No. 20-6957

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

Reply in support of petition for a writ of certiorari

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As Mr. Centofanti's petition explains, the courts of appeals have developed a deep, 7-2 split over how litigants may challenge district court decisions granting or denying interim release in habeas proceedings. The State makes no attempt to dispute the existence of the split, which the appellate courts have repeatedly lamented. Likewise, the State makes no effort to downplay the recurring nature of this issue, which arises frequently in federal post-conviction litigation. This Court's review is necessary to resolve this serious, entrenched split.

Rather than address these primary issues, the State's brief in opposition presents a scattershot series of arguments, none of which provides a valid reason to deny review.

The coronavirus pandemic presents an extraordinary risk to Nevada inmates, and the State fails to seriously contest that proposition. Rather, the State implies the risk has diminished (and the question presented has therefore become moot) because Mr. Centofanti has recently received a first dose of the vaccine. Nonetheless, he still faces a grave threat to his health, among other things due to emerging variants and the likelihood substantial numbers of inmates and staff at his prison will decline the vaccine. The coronavirus pandemic will continue endangering Mr. Centofanti for the foreseeable future; he therefore maintains his request for interim release; and so the question presented is not moot.

Next, although the State agrees the circuits have split over the question presented and have therefore developed different "procedural mechanism[s]" for reviewing interim release orders (Br. Opp. at 1, 7), the State nonetheless insists those mechanisms are materially identical. The State misunderstands the highly deferential nature of mandamus review, which can be outcome-determinative in many cases and was likely so in this case.

Finally, the State presents a series of arguments that are irrelevant at the certiorari stage. It insists interim release decisions are unappealable interlocutory orders. But its scant analysis on this front is unpersuasive, and the issue is better left for merits briefing. The State also provides reasons it believes interim release is inappropriate in Mr. Centofanti's case. But the court of appeals below declined to resolve those incorrect arguments, and they would be better left for remand. The Court should grant certiorari to provide guidance on the question presented to the deeply fractured appellate courts.

I. The question presented is not moot.

The State doesn't seriously dispute that the coronavirus pandemic poses a grave risk to inmates, and that the risk may conceivably justify interim release. Instead, the State represents it's "started inoculating [the] inmate population" (Br. Opp. at 5), which in its view "moots" Mr. Centofanti's request for interim release (*id.* at 6).

Roughly the same time the State filed its brief in opposition, on March 19, 2021, Mr. Centofanti received a first dose of the Moderna coronavirus vaccine.[1] He's scheduled to receive a second dose roughly 28 days after the first dose, although there's no guarantee he will ultimately receive the second dose as scheduled.

Although Mr. Centofanti has received a first dose of the vaccine, that doesn't render his interim release request moot. As the State correctly notes, Mr. Centofanti initially asked the district court to order him released until his vaccination. At the time Mr. Centofanti filed that emergency motion and made that suggestion—in April 2020, still early into the pandemic—little was known about the potential roll-out and effect of as-yet undeveloped vaccines, so it was reasonable to presume a vaccine might sufficiently mitigate the risk from the pandemic. At this point, as more has become known about the virus and the current state of the public health crisis, Mr. Centofanti has no guarantee the vaccine will sufficiently reduce his risk of harm.

Various factors suggest an emergency still exists despite the administration of a vaccine. Although the Moderna vaccine provides useful protection against the virus, it isn't 100 percent effective at preventing infection and, in turn, serious complications.[2] It's unclear how well the vaccines work for people who are immuno-

[1] Counsel spoke to Mr. Centofanti on the phone on April 1, 2021, about recent developments regarding the vaccine and his medical issues. Counsel is basing the factual representations in this reply on that conversation.

[2] See, e.g., Kathy Katella, "Comparing the COVID-19 Vaccines: How Are They Different?" Yale Medicine (Mar. 29, 2021), available at https://bit.ly/31xLzt8 (last visited Apr. 2, 2021).

compromised.[3] It's unclear how long vaccines provide protection.[4] Vaccine efficacy against variants remains an ongoing concern.[5] Large numbers of inmates and correctional officers across the country are declining the vaccine;[6] on information and belief, the same is true in Nevada prisons, where the department of corrections apparently isn't requiring inmates and staff to receive the vaccine. Without full vaccination among inmates and staff, herd immunity is unlikely to develop in the prison. Meanwhile, the virus continues to spread among the general public; although the case count around the Nation began to drop after Mr. Centofanti filed his petition, the numbers of new infections are now continuing to rise again, and public health officials are beginning to express concerns about a fourth wave.[7] If the virus continues to spread among the general public, and if Mr. Centofanti's prison doesn't reach herd immunity, then the virus will continue to threaten inmates at the prison—those who are vaccinated, as well as those who are unvaccinated.

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[3] See, e.g., Tara Haelle, "What Can You Do Once You're Vaccinated?" The New York Times (Mar. 30, 2021), available at https://nyti.ms/3cIe3qq (last visited Apr. 2, 2021).

[4] See, e.g., "Frequently Asked Questions about COVID-19 Vaccination," Centers for Disease Control and Prevention (Mar. 12, 2021), available at https://bit.ly/2R0jTeD (last visited Apr. 2, 2021).

[5] See, e.g., Rita Rubin, "COVID-19 Vaccines vs Variants—Determining How Much Immunity Is Enough," JAMA Network (Mar. 17, 2021), available at https://bit.ly/2Oarp5C (last visited Apr. 2, 2021).

[6] See, e.g., Nicole Lewis & Michael Sisak, "'Hell No': Correctional Officers Are Declining The Coronavirus Vaccine En Masse," The Marshall Project (Mar. 15, 2021), available at https://bit.ly/31rRX5c (last visited Apr. 2, 2021).

[7] See, e.g., Tara Law, "Is the U.S. Entering a Fourth Wave of COVID-19?" Time (Mar. 31, 2021), available at https://bit.ly/3cHHadN (last visited Apr. 2, 2021).

For these reasons and others, the administration of a vaccine by itself doesn't eliminate the danger the pandemic poses to Mr. Centofanti, and he continues to request interim release for the foreseeable future, until the threat of the virus has become effectively minimized. His request for interim release therefore is not moot: the district court can still order the relief he seeks to protect him from dangerous conditions. To the extent the State maintains the pandemic no longer poses an extraordinary circumstance justifying interim release now that Mr. Centofanti has received a first dose of the vaccine, the district court would be better suited on remand to develop on-the-ground information about the situation in Nevada prisons and hear expert testimony about the relevant risks.

Even if the State could demonstrate on the existing record the administration of the first dose has rendered Mr. Centofanti's interim release request moot, the Court should still grant review because the question presented is capable of repetition yet evading review. See, e.g., *Turner* v. *Rogers*, 564 U.S. 431, 439-41 (2011). Interim release requests often arise in emergency situations. See, e.g., *Dotson* v. *Clark*, 900 F.2d 77, 78 (6th Cir. 1990) (describing a case where a petitioner sought interim release for medical treatment at a private hospital). In many cases, it will be difficult for a habeas litigant to seek this Court's review of the question presented while the emergency remains live. The same is true here. The issue is capable of repetition for Mr. Centofanti, especially given the emergence of coronavirus variants and the lack of concrete information about whether the Moderna vaccine provides adequate protection against variants. If a vaccine-resistant variant begins spreading among the

Nation—an unfortunately realistic possibility—it's unlikely Mr. Centofanti could relitigate his interim release request and bring the question presented to this Court for review in time to avoid a substantial risk of harm, or alternatively before Mr. Centofanti received an additional vaccine for the new variant.

The question presented is capable of repetition yet evading review for another reason. On or about March 17, 2021, Mr. Centofanti noticed a lump on his chest, raising concerns about the recurrence of lymphoma. He had a visit with his oncologist on March 30, 2021, and the oncologist plans to schedule an ultrasound to diagnose the lump. The oncologist confirmed that if his lymphoma recurred, chemotherapy would no longer be an available treatment; Mr. Centofanti would likely need alternative treatment out-of-state, but on information and belief the department of corrections may be unwilling to arrange for out-of-state treatment. If this situation arises, where Mr. Centofanti needs out-of-state treatment but the department of corrections refuses to coordinate the treatment, Mr. Centofanti may need to file another request for interim release, asking the district court to order him released so he can receive out-of-state treatment. See *Dotson*, 900 F.2d at 78 (describing a similar request). Thus, there's a realistic possibility Mr. Centofanti will again need to seek interim release on an emergency basis for reasons unrelated to the virus, and it's unlikely Mr. Centofanti could bring the appealability issue to the Court in time to get the treatment he needs.

In sum, the State's suggestion of mootness is incorrect and provides no reason for the Court to deny review of this important appealability issue.

II. The question presented is significant.

The State doesn't appear to disagree the wide circuit split in this case implicates a frequently recurring issue. Br. Opp. at 6 (acknowledging and failing to dispute Mr. Centofanti's position that "this is a commonly recurring issue"). But the State suggests the issue is academic because there's no "appreciable difference between" mandamus review and normal appellate review. *Id.* at 8.

In truth, mandamus review involves stringent standards that often place relief out of reach. As Mr. Centofanti's petition explains, 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); see also *ibid.* ("[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.") (cleaned up). As the governing law stresses, mandamus review is vastly more deferential than typical appellate review, and the State cannot seriously argue the two are equivalent.

Still, the State notes the circuits on the majority side of the split tend to apply abuse of discretion review to interim release decisions; according to the State, abuse of discretion review is akin to mandamus review. Br. Opp. at 8-9. But the differences remain striking. As this Court's case law explains, appellate courts may order mandamus only in extraordinary cases. The State cite no such provisos for abuse of discretion review. Likewise, appellate courts exercising mandamus authority often consider a daunting list of relevant factors. See, e.g., *Perry* v. *Schwarzenegger*, 591 F.3d

1147, 1156 (9th Cir. 2009). The State fails to locate any similar multi-pronged tests for abuse of discretion review.

Perhaps most significantly, the abuse of discretion standard allows courts to consider legal issues de novo, as the State concedes. Br. Opp. at 8 (citing *Highmark, Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n. 2 (2014)). By contrast, mandamus relief is available only if a litigant demonstrates *clear* legal error by the district court. See, e.g., *United States* v. *McCandless*, 841 F.3d 819, 822 (9th Cir. 2016) ("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."). There's an appreciable legal distinction between these standards—clear legal error, as opposed to legal error found on de novo review as part of an abuse of discretion analysis—and this Court should settle which standard applies to interim release orders.

The State suggests that even if the standards differ in the abstract, the difference wasn't outcome-determinative for Mr. Centofanti in the Ninth Circuit below. Br. Opp. at 9-10. But as Mr. Centofanti demonstrated in his petition, the Ninth Circuit repeatedly invoked the daunting mandamus standard of review and the need for Mr. Centofanti to demonstrate the district court committed not just legal errors but *clear* legal errors. Pet. App. 5-6, 8. Had the court instead engaged in de novo review of the relevant legal issues, it likely would've concluded Mr. Centofanti had a strong enough chance of success on his juror bias claim to warrant interim release. Indeed, Mr. Centofanti explained in his petition why he's entitled to relief on this claim, and why the state appellate court's contrary decision is flawed even under Section 2254(d). As

explained below, the State provides no substantial counterargument in its brief, except to say a federal evidentiary hearing would likely be necessary to resolve this claim. Had the Ninth Circuit given fresh review (as opposed to highly deferential review) to these legal questions, the court likely would've agreed with Mr. Centofanti and would've found a high enough likelihood of success to justify interim release.

In sum, courts exercising mandamus review have much less license to intervene in favor of habeas petitioners or wardens who lose interim release litigation. The Court should grant review to resolve this substantial problem.

III. The State's merits arguments are incorrect and provide no reason to deny review.

The State presents a series of arguments about the merits, both the question presented and Mr. Centofanti's interim release request. All are wrong.

As an initial matter, the State briefly argues the minority side of the split has correctly concluded interim release decisions are unappealable interlocutory orders. Br. Opp. at 11. But the State provide only a terse two-paragraph discussion of the issue. In its view, courts considering interim release sometimes weigh the likelihood of success on the merits, so interim release orders aren't cleanly divorced from the merits. *Ibid*. But the gravamen of an interim release request is an emergency that requires immediate release; the emergency is usually unrelated to the merits. See, e.g., *Dotson*, 900 F.2d at 79. For that reason and the other reasons described in the petition (and in the well-reasoned decisions on the majority side), an interim release

decision is a collateral order. To the extent the Court remains unconvinced at the certiorari stage, it should resolve the question after full merits briefing.

The State then presents a series of arguments about Mr. Centofanti's interim release request itself. First, the State complains Mr. Centofanti was pursuing a second round of state post-conviction litigation when he filed his emergency motion in the district court. Br. Opp. at 6-7. If some of Mr. Centofanti's claims remained unexhausted, the State suggests, then interim release would implicate comity. *Ibid.* But comity is a concern only if the court is granting release (or interim release) based on a claim the state court has yet to evaluate. Here, Mr. Centofanti predicated his interim release request on his juror bias claim, which he raised and exhausted on direct appeal. Mr. Centofanti's motion didn't rely on any claims he was continuing to litigate in state court. Comity was therefore an irrelevant concern. In any event, according to the State, Mr. Centofanti's "state-court challenge recently concluded" (Br. Opp. at 2 n. 1), so any comity concerns it invokes should now be resolved.

Second, the State argues Mr. Centofanti has only a speculative, not a high, probability of success on the merits. Notably, while the State refuses to concede the state court's decision fails to qualify for deference under Section 2254(d), it declines to present any substantial arguments on that issue. Br. Opp. at 12. Rather, it suggests that to win relief on de novo review, Mr. Centofanti would have to prove at a federal evidentiary hearing the juror lied about her prior felony conviction for an improper, as opposed to an innocuous, reason. *Ibid.* The State considers it "speculative" whether Mr. Centofanti could ultimately make that showing. *Ibid.* But on de novo

review, Mr. Centofanti intends to demonstrate that under current case law (postdating the state court's decision), he need not prove an improper motive; instead, the juror's material untruthful answer by itself warrants relief, regardless of the juror's motive for lying. See *Warger* v. *Shauers*, 574 U.S. 40, 43, 45 (2014) (twice reciting the relevant standard without requiring a showing of improper motive). A hearing will therefore be unnecessary on de novo review.

Were a hearing still necessary, Mr. Centofanti could meet his burden. As he has demonstrated, the juror not only intentionally concealed her prior felony conviction during voir dire, she then made material misrepresentations about the situation in a post-trial affidavit: she falsely stated she had disclosed her felony status to the jury commissioner, and she falsely claimed her civil rights had been restored. It's implausible the juror could supply a credible innocent explanation for this conduct while under oath at a federal evidentiary hearing. Thus, were Mr. Centofanti to proceed to a hearing, he would likely demonstrate the juror lied for an improper reason. But either way, the mere suggestion by the State that Mr. Centofanti will be entitled to a federal evidentiary hearing shows a high enough likelihood of success to warrant interim release. After all, a federal court may order a hearing only in very limited circumstances; among other things, the petitioner must survive any procedural defenses; must survive review under Section 2254(d); must show an entitlement to a hearing under 28 U.S.C. § 2254(e)(2); and must allege facts that, if true, would demonstrate a constitutional violation. That procedural posture is quite far down the road to relief, so it suffices as a high likelihood of success.

Third, the State argues interim release is an unavailable remedy because even if Mr. Centofanti has a meritorious juror bias claim, the federal district court would likely issue a conditional writ giving the State an opportunity to retry him. In the State's view, interim release "is improper if the appropriate remedy in granting a petition leaves the government with a right to retry the petitioner." Br. Opp. at 12. This argument proves too much. Almost all federal habeas claims are claims that, if successful, would nonetheless result in a conditional writ that permits a retrial. Under the State's position, interim release would almost never be available. But either way, the State's logic doesn't apply here. Mr. Centofanti was at liberty on house arrest before his trial and would likely be similarly situated if the federal court were to allow a retrial. Interim release is thus a conceptually appropriate remedy for him.

Fourth, the State makes a series of flawed fact-based arguments. For example, it faults Mr. Centofanti for failing to file his medical records in the district court. Br. Opp. at 13 n. 4. But the warden was a party to the proceedings in the district court, and unlike Mr. Centofanti, the warden has direct access to prison medical records. If the warden had any sort of good faith reason to believe Mr. Centofanti was misrepresenting the nature of his medical conditions, the warden could've easily filed those records and proven the misrepresentation, which he didn't. There should be no serious dispute about Mr. Centofanti's medical issues; if there were, a hearing would've been necessary to sort out the disagreement.

The State notes the district court originally concluded the prison was well equipped to protect inmates in the event of an outbreak. Br. Opp. at 13-14. After the

district court's decision, multiple Nevada correctional facilities began suffering massive institution-wide outbreaks. Pet. at 8. Those incidents disprove the district court's conclusion and demonstrate Nevada prisons cannot reliably contain the virus.

The State finally suggests Mr. Centofanti is a flight risk and a danger to the community. Br. Opp. at 14. Neither the district court nor the Ninth Circuit agreed with that proposition. In fact, Mr. Centofanti remained at liberty before his first trial without fleeing and without serious incident. His medical issues and the potential need for further treatment reduce the likelihood he would reoffend or abscond. These observations suggest he would remain compliant on interim release.

To the extent the State has provided any plausible alternative arguments against interim release, those arguments are best suited for additional litigation in the court of appeals and/or the district court on remand. They provide little reason for the Court to deny review of this important appealability issue here.

CONCLUSION

The Court should issue a writ of certiorari.

Dated April 2, 2021.

Respectfully submitted,

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/s/Jeremy C. Baron
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