No. 22A551

IN THE

Supreme Court of the United States

GIGI JORDAN,

Applicant,

- versus -

AMY LAMANNA,

Respondent.

BRIEF IN OPPOSITION TO EMERGENCY APPLICATION

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INTRODUCTION

A New York State jury convicted petitioner Gigi Jordan of first-degree manslaughter for intentionally killing her autistic eight-year-old son with a fatal dose of prescription medications. At one point during the two-month trial, the trial court closed the courtroom to the public for approximately fifteen minutes to hear arguments about a website and email by petitioner that accused the court of undermining the fairness of the trial. The only impact of the closed proceeding was that, once the courtroom reopened, the court repeated an earlier instruction to the jury not to consume media coverage about the trial; later the same day, the court unsealed the minutes of the closed proceeding and two exhibits that had been marked during it. The closed proceeding did not otherwise affect any substantive matter before the jury. The New York Appellate Division and Court of Appeals rejected petitioner's claim that the closed proceeding violated the Sixth Amendment.

The United States District Court for the Southern District of New York concluded otherwise, granting federal habeas relief to petitioner; the district court further ordered that petitioner be released from state custody on bail pending the State's appeal. The United States Court of Appeals for the Second Circuit reversed, reasoning that the closed proceeding was so inconsequential that the state courts had not acted unreasonably in finding no violation of federal law. In a subsequent order, the Second Circuit also directed that petitioner surrender to the State forthwith.

Petitioner now asks this Court for emergency relief to prevent her return to state custody to resume her prison sentence while this Court considers her petition for a writ of certiorari. This Court should deny any such relief.

Petitioner errs at the outset by claiming that a presumption of release applies here. Such a presumption may apply when this Court is reviewing a lower court order that *grants* habeas relief. But here, the order under review is the Second Circuit's ruling that petitioner is not entitled to habeas relief—not the district court's original order. Under this Court's Rule 36.4 and Federal Rule of Appellate Procedure 23(d), the Second Circuit's ruling constitutes an independent order that is now the presumptive basis for petitioner's custody. Petitioner's continued reliance on the district court's (now reversed) grant of habeas relief is misplaced.

No compelling reason supports granting extraordinary emergency relief here. At base, petitioner is no differently situated from any state prisoner who seeks this Court's review of an adverse habeas ruling. For such prisoners, state custody should be the rule, not the exception. And here, additional factors weigh heavily against an emergency order that would allow petitioner to avoid the consequences of her state conviction. There is no reasonable probability that four justices will grant certiorari given that (a) this Court has already denied petitioner's attempt to raise her Sixth Amendment claim directly from her final state court judgment, and (b) the Second Circuit correctly found that the closed proceeding here was vastly different from the more substantive and prejudicial courtroom closures in this Court's precedents. Moreover, the public interest weighs heavily against any emergency relief given that,

under the status quo established by the Second Circuit's ruling, there is no legal basis to prevent petitioner from serving her lawfully imposed state sentence. Petitioner should accordingly be returned to state custody forthwith.

STATEMENT

A. Factual Background

On the evening of February 3, 2010, petitioner Gigi Jordan, a wealthy pharmaceutical executive, took her autistic eight-year-old son, Jude Mirra, to the Peninsula Hotel. At some point during the next day or so, petitioner administered to Jude a fatal overdose of prescription medications. Jude died in the hotel room at night on February 4 or early in the morning on February 5. Around the time that Jude died, petitioner ingested her own cocktail of medications and emailed her aunt, telling her what she had done. Petitioner's aunt contacted the police, who arrived at the Peninsula Hotel later that morning. In petitioner's room, officers found Jude's lifeless body on the bed; petitioner was awake on the floor next to the bed, surrounded by prescription drugs. (Pet. App. 2a-3a, 18a.)

B. Procedural History

1. The trial and fifteen-minute closed proceeding

Petitioner was charged with second-degree murder under New York Penal Law § 125.25. A jury trial commenced on September 3, 2014, and lasted approximately nine weeks. (Pet. App. 3a-4a.) Petitioner's only meaningful defense was a claim of

extreme emotional disturbance. Under New York law, a defendant who has committed intentional murder may instead be convicted of first-degree manslaughter if she establishes by a preponderance of the evidence that she "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." N.Y. Penal Law § 125.25(1)(a). Petitioner's claim was that she killed Jude in order to save him from sexual abuse by his biological father. (Pet. App. 3a.)

The closed proceeding that is the subject of petitioner's habeas claim occurred approximately one month into the trial, on October 1, 2014. That morning, before the jury was brought into the courtroom, the trial court asked all spectators to leave so that the court could resolve an issue that the prosecution wished to raise. (Pet. App. 4a.) The issue, the prosecution explained, was a pair of related public communications about the trial. The first communication was a website that had gone live the night before that "accused the court of undermining the fairness of the trial by refusing to admit certain evidence." (Pet. App. 4a.) The second communication was an email from petitioner to more than one hundred recipients, many in the media, saying that she had "posted this website in the hope that the truth will come out," and again accusing the court of preventing a "fair trial" by the "suppression of evidence." Both of these communications were then marked as exhibits. To address these communications, the prosecution asked the court to repeat an earlier instruction that the jury avoid media coverage about the trial. (Pet. App. 5a.)

For the remainder of the closed proceeding, defense counsel objected to the closure of the courtroom, and the court repeatedly asked defense counsel who was responsible for the website. Near the end of the proceeding, the court denied defense counsel's motion to unseal the minutes and the two marked exhibits. The court then reopened the courtroom and repeated its instruction to the jury not to consume media about the trial. Altogether, the closed proceeding had lasted approximately fifteen minutes. Later the same day, the court revisited its earlier ruling and decided, upon further reflection, to unseal the minutes and the two exhibits (i.e., the website and email). (Pet. App. 6a.)

After five more weeks of trial, on November 5, 2014, the jury accepted petitioner's affirmative defense and convicted her of first-degree manslaughter. (Pet. App. 3a-4a.) The Appellate Division, First Department unanimously affirmed the conviction and, among other rulings, rejected petitioner's claim that the fifteen-minute closure of the courtroom constituted reversible error. The Appellate Division reasoned that the closed proceeding was "the equivalent of a sidebar, robing room or chambers conference" that did not trigger the Sixth Amendment right to a public trial. In any event, "the conference had no impact upon the conduct of the trial other than having the court repeat its previous instructions about trial publicity," and the "minutes and exhibits that had been sealed [during the closed proceeding] were unsealed the same day." *People v. Jordan*, 145 A.D.3d 584, 585 (N.Y. App. Div. 1st Dep't 2016).

The New York Court of Appeals denied leave to appeal. *People v. Jordan*, 29 N.Y.3d 1033 (2017). Petitioner then filed a petition for a writ of certiorari with this Court, claiming a Sixth Amendment violation from the closed proceeding. This Court denied the petition. *Jordan v. New York*, 138 S. Ct. 481 (2017).

2. Federal habeas proceedings

On November 20, 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 with the United States District Court for the Southern District of New York. On September 25, 2020, the district court (Cave, M.J.) granted the writ. The district court found that the Appellate Division had unreasonably applied clearly established federal law in finding no Sixth Amendment violation from the closed proceeding. (Pet. App. 42a.) The district court held that the fifteen-minute closure was impermissible, that the closure was "not trivial," and that the proper remedy was a new trial. (Pet. App. 53a-61a.)

On May 5, 2022, the Second Circuit reversed. (Pet. App. 2a.) The circuit found no clearly established federal law that the right to a public trial applied in this context because prior precedents concerning courtroom closures involved far more substantive proceedings (e.g., suppression hearings or jury selection) than the "wholly ancillary proceeding" here. (Pet. App. 14a.) The circuit emphasized that the closed proceeding "did not appear to have any substantive impact on the case" since (a) it did not concern any evidence that would have been submitted to the jury, (b) the minutes of the proceeding and the two marked exhibits were unsealed later the same

day, and (c) the only practical consequence of the proceeding was the court's repetition of an earlier instruction that the jury not consume media coverage about the trial. (Pet. App. 12a-13a.) In light of the nonexistent impact of the closed proceeding and the "unorthodox circumstances" leading to the courtroom closure, the circuit concluded that it "was not unreasonable for the Appellate Division to deny Jordan's claim." (Pet. App. 12a, 14a.)

On June 9, 2022, the circuit denied rehearing and rehearing en banc (Brief in Opposition to Emergency Application ("Opp.") App. A), and on June 16, 2022, the appellate mandate was issued (Opp. App. B). 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. (Opp. App. C.)

C. Petitioner's Custody Pending Appeal

During much of the pendency of the Second Circuit appeal, petitioner was not in state custody due to a series of orders by the district court. On November 12, 2020, the district court issued an order directing that petitioner be released from state custody into federal custody pending a bail hearing. (Emergency Application App. C at 17-18.) The Second Circuit denied the State's request for a stay of that order. (Emergency Application App. D.) On December 9, 2020, the district court conditionally released petitioner to home detention under the supervision of federal Pretrial Services. (Emergency Application App. B.) On March 11, 2022, the district court modified the December 2020 Order to allow petitioner to be placed on a curfew

with electronic monitoring as directed by and with hours to be set by Pretrial Services. (Opp. App. D.)

On June 24, 2022, one week after the issuance of the appellate mandate, the State filed a motion with the district court seeking clarification that its earlier bail orders were no longer in effect given the Second Circuit's decision and issuance of the appellate mandate and the district court's dismissal of the case. In the alternative, the State sought an order modifying the bail orders to revoke bail and direct petitioner to surrender to complete her state sentence. (Opp. App. E at 7.)

On September 2, 2022, the district court held that it lacked authority to entertain the State's motion because, under Federal Rule of Appellate Procedure 23 and Supreme Court Rule 36,4, only this Court and the Second Circuit had the authority to modify the terms of the district court's initial bail orders. (Emergency Application App. E at 10.)

On October 3, 2022, the State filed a motion with the Second Circuit to vacate the district court's bail orders and return petitioner to state custody, and to recall the mandate in order to effectuate this limited relief. (Opp. App. F.) On December 19, 2022, the Second Circuit recalled its mandate for the limited purpose of issuing an order directing petitioner to surrender "forthwith" to the State. (Emergency Application App. A.)

ARGUMENT

THE COURT SHOULD DENY PETITIONER'S REQUEST FOR EMERGENCY RELIEF

Petitioner asks this Court for emergency relief under Supreme Court Rule 36.4 to prevent her return to state custody—notwithstanding the fact that the Second Circuit has found her federal habeas corpus claims meritless, directed that the petition be dismissed, and ordered petitioner to surrender to the State forthwith. This Court should deny petitioner's application for emergency relief in its entirety.

A. No Presumption of Release Applies

As a threshold matter, petitioner's argument for emergency relief is founded on the mistaken premise that "a strong presumption in favor of release" continues to apply to this case. (Emergency Application at 7.) Petitioner is wrong. Both Supreme Court Rule 36 and Federal Rule of Appellate Procedure 23 may apply such a presumption "when a decision *ordering the release* of a prisoner is under review" (Emergency Application App. D (emphasis added)). *See* Sup. Ct. Rule 36.3(b), 36.4; FRAP 23(c),(d). But any such presumption persists only until "an independent order respecting custody, enlargement, or surety is entered." Sup. Ct. Rule 36.4; *see also* FRAP 23(d). This conclusion follows from the plain text of the relevant rules, which expressly provides that any "initial order respecting the custody" of a habeas petitioner "shall continue in effect pending [appellate] review"—"*unless* . . . an independent order respecting custody . . . is entered." Sup. Ct. Rule 36.4 (emphasis

added). The word "unless" makes clear that, at that point, it is the intervening order, not the original one, that presumptively governs a habeas petitioner's custody.

Here, the State has consistently argued that the Second Circuit's May 5, 2022, reversal of habeas relief and June 16, 2022, issuance of the appellate mandate constituted "an independent order respecting custody" that superseded any presumption of release that may have arisen from the district court's original (and now reversed) grant of habeas relief. Circuit precedent supports such a conclusion. *See Lurie v. Wittner*, 228 F.3d 113, 134-135 (2d Cir. 2000); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978). But regardless of whether the Second Circuit's original orders were sufficient, the circuit plainly issued an "independent order respecting custody" in its December 19, 2022, order directing petitioner "to surrender to the State of New York forthwith." (Emergency Application App. A.) Not only did the Second Circuit's order expressly vacate the district court's earlier bail orders, but it did so in response to the State's request for relief specifically under FRAP 23. (Opp. App. F.) The Second Circuit's most recent order thus eliminates any presumption of release that may have applied in earlier phases of this appeal.

This result is a sensible one. Once an initial grant of habeas relief is reversed, the appellate mandate has issued, and the federal circuit court has directed a petitioner's return to state custody, the only operative judicial ruling is a holding that federal law does not give petitioner any relief from her state conviction and sentence. That ruling thus "authorize[s] [the State] to insure compliance with whatever sentence was imposed." *Ostrer*, 584 F.2d at 598. Under these circumstances, there is

no basis for a petitioner like Jordan to essentially receive interim relief from a state conviction and sentence that has been adjudicated to be lawful, even if she continues to dispute the denial of the writ.

This conclusion does not, as petitioner asserts, undercut the purpose of Supreme Court Rule 36.4. That rule would still presumptively recognize the effectiveness of "[a]n initial order respecting . . . custody" through the pendency of this Court's review so long as the Court of Appeals *affirmed* that initial order—even if the State were at that point seeking review from this Court. Here, however, the Second Circuit not only reversed the district court's grant of habeas relief, but subsequently agreed with the State that petitioner should be returned to state custody forthwith. Under these circumstances, no presumption of release applies.

B. This Court Should Not Independently Direct Petitioner's Release from State Custody

In the absence of any presumption of release, petitioner's emergency application amounts to an extraordinary request for this Court to independently direct petitioner's release from state custody—even before this Court has decided whether to prolong this litigation by granting a writ of certiorari. No such extraordinary relief is warranted here.

Given the Second Circuit's conclusion that petitioner is not entitled to federal habeas relief, and the district court's compliance with that ruling by dismissing the petition and closing the case, petitioner is no differently situated from any state prisoner who seeks this Court's intervention to disrupt a lawful conviction and

sentence. Where state custody has not been deemed unlawful, the State's maintenance of that custody pending appeal should be the rule, not the exception. And none of the equitable factors that this Court considers in deciding whether to release prisoners pending appeal supports petitioner's application here. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

First, petitioner has failed to make a "strong showing" of likely success on the merits of her appeal. *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation marks omitted). This factor encompasses "a discretionary judgment about whether the Court should grant review in th[is] case." *Doe v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring). When a habeas petitioner's legal claims are weak or unlikely to lead to the grant of a writ of certiorari, this Court has not hesitated to deny requests for release pending appeal—even when, unlike here, the federal circuit court has *granted* habeas relief. *See, e.g.*, *Tate v. Rose*, 466 U.S. 1301, 1303 (1984) (O'Connor, J., in chambers); *Sumner v. Mata*, 446 U.S. 1302, 1304 (1980) (Rehnquist, J., in chambers).

Here, further review by this Court is highly unlikely, for several reasons. This Court has already denied petitioner's earlier petition requesting direct review of her state criminal judgment on the same Sixth Amendment grounds that she has asserted in this habeas proceeding. *Jordan v. New York*, 138 S. Ct. 481 (2017). Given the 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 would deem the legal issue to be more cert-worthy now.

Moreover, this Court recently denied certiorari in a case presenting a more troubling courtroom closure than occurred here. *See Smith v. Titus*, 141 S. Ct. 982 (2021). In dissenting from the denial of certiorari, Justice Sotomayor noted 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, the Second Circuit correctly noted that the courtroom closure occurred during a "wholly ancillary proceeding" that "did not appear to have any substantive impact on the case," evidentiary or otherwise. (Pet. App. 12a, 14a.) The closed proceeding here is thus a far cry from the more critical courtroom closure at issue in *Smith v. Titus*. And given that this Court declined to review *Smith v. Titus*, there is no "reasonable probability" that four justices will vote to grant certiorari here. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

The same conclusion applies even under petitioner's attempt to reformulate the question presented as one about the appropriate standard for granting federal habeas relief under 28 U.S.C. § 2254. Petitioner claims that the Second Circuit ruled the way that it did because it found no "Supreme Court precedent involving analytically indistinguishable facts." (Pet. i.) But petitioner mischaracterizes the Second Circuit's ruling: the gist of that court's reasoning was that the nature and immateriality of the closed proceeding here was *not close* to the meaningful substantive proceedings at issue in cases like *Waller v. Georgia*, 467 U.S. 39 (1984) (pretrial suppression hearing), and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam) (jury voir dire). The circuit emphasized the "unorthodox circumstances that

gave rise to the Closed Proceeding." (Pet. App. 12a.) It noted that the closed proceeding here lacked both the "tradition of accessibility" and "particularly significant positive role in the actual functioning of the [trial] process" that characterized other proceedings that would trigger the Sixth Amendment. (Pet. App. 12a n.2 (quotation marks omitted).) And it underscored that any immediate denial of public access quickly became immaterial when, later the same day, the trial court unsealed the minutes of the closed proceeding and the two marked exhibits. (Pet. App. 12a-13a.) The problem with petitioner's habeas claim was thus not the absence of factually identical Supreme Court precedents, as petitioner claims, but rather the vast gulf between the idiosyncratic and harmless closure here and the more serious and prejudicial denials of public access in this Court's prior cases. There is no reasonable probability that four justices will grant certiorari to resolve a purported dispute about the standard for granting habeas relief that is not even squarely presented here.

Second, petitioner has not shown that she will be "irreparably injured absent a stay." *Hilton*, 481 U.S. at 776. State custody pending a state prisoner's appeal from an unfavorable habeas ruling cannot constitute such irreparable injury; otherwise, release pending the disposition of a prisoner's petition for a writ of certiorari would be the rule, rather than the exception. Moreover, in this case, there are reasons to doubt that petitioner would be able to escape state custody altogether even if she were to prevail on her Sixth Amendment claim. For one thing, even if the closed proceeding violated petitioner's constitutional rights, the district court's remedy of a new trial

went too far: after all, in *Waller*, where an entire suppression hearing was improperly closed, the remedy approved by this Court was merely to repeat the proceeding in open court—and to leave the conviction undisturbed unless the result of the open proceeding differed from the closed one. 467 U.S. at 49-50. Here, a repetition of the closed proceeding in open court would not have made any difference because the jury would have received the same instruction about not consuming media coverage about the case, and there is no dispute that the closed proceeding did not affect any evidence that was or could have been introduced at trial. (Pet. App. 12a-13a.)

Moreover, even if there were a new trial, it is exceedingly unlikely that petitioner would have been able to avoid a significant prison sentence. In her testimony in this trial, petitioner already admitted to the grievous offense of intentionally killing her son, and she already received the benefit of the only defense that she raised when the jury accepted her affirmative defense of extreme emotional disturbance. Given that the same evidence would be introduced at any new trial—bolstered by the fact that petitioner already admitted to the killing in this trial—there is little chance that petitioner would be able to avoid a conviction and similar sentence. Petitioner thus cannot show that she would be irreparably injured by being in state custody pending the disposition of her petition for a writ of certiorari, even if her claims had any merit whatsoever.

Finally, the public interest weighs heavily against any stay of petitioner's return to state custody. As this 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, *id.*, in reliance on district court orders whose legal basis has already been definitively rejected by the Second Circuit. As this Court has observed, "[a] State's interests in finality are compelling when," as here, "a federal court of appeals issues a mandate denying federal habeas relief." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Petitioner's arguments to the contrary are meritless. First, petitioner asserts that "[t]here has been no change in factual circumstances warranting a change in Jordan's custody status." (Emergency Application at 7.) But this claim ignores the most significant intervening event here: the Second Circuit's reversal of the district court's grant of habeas relief, and its order directing that petitioner be returned to state custody forthwith. The elimination of any legal basis for petitioner to continue evading the completion of her state sentence is a meaningful—indeed, dispositive—change of circumstances, as the Second Circuit appropriately recognized.

Second, petitioner accuses the Second Circuit of abusing its discretion when it recalled the mandate to issue its December 19, 2022, independent order respecting custody. (Emergency Application at 15-16.) But both this Court's Rule 36.4 and FRAP 23(d) expressly authorize "the court of appeals" to enter "an independent order" regarding a habeas petitioner's custody. It would make no sense for the court of appeals to lack the power to recall its mandate for the limited purpose of issuing such an independent order.

The case cited by petitioner limiting any recall of the mandate to "extraordinary circumstances" (Emergency Application at 15) concerned a recall that was effected for a very different reason. In *Calderon v. Thompson*, the en banc Ninth Circuit recalled its mandate based on a questionable "malfunction" of "the Ninth Circuit's en banc process." 523 U.S. at 552. The Ninth Circuit was thus not recalling the mandate for the purpose of issuing an intervening order that was exclusively the province of the appellate courts, and that was unquestionably authorized under both this Court's rules and the Federal Rules of Appellate Procedure. Following *Calderon*, courts have also recognized that the appellate mandate should not be recalled solely to revisit the merits of an appellate ruling, since such a collateral attack is more properly the basis of a petition for writ of certiorari or a federal habeas petition. *See, e.g.*, *Bottone v. United States*, 350 F.3d 59, 63 (2d Cir. 2003). But the recall here was also not done for this purpose: far from calling into "question[] the merits of the underlying decision," *id.*, the Second Circuit recalled the mandate in order to give its habeas ruling its lawful and intended effect on petitioner's custody. Petitioner's criticism of the circuit's recall of its mandate thus also provides no basis for her request for emergency relief.

CONCLUSION

The emergency application should be denied.

Dated: New York, NY
December 27, 2022

Respectfully submitted,

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