Appendix A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty-two.

Gigi Jordan,

Petitioner - Appellee,

v.

Amy Lamanna, in her official capacity as Superintendent of the Bedford Hills Correctional Facility,

Respondent - Appellant.

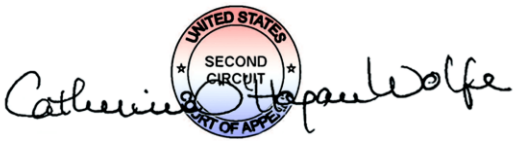
ORDER

Docket No: 20-3317

Appellee, Gigi Jordan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



Appendix B

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of May, two thousand twenty-two,

Before: Pierre N. Leval,
Robert D. Sack,
Michael H. Park,
Circuit Judges.

Gigi Jordan,

Petitioner - Appellee,

v.

Amy Lamanna, in her official capacity as Superintendent of the Bedford Hills Correctional Facility,

Respondent - Appellant.

JUDGMENT

Docket No. 20-3317

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is REVERSED, and the cause is REMANDED with instructions for the district court to deny the petition for a writ of habeas corpus.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 06/16/2022

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIGI JORDAN,

Petitioner,

-v-

AMY LAMANNA, *superintendent of Bedford Hills Correctional Facility*,

Respondent.

CIVIL ACTION NO.: 18 Civ. 10868 (SLC)

ORDER

SARAH L. CAVE, United States Magistrate Judge.

On November 20, 2018, Gigi Jordan ("Jordan"), who was incarcerated following her conviction for first degree manslaughter, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF Nos. 1, 6 (the "Petition")). On September 25, 2020, the Court issued an Opinion and Order granting the Petition on the grounds that, in denying Jordan's motion to set aside her conviction, the New York State Supreme Court, Appellate Division, First Department (the "Appellate Division") unreasonably applied clearly established law governing the Sixth Amendment right to a public trial. (ECF No. 34 (the "Opinion")).

On September 28, 2020, Respondent appealed the Order to the United States Court of Appeals for the Second Circuit. (ECF No. 37). On May 5, 2022, the Second Circuit reversed the Opinion, on the ground that the Appellate Division's decision was not contrary to clearly established law, and remanded the case "with instructions for the court to deny" the Petition. (ECF No. 69 at 21).

Accordingly, in compliance with the Mandate issued today, June 16, 2022 (ECF No. 70), the Petition is DENIED, and the case is DISMISSED. The Clerk of the Court is respectfully directed to CLOSE this case.

Dated: New York, New York
June 16, 2022

SO ORDERED.

SARAH L. CAVE
United States Magistrate Judge

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIGI JORDAN,

Petitioner,

-v-

AMY LAMANNA, *superintendent of Bedford Hills Correctional Facility*,

Respondent.

CIVIL ACTION NO.: 18 Civ. 10868 (SLC)

AMENDED ORDER SETTING CONDITIONS OF RELEASE

SARAH L. CAVE, United States Magistrate Judge.

Pursuant to the bail hearing held Wednesday, December 9, 2020, Petitioner Gigi Jordan was released from federal custody subject to the following conditions:

1. Jordan must post a bond in the amount of $250,000, co-signed by three financially responsible persons, and secured by $100,000 in cash or property.
2. Jordan shall reside at a location in New York City as approved by Pretrial Services, and may not relocate without advance authorization by Pretrial Services.
3. Jordan shall permit Pretrial Services to inspect her residence at any time and shall permit confiscation of any contraband observed in plain view of Pretrial Services.
4. Jordan shall be placed on Home Detention with electronic monitoring as directed by Pretrial Services, and will be permitted to self-install home monitoring equipment at the instruction and under the direction of Pretrial Services.
5. Jordan will be subject to Pretrial Services supervision as directed.
6. Jordan shall not commit any federal, state, or local crime.

7. Jordan shall not unlawfully use or possess a controlled substance unless prescribed by a physician with notice to Pretrial Services, and she will be subject to drug testing at the direction of Pretrial Services.
8. Jordan shall not possess a firearm, ammunition, destructive device, or other dangerous weapon.
9. Jordan shall not leave the Southern and Eastern Districts of New York unless otherwise authorized in advance by Pretrial Services.
10. Jordan must truthfully answer all inquiries by Pretrial Services and follow the instructions of Pretrial Services.
11. Jordan shall refrain from excessive use of alcohol.
12. Jordan shall not associate with any persons she knows to be engaged in criminal activity and shall not associate with any persons she knows to have been convicted of a felony unless otherwise authorized in advance by Pretrial Services.
13. Jordan must notify Pretrial Services within 48 hours of being questioned by a law enforcement officer.

(ECF No. 60 (the "Dec. 9 Order")).

Pursuant to the Dec. 9 Order, Jordan was released from federal custody into the custody of her attorney, and on December 15, 2020, she posted the required bond. (ECF No. 61).

On the application of Pretrial Services, which is overseeing Ms. Jordan's compliance with the terms of the Dec. 9 Order, to relax the conditions of Ms. Jordan's release, the Court held a status conference on March 8, 2022. (ECF No. 65; ECF minute entry Mar. 8, 2022 (the "Conference")). During the Conference, Pretrial Services explained that Ms. Jordan has been

compliant with the Dec. 9 Order in all respects, and recommended that condition #4, Home Detention, be relaxed to a Curfew enforced by electronic monitoring, with hours to be set by Pretrial Services. Following the Conference, the Court granted Respondent leave to file "a letter advising whether it objects to the recommendation [of Pretrial Services] and setting forth the factual basis for any such objection." (ECF No. 66).

On March 11, 2022, Respondent filed a letter stating, in sum, that she "takes no position on the modification recommended by Pretrial Services." (ECF No. 67 ("Respondent's Letter")).

Having considered the application of Pretrial Services, the statements by Pretrial Services during the Conference, Respondent's Letter, and the record in this case, the Court endorses the recommendation of Pretrial Services. Accordingly, paragraph 4 of the Dec. 9 Order is amended as follows:

Jordan shall be placed on a Curfew with electronic monitoring as directed by and with hours to be set by Pretrial Services, and will be permitted to self-install home monitoring equipment at the instruction and under the direction of Pretrial Services.

All other terms of the Dec. 9 Order and the Court's prior warnings to Ms. Jordan about the consequences of non-compliance remain in effect. The Court reserves the opportunity to hold a hearing, on its own motion or on the motion of any party or Pretrial Services, to consider whether to modify these conditions at any time.

Dated: New York, New York
March 11, 2022

SO ORDERED.

SARAH L. CAVE
United States Magistrate Judge

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIGI JORDAN, Petitioner, -against- AMY LAMANNA, Respondent.	DECLARATION IN SUPPORT OF MOTION TO VACATE BAIL ORDER(S) 18 Civ. 10868 (SLC)

VINCENT RIVELLESE, an attorney duly admitted to practice in the state of New York and before this Court, declares under penalty of perjury that:

1. I am an Assistant District Attorney, of counsel to ALVIN L. BRAGG, JR., District Attorney of New York County, Attorney for Respondent. I submit this declaration in support of respondent's motion for an order confirming that this Court's order issued on December 9, 2020, and modified on March 11, 2022, is no longer in effect, or vacating said order(s). The motion has already been noticed and a briefing schedule set as proposed by the parties and adopted by Your Honor.

BACKGROUND

2. On September 25, 2020, Your Honor granted petitioner Gigi Jordan's petition for a writ of habeas corpus. During the pendency of respondent's appeal to the Second Circuit, this Court issued an order on November 12, 2020 ("11/12/20 Order"), directing that Jordan be released from state custody into federal custody pending a bail hearing. Your Honor explained that this Court had the power to set bail "while [Jordan's] Petition was pending in this Court and while [respondent's] appeal [was] pending" (11/12/20 Order at 10). This Court further noted that once the appeal was "resolved by the Second Circuit," Jordan would "be back in the state's jurisdiction, either for retrial

or for continued incarceration on [her] original conviction" (*id.*). After that hearing, in an order issued on December 9, 2020 ("12/9/20 Order"), Your Honor conditionally released petitioner on bail under the supervision of federal Pretrial Services. On March 11, 2022, Your Honor modified the 12/9/20 Order to allow Jordan to be placed on a curfew with electronic monitoring as directed by and with hours to be set by Pretrial Services ("3/11/22 Order"). All other terms in the 12/9/20 Order remained in effect.

3. Your Honor's Orders did not specify an expiration date for petitioner's conditional release to federal supervision, but they included provisions reserving the Court's power "to hold a hearing, on its own motion or on the motion of any party or Pretrial Services, to consider whether to modify these conditions at any time" (11/12/20 Order at 16; 12/9/20 Order at 2; 3/11/22 Order at 3).

4. On May 5, 2022, the Second Circuit issued its decision reversing the grant of the writ and remanding for this Court to dismiss the petition. On June 9, 2022, the Second Circuit denied rehearing en banc. On June 16, 2022, the Second Circuit issued the mandate. In compliance with the mandate, that same day, Your Honor denied the petition, dismissed the case, and directed the Clerk of Court to close the case. Your Honor did not directly address the bail Orders.

ARGUMENT

5. Given the Second Circuit's decision and this Court's dismissal of the habeas petition, petitioner should be remanded to state custody. Petitioner, however, has expressed the view that she is entitled to remain under the supervision of federal Pretrial Services pursuant to Your Honor's 12/9/20 and 3/11/22 Orders. For the reasons given below, petitioner is incorrect. Accordingly, respondent respectfully requests that Your Honor either confirm that the bail Orders are no longer in effect, or vacate those orders.

6. As an initial matter, Your Honor's 11/12/20 Order expressly contemplated that petitioner's release to the supervision of federal Pretrial Services would expire upon the Second Circuit's disposition of the appeal. Specifically, the 11/12/20 Order stated that if the appeal was "resolved by the Second Circuit" in respondent's favor, Jordan would be returned to state custody (11/12/20 Order at 10.). The Second Circuit now has resolved the appeal in respondent's favor and ordered the dismissal of the petition. Given this disposition, Your Honor's prior Orders have now expired by their own terms, and petitioner should be returned to state custody to complete her sentence. *See Ostrer v. United States*, 584 F.2d 594, 597-98 (2nd Cir. 1978) (holding under similar circumstances that "[u]pon our affirming the district court's denial of habeas relief the order enlarging Ostrer on bail thereupon expired by its own terms and Ostrer was bound to surrender and start serving his sentence").

7. The Second Circuit's decision and issuance of its appellate mandate would lead to the same result even if Your Honor's prior Orders had not already expired on their own terms. Petitioner has taken a different view, relying on Supreme Court Rule 36(4) and the analogous Federal Rule of Appellate Procedure 23(d). But petitioner misinterprets those rules, as Second Circuit precedent confirms.

8. Petitioner has informed respondent that she believes that this Court's 12/9 and 3/11 Orders should remain in force for as long as she has time to petition the United States Supreme Court for a writ of certiorari and for that Court to determine her petition or decide her case. As authority for that proposition, Jordan points to Supreme Court Rule 36(4), which states:

> An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

This Rule mirrors Federal Rule of Appellate Procedure 23(d), which states:

> An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

FRAP 23(d). Petitioner's position is that this Court's 12/9 Order (as modified by the 3/11 Order) is an "initial order" regarding her custody that continues in effect pending the Supreme Court's disposition of her forthcoming petition for a writ of certiorari.

9. Under Second Circuit precedent, however, any "initial order" from Your Honor has now been superseded by an "independent order" on petitioner's custody—namely, the Second Circuit's intervening decision, denial of rehearing en banc, and issuance of the appellate mandate. That conclusion is compelled by *Ostrer*. In that case, as here, the federal habeas court issued an order granting bail pending appeal, allowing Ostrer "to remain at liberty 'until the Court of Appeals shall determine Ostrer's appeal from today's orders, or otherwise direct.'" 584 F.2d at 596-597. The Second Circuit affirmed the denial of the habeas petition in a decision that also ordered the issuance of the mandate forthwith. Ostrer then sought "an order declaring that his earlier grant of bail" from the district court "was still in effect" under Federal Rule of Appellate Procedure 23(d), "or, in the alternative, a new bail order permitting Ostrer to remain at liberty pending further appellate review." 584 F.2d at 597. The Second Circuit rejected that request. The court recognized that the district court's order of bail pending appeal was an "initial order" as contemplated by Rule 23(d). But the court held that its appellate ruling affirming the denial of habeas relief and issuing the mandate "constituted an 'independent order respecting . . . custody' under Rule 23(d), based on special reasons, namely, that after an extensive review of the record Ostrer's appeal was found by us to be meritless." *Id.* at 598. Having resolved the appeal against the petitioner and issued its mandate, the Second Circuit concluded that bail was no longer appropriate because "[t]he practical effect of the mandate's issuance, at least with respect to appellants facing criminal sentences, is to authorize the

executive branch to insure compliance with whatever sentence was imposed[.]" *Id.* The same is true here, where the Second Circuit similarly has rejected petitioner's federal habeas claim, denied rehearing en banc, and issued its mandate.

10. The fact that petitioner plans to file a petition for a writ of certiorari makes no difference. As an initial matter, given that petitioner has yet to file anything with the Supreme Court, it is far from clear that this case is "pending review" there, as required for Supreme Court Rule 36(4) to apply. In any event, Rule 36(4) contains the same language as Federal Rule of Appellate Procedure 23(d), recognizing that any "initial order respecting . . . custody" no longer has effect when, as here, there has been "an independent order respecting custody" from the circuit.

11. Finally, even assuming that Your Honor's 12/9 Order (as modified by the 3/11 Order) remains in effect under either Supreme Court Rule 36(4) or Federal Rule of Appellate Procedure 23(d), both rules allow any existing order governing custody to be modified. Your Honor's Orders likewise reserved discretion to modify petitioner's release. Your Honor should exercise that discretion here to vacate the 12/9 and 3/11 Orders because there is no longer a justification for petitioner to avoid state custody.

12. Under the status quo, Your Honor has already dismissed the habeas petition and closed the case, pursuant to a Second Circuit decision that unanimously rejected petitioner's federal habeas claim. In addition, the Second Circuit has denied petitioner's request for rehearing en banc and issued its mandate. Petitioner should therefore be required to serve her sentence, as any other convicted felon would be required to do. The bail order was issued when petitioner's situation was markedly different than it is now, after the Second Circuit's decision.

13. Although petitioner is certainly entitled to seek further review from the Supreme Court, the mere fact that she is doing so is not sufficient reason to delay the effect of the Second Circuit's mandate – which, as noted, is an independent order respecting petitioner's custody. To the

extent this Court considers the bail order still to be in effect, it should vacate it for the same reasons that a stay of the mandate would not be appropriate pending a petition for certiorari: because there is neither a "substantial question" for Supreme Court review nor "good cause for a stay." Fed. R. App. P. 41(d)(2)(A).[1]

14. In determining whether a "substantial question" exists to stay the effect of a decision pending a certiorari petition, Supreme Court Justices have considered whether the petitioner can show a "reasonable probability" that four Justices will grant certiorari; whether the petitioner can establish a "fair prospect" that the Supreme Court will rule for her; and whether "irreparable harm is likely to result" if a stay is denied. *See*, *e.g.*, *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (collecting cases); *see also Graves v. Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in chambers); *Mahan v. Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers). Only in "close" cases need the court also "balance the equities" and consider "relative harm" to the parties and the "interests of the public at large." *Rostker v. Goldberg*, 448 U.S. at 1308.

15. Here, petitioner cannot show that there is any significant likelihood that the Supreme Court will grant certiorari and reverse the Second Circuit's denial of habeas relief. Indeed, the Supreme Court has *already* denied certiorari on the same constitutional claim when petitioner raised it on direct appeal. *Jordan v. New York*, 138 S. Ct. 481 (2017). The Court also recently denied certiorari on a similar issue presented in a different case. *Smith v. Titus*, 958 F.3d 687 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 982 (Sotomayor, J., dissenting because the closed proceeding involved a "key

[1] Supreme Court Rule 23 would permit petitioner to make the same argument to that Court should a lower court reject it.

evidentiary ruling").[2] And the Second Circuit's denial of rehearing en banc indicates that the circuit court did not believe that "the proceeding involve[d] a question of exceptional importance," FRAP 35(a)(2)—yet another indication that the Supreme Court would be unlikely to grant review. *Cf.* Sup. Ct. R. 10.

16. In short, there is no basis for petitioner to delay the continuation of her sentence. She should be returned to state custody, without prejudice to her seeking certiorari from the Supreme Court.

WHEREFORE, respondent moves this Court to confirm that the November 12, 2020, December 9, 2020, and March 11, 2022 bail orders are no longer in effect, or to vacate said orders, and to direct that petitioner surrender to New York State Supreme Court to be returned to state custody to serve her sentence.

Dated: New York, New York
June 24, 2022

VINCENT RIVELLESE
Assistant District Attorney

cc: Michael Kimberly, Esq.
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, DC 20001

[2] In *Smith v. Titus*, the trial court conducted a public hearing during which Smith's attorney requested to call certain witnesses. A few days later, the trial court closed the courtroom, over Smith's objection, to issue an evidentiary ruling respecting the calling of those witnesses. The court explained that it had closed the courtroom because it did not want the press to report the names of the witnesses. 958 F.3d at 690. Here, of course, the only "ruling" that took place during the closed proceeding did not pertain to the admissibility of trial evidence at all, but simply to the provision of a jury instruction to which neither party objected.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIGI JORDAN,

Petitioner,

-against-

AMY LAMANNA,

Respondent.

MOTION TO VACATE OR MODIFY BAIL ORDER(S)

18 Civ. 10868 (SLC)

ALVIN L. BRAGG, JR.
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

VINCENT RIVELLESE
Assistant District Attorney
Of Counsel

Appendix F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3317 Caption [use short title] Jordan v. Lamanna

Motion for: independent order pursuant to FRAP 23 vacating district court orders admitting Jordan to bail pending appeal and directing her return to state custody.

Set forth below precise, complete statement of relief sought:

District court granted habeas and ordered bail pending the State's appeal; this Court reversed and habeas has now been denied. Lamanna seeks an "independent order" pursuant to FRAP 23 and S. Ct. Rule 36 returning Jordan to State custody to complete her sentence.

MOVING PARTY: Amy Lamanna **OPPOSING PARTY:** Gigi Jordan

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Vincent Rivellese **OPPOSING ATTORNEY:** Michael Kimberly

[name of attorney, with firm, address, phone number and e-mail]

NY County DA's Office
One Hogan Place, New York, NY 10013
(212) 335-9305, rivellesev@dany.nyc.gov

McDermott, Will & Emery
500 North Capitol Street, N.W., Washington, DC 20001
(202) 756-8901, mkimberly@mwe.com

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: Sept. 28, 2021 (decided May 5, 2022)

Signature of Moving Attorney:

/s/ Vincent Rivellese **Date:** 10/18/2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GIGI JORDAN, Petitioner-Appellee, -against- AMY LAMANNA, Respondent-Appellant.	AFFIRMATION IN SUPPORT OF MOTION FOR AN ORDER VACATING DISTRICT COURT'S BAIL ORDERS AND DIRECTING PETITIONER'S RETURN TO NEW YORK STATE'S CUSTODY 20-3317

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

VINCENT RIVELLESE, an attorney duly admitted to practice law before the courts of New York State and this Court, affirms that:

1. I am an Assistant District Attorney, of counsel to ALVIN L. BRAGG, JR., District Attorney, New York County, attorney for respondent-appellant Amy Lamanna (hereinafter "the State").

2. I make this affirmation in support of the State's motion, pursuant to Federal Rule of Appellate Procedure (FRAP) 23 and Supreme Court Rule 36, for an "independent order" (1) vacating the district court's "initial order[s] governing [petitioner Gigi Jordan]'s custody or release," and (2) directing Jordan to surrender to the State forthwith or by a date certain, and authorizing New York to take custody of Jordan. Such relief is warranted because this Court has already held that Jordan is not entitled to federal habeas relief, denied en banc review, and issued

the appellate mandate; the district court has already denied the petition and closed the case; and there is no reasonable prospect that the Supreme Court will grant a writ of certiorari to review this Court's decision. Under the circumstances, petitioner should be returned to state custody to serve out the remainder of her sentence for administering a fatal dose of prescription medication to her eight-year-old son.

BACKGROUND

3. On September 25, 2020, Magistrate Judge Sarah L. Cave, sitting as the district court by consent of the parties pursuant to 28 U.S.C. § 636(c), granted Jordan's petition for a writ of habeas corpus. Respondent appealed to this Court.

4. During the pendency of the appeal, the district court issued an order on November 12, 2020 (Exhibit A ["11/12/20 Order"]), directing that Jordan be released from state custody into federal custody pending a bail hearing. The district court explained that it had the power to set bail "while [Jordan's] Petition was pending in this Court and while [respondent's] appeal [was] pending" (11/12/20 Order at 10). The district court further noted that once the appeal was "resolved by the Second Circuit," Jordan would "be back in the State's jurisdiction, either for retrial or for continued incarceration on [her] original conviction" (*id.*). After that hearing, in an order issued on December 9, 2020 (Exhibit B ["12/9/20 Order"]), the district court conditionally released petitioner on bail under the supervision of federal Pretrial Services, with home detention. On March 11, 2022, the district court modified the 12/9/20 Order to allow Jordan to be placed on a curfew with electronic monitoring as directed by and with hours to be set by Pretrial Services (Exhibit C ["3/11/22 Order"]). All other terms in the 12/9/20 order remained in effect. The 12/9/20 and 3/11/21 orders did not specify an expiration date for petitioner's conditional release to federal supervision, but they included provisions reserving the district court's power "to hold a hearing,

on its own motion or on the motion of any party or Pretrial Services, to consider whether to modify these conditions at any time" (11/12/20 Order at 16; 12/9/20 Order at 2; 3/11/22 Order at 3).

5. On May 5, 2022, this Court issued its decision reversing the grant of the writ and remanding with instructions to the district court to dismiss the petition. *Jordan v. Lamanna*, 33 F.4th 144 (2d Cir. 2022). On June 9, 2022, this Court denied rehearing and rehearing en banc, and on June 16, 2022, the appellate mandate was issued. In compliance with the mandate, that same day, the district court denied the petition, dismissed the case, and directed the Clerk of Court to close the case. The district court did not address the 11/12/020, 12/9/2020, and 3/11/2021 orders governing Jordan's custody.

6. In a motion filed in the district court on June 24, 2022, the State sought clarification from the district court that these earlier bail orders were no longer in effect given this Court's decision and issuance of the appellate mandate. In the alternative, the State sought an order modifying these bail orders to revoke bail and direct Jordan to surrender to complete her state sentence. Jordan argued that the district court's bail orders should remain in effect until the Supreme Court disposed of her (still-unfiled) petition for a writ of certiorari or decided her case; concomitantly, Jordan obtained a 58-day extension of the deadline to file a cert petition, to November 4, 2022.

7. On September 2, 2022, the district court held that it lacked authority to entertain the State's motion because, pursuant to FRAP 23 and United States Supreme Court Rule 36, only this Court and the Supreme Court have the authority to modify the terms of the district court's initial bail orders (Exhibit D [9/2/2022 Dec. at 6-7]). Thus, the district court denied the motion without making a determination whether it would be appropriate to modify Jordan's custodial status.

DISCUSSION

8. This Court should vacate the district court's orders granting bail and direct that Jordan surrender to the State to complete her sentence. Although the district court was wrong to hold that it lacked the authority to modify, or at least interpret, its prior bail orders, that issue is now immaterial because there can be no doubt that this Court has the requisite authority. Here, as explained below, this Court's reversal of the district court's grant of habeas relief and issuance of the appellate mandate are independent orders concerning Jordan's custody that supplanted the initial bail orders issued by the district court. In the alternative, this Court should now vacate the district court's bail orders because there is no reasonable prospect that the Supreme Court will grant Jordan's forthcoming petition for a writ of certiorari, and the balance of the equities now tips in favor of the State's compelling interest in ensuring that a duly convicted defendant completes her sentence for killing her eight-year-old son.

9. To begin, FRAP Rule 23(4) directs that "[a]n initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued." Similarly, Supreme Court Rule 36(4) directs that "[a]n initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered."

10. Both the FRAP and Supreme Court Rules contemplate that, in an "initial order" concerning a petitioner's custody during an appeal after the petition has been granted, the petitioner

should presumptively be released or admitted to bail pending appeal. Sup. Ct. Rule 36(3)(a),(b); FRAP Rule 23(b),(c). But both rules also expressly provide that such an "initial order" no longer has effect once a subsequent "independent order" concerning custody is issued.

11. Here, this Court's May 5, 2022, decision reversing the district court's grant of habeas relief and subsequent issuance of the appellate mandate constitute such an "independent order" that supersedes the district court's initial bail orders. This Court held as much in *Ostrer v. United States*, 584 F.2d 594 (2d Cir. 1978). In *Ostrer*, as here, the district court issued an order granting bail pending appeal, allowing Ostrer "to remain at liberty 'until the Court of Appeals shall determine Ostrer's appeal from today's orders, or otherwise direct.'" 584 F.2d at 596-597. This Court affirmed the denial of the habeas petition in a decision that also ordered the issuance of the mandate forthwith. Ostrer then sought "an order declaring that his earlier grant of bail" from the district court "was still in effect" under Federal Rule of Appellate Procedure 23(d), "or, in the alternative, a new bail order permitting Ostrer to remain at liberty pending further appellate review." 584 F.2d at 597. This Court rejected that request. The Court recognized that the district court's order of bail pending appeal was an "initial order" as contemplated by Rule 23(d). But the court held that its appellate ruling affirming the denial of habeas relief and issuing the mandate "constituted an 'independent order respecting . . . custody' under Rule 23(d), based on special reasons, namely, that after an extensive review of the record Ostrer's appeal was found by us to be meritless." *Id.* at 598. Having resolved the appeal against the petitioner and issued its mandate, the Court concluded that bail was no longer appropriate because "[t]he practical effect of the mandate's issuance, at least with respect to appellants facing criminal sentences, is to authorize the executive branch to insure compliance with whatever sentence was imposed[.]" *Id*. The same

is true here, where this Court similarly has rejected Jordan's federal habeas claim, denied rehearing en banc, and issued its mandate.

12. The interpretation that an initial order governing custody after a habeas determination is extinguished when that habeas determination is reversed on appeal is a sensible one. Once an initial grant of habeas relief is reversed and the appellate mandate has issued, the only operative judicial ruling is a holding that federal law does not give petitioner any relief from her state conviction and sentence—and that thus "authorize[s] [the State] to insure compliance with whatever sentence was imposed." *Id.* Under those circumstances, there is no basis for a petitioner like Jordan to essentially receive interim federal habeas relief while she continues to dispute this Court's decision. As the Supreme Court recently reaffirmed, federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quotation marks omitted). It would be extraordinary to continue "overrid[ing] the States' core power to enforce criminal law" here in reliance on district court bail orders whose legal basis this Court has definitively rejected.

13. In the district court, Jordan asserted that *Ostrer* was distinguishable because, in that case, the mandate was issued "forthwith." That distinction is immaterial. *Ostrer*'s holding relied on "the nature and purpose of [the] mandate," not on the fact that it had been issued "forthwith." *Id*. at 598. And although *Ostrer* did note that the "forthwith" issuance of the appellate mandate reflected the court's view that both rehearing en banc and Supreme Court review were unlikely, *id*. at 598-599, the Court here expressed the same view through other means when it considered and rejected petitioner's petition for rehearing and rehearing en banc. *See* FRAP 35(a), (b)(1) (identifying factors that would support rehearing or rehearing en banc); *compare* Sup. Ct. R. 10 (identifying factors that would support certiorari).

14. Nor does this view of the mandate undercut the effect of Supreme Court Rule 36(4), as Jordan also asserted below. This Rule would still presumptively recognize the effectiveness of "[a]n initial order respecting . . . custody" through the pendency of Supreme Court review so long as the Court of Appeals did not disturb that initial order—thus respecting the principle that the status quo should not change until a court orders otherwise. Conversely, construing the mandate as an "independent order" does not compel the result that every petitioner must be returned to state custody in every case involving a reversal of a grant of habeas relief. A petitioner could forestall that result by seeking a stay of the appellate mandate under FRAP 41(d)—a remedy that Jordan notably failed to pursue here—or by seeking a further "intervening order respecting custody" under Supreme Court Rule 36(4) from the Supreme Court itself.

15. In any event, regardless of whether this Court's reversal and appellate mandate automatically superseded the district court's bail orders, this Court should at minimum exercise its power to vacate the bail orders and permit the State to resume custody of Jordan. Here, the equitable factors relevant to a custody determination tilt decidedly in favor of the State.

16. To begin, there could be no more compelling reason to revoke bail than the reversal of the erroneous decision granting the writ. Jordan was initially admitted to bail because the district court had determined that she was being held by the State on a conviction obtained in violation of the Constitution, and that she should be at liberty while the State challenged that ruling. The governing standard for that determination was *Hilton v. Braunskill*, 481 U.S. 770, 772 (1987), which discusses the "factors … to consider in determining whether to release a state prisoner pending appeal of a district court order granting habeas relief." Those factors, which the Supreme Court likened to the factors informing whether to grant a stay in any civil case, included first and foremost the State's likelihood of success on appeal; the other factors were the potential injury to

the State, the potential injury to the petitioner, and the public interest. *Id.* at 776-778 ("The balance may depend to a large extent upon determination of the State's prospects of success in its appeal"). It was on application of *Hilton v. Braunskill* that the district court admitted Jordan to bail. Now that the district court's order granting habeas relief has been reversed, so too should the orders releasing Jordan pending appeal be vacated.

17. Moreover, although Jordan is free to seek further review from the Supreme Court, there is no reasonable prospect that the Court will grant her forthcoming petition for a writ of certiorari. The Supreme Court has already denied Jordan's earlier petition requesting direct review of her state criminal judgment, on the same grounds that she has asserted in this habeas proceeding, *Jordan v. New York*, 138 S. Ct. 481 (2017); given the much stricter standard of review for such claims raised in a subsequent federal habeas proceeding, *see Williams v. Taylor*, 529 U.S. 362, 413 (2000), it seems unlikely that the Court will deem the legal issue here to be more cert-worthy now. Moreover, the Supreme Court recently denied certiorari in a case presenting a more troubling courtroom closure than Jordan's. *See Smith v. Titus*, 141 S. Ct. 982 (2021). Indeed, in dissenting from the denial of certiorari, Justice Sotomayor emphasized that the closure in *Smith* had taken place during an "important evidentiary ruling excluding testimony from multiple defense witnesses." *Id.* at 987. Here, by contrast, this Court correctly noted that the courtroom closure occurred during a "wholly ancillary proceeding" 33 F.4th at 153, not during the type of critical substantive proceeding that troubled Justice Sotomayor—and that was still not enough to persuade the Court to grant review in *Smith*.

WHEREFORE, respondent-appellant respectfully requests that the bail orders be vacated and petitioner be directed to surrender forthwith or on or before a date certain to New York State

Supreme Court, and that the State be authorized to take custody of petitioner for the completion of her sentence.

Dated: New York, New York
October 18, 2022

Vincent Rivellese
Assistant District Attorney
(212) 335-9305

cc: (via ecf) Michael Kimberly, Esq.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3317 Caption [use short title] Jordan v. Lamanna

Motion for: recall mandate

Set forth below precise, complete statement of relief sought:

The State appealed to this Court from the district court's grant of habeas relief. This Court reversed, ordered habeas denied, and issued the mandate. The State moved the district court to vacate its bail orders, and that court held that it lacked authority to decide the motion. The state moves this Court to recall the mandate so that it will have jurisdiction to decide the motion.

MOVING PARTY: Amy Lamanna **OPPOSING PARTY:** Gigi Jordan

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Vincent Rivellese **OPPOSING ATTORNEY:** Michael Kimberly

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: USDJ: Magistrate Judge Sarah L. Cave

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: Sept. 28, 2021 (Decided May 5, 2022)

Signature of Moving Attorney:

/s/ Vincent Rivellese **Date:** Oct. 18, 2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GIGI JORDAN, Petitioner-Appellee, -against- AMY LAMANNA, Respondent-Appellant.	AFFIRMATION IN SUPPORT OF MOTION TO RECALL MANDATE 20-3317

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

VINCENT RIVELLESE, an attorney duly admitted to practice law before the courts of New York State and this Court, affirms that:

1. I am an Assistant District Attorney, of counsel to ALVIN L. BRAGG, JR., District Attorney, New York County, attorney for respondent-appellant Amy Lamanna (hereinafter "the State").

2. I make this affirmation in support of the State's motion to recall the mandate for the purpose of hearing and determining the State's motion (separately filed), pursuant to Federal Rule of Appellate Procedure (FRAP) 23 and Supreme Court Rule 36, for an "independent order" (1) vacating the district court's "initial order[s] governing [petitioner Gigi Jordan]'s custody or release," and (2) directing Jordan to surrender to the State forthwith or by a date certain, and authorizing New York to take custody of Jordan for the remainder of her sentence.

3. On September 25, 2020, Magistrate Judge Sarah L. Cave, sitting as the district court by consent of the parties pursuant to 28 U.S.C. § 636(c), granted Jordan's petition for a writ of habeas corpus. Respondent appealed to this Court.

4. During the pendency of the appeal, the district court issued orders on November 12, 2020, December 9, 2020, and March 11, 2022, releasing Jordan from state custody and admitting her to bail pending appeal, under federal supervision. The orders did not specify an expiration date, but they included provisions reserving the district court's power to modify the conditions.

5. On May 5, 2022, this Court issued its decision reversing the grant of the writ and remanding with instructions to the district court to dismiss the petition. *Jordan v. Lamanna*, 33 F.4th 144 (2d Cir. 2022). On June 9, 2022, this Court denied rehearing and rehearing en banc, and on June 16, 2022, the appellate mandate was issued. In compliance with the mandate, that same day, the district court denied the petition, dismissed the case, and directed the Clerk of Court to close the case. The district court did not address the 11/12/2020, 12/9/2020, and 3/11/2022 orders governing Jordan's custody.

6. In a motion filed in the district court on June 24, 2022, the State sought clarification from the district court that these bail orders were no longer in effect given this Court's decision and issuance of the appellate mandate. In the alternative, the State sought an order modifying the bail orders to revoke bail and direct Jordan to surrender to complete her state sentence. Jordan argued that the district court's bail orders should remain in effect until the Supreme Court disposed of her (still-unfiled) petition for a writ of certiorari or decided her case; concomitantly, Jordan obtained a 58-day extension of the deadline to file a cert petition, to November 4, 2022.

7. On September 2, 2022, the district court held that it lacked authority to entertain the State's motion because, pursuant to FRAP 23 and United States Supreme Court Rule 36, only this

Court and the Supreme Court have the authority to modify the terms of the district court's initial bail orders. Thus, the district court denied the motion without making a determination whether it would be appropriate to modify Jordan's custodial status.

8. Today, the State filed a motion for the same relief in this Court, and was informed by the Clerk that a motion to recall the mandate would be required because this Court lacks jurisdiction after having issued the mandate to the district court. Accordingly, the State moves the Court to recall its mandate in order to permit the State to move the Court to vacate the district court's orders granting bail, and to direct that Jordan surrender to the State to complete her sentence.

9. Jordan's attorney has informed me that Jordan, in addition to opposing the substantive motion to revoke bail and direct her surrender, also opposes this motion to recall the mandate. Given Jordan's argument in the district court that under FRAP 23 and Supreme Court Rule 36, only the Supreme Court is authorized to issue an order respecting the custody of a petitioner who intends to seek certiorari after the appellate mandate has issued, the State anticipates that Jordan's objection will be based on that position. It is the State's position that, as the district court appeared to agree in denying the State's bid for relief there, both this Court and the Supreme Court are authorized to issue orders pertaining to a petitioner's custody during the appeal and certiorari processes. In any event, the recall of the mandate would be nothing more than a ministerial action returning the case to this Court's jurisdiction, where the parties' positions on this Court's authority can be adjudicated.

WHEREFORE, respondent-appellant respectfully requests that the Court recall its mandate for the purpose of hearing and determining the State's motion to revoke bail and return Jordan to state custody.

Dated: New York, New York
October 18, 2022

Vincent Rivellese
Assistant District Attorney
(212) 335-9305

cc: (via ecf) Michael Kimberly, Esq.