse of discretion.

First, the district court appropriately considered whether release would be a proper remedy if Centofanti were to prevail on his claim. As the Ninth Circuit acknowledged in *United States v. Dade*, 959 F.3d 1136 (9th Cir. 2020), an award of pre-decision release is improper if the appropriate remedy in granting a petition leaves the government with a right to retry the petitioner.[3] Federal habeas review

[3] While *Dade* is a case addressing release pending appeal under Fed. R. App. P. 23, the same consideration is applicable—if not stronger—in this context.

results in a significant intrusion on state sovereignty. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). And federal courts often use conditional writs permitting retrial to soften that intrusion by allowing the state to substitute an invalid judgment with a valid one. *Harvest v. Castro*, 531 F.3d 737, 741-45 (9th Cir. 2008).

This point is particularly salient given Centofanti is ultimately challenging the Nevada Supreme Court's affirmance of the trial court's order denying Centofanti's motion for *a new trial*. And the claim of error, although structural in nature, bears no relationship to the evidence that led to Centofanti's conviction and sentence. As a result, the district court's determination that it "remains to be seen" whether release would even be an appropriate remedy independently supports the denial of relief here, even under an abuse of discretion standard. App. 18.

Second, the district court determined that Centofanti failed to present evidence establishing extraordinary circumstances warranting release.[4] App. 19-22. In particular, the district court emphasized that Centofanti had not shown that NDOC (1) could not protect him if an outbreak occurred by isolating inmates that presented as a high risk for complications with COVID-19, or (2) could not transport inmates to hospitals to receive appropriate care, if needed. App. 21-22. Additionally, the Court noted that existing numbers on community spread of the virus in Nevada highlighted that Centofanti's assertion that he would be safer if released was speculative. App.

[4] While Centofanti makes various statements about his medical condition in his petition, he does not provide any citations to support that information. Pet. at 6. Meanwhile, as the district court noted, Centofanti supported his motion with declarations from family and another inmate, rather than providing any medical records or expert opinions. App. 20.

22. Neither of those determinations amounts to an abuse of discretion based on the evidentiary record before the district court when it denied Centofanti's motion, nearly 11 months ago.

Finally, regardless of his ability to show a high likelihood of success on the merits and extraordinary circumstances, Centofanti presents as an inherent danger to the community and a flight-risk because he is serving consecutive sentences of life without the possibility of parole for first-degree murder. As a result, regardless of the standard of review a court of appeals applies—clear error or abuse of discretion—Centofanti has no right to pre-decision release.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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