**No. 22A551**

# In the Supreme Court of the United States

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GIGI JORDAN,
*Applicant*,
v.
AMY LAMANNA,
*Respondent*.

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On Application for Emergency Relief

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**REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR AN ORDER REINSTATING THE DISTRICT COURT'S INITIAL ORDER RESPECTING CUSTODY PENDING APPEAL, OR IN THE ALTERNATIVE FOR A STAY OF THE SECOND CIRCUIT'S ORDER RECALLING THE MANDATE AND VACATING THE DISTRICT COURT'S ORDER**

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NORMAN H. SIEGEL
*Siegel Teitelbaum & Evans, LLP*
*260 Madison Avenue*
*22nd Floor*
*New York, NY 10016*

EARL S. WARD
*Emery Celli Brinckerhoff Abady Ward & Maazel LLP*
*600 Fifth Avenue*
*Rockefeller Ctr., 10th Floor*
*New York, NY 10020*

MICHAEL B. KIMBERLY
*Counsel of Record*
PAUL W. HUGHES
SARAH P. HOGARTH
CHARLES SEIDELL
*McDermott Will & Emery LLP*
*500 North Capitol Street NW*
*Washington, DC 20001*
*(202) 756-8000*
*mkimberly@mwe.com*

EUGENE R. FIDELL
*Yale Law School Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*

*Counsel for Applicant*

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**



**Statutes and rules**



**Other authorities**

**APPLICANT'S REPLY**

The opposition to the application is most notable for what it does *not* say: The State does not deny that, *if* Rule 36.4's presumption in favor of Jordan's continued release applies in these circumstances, the presumption is not overcome here, and an "independent order" reinstating the district court's original custody order would be warranted. It also does not disagree that, *if* extraordinary circumstances are necessary for a court of appeals to recall its mandate in these circumstances, none were present in this case, and an "independent order" vacating the Second Circuit's recall of its mandate and in turn its December 19 custody order likewise would be warranted.

Concerning the more specific factors at issue, the State does not (and cannot) dispute that Jordan has been a fully compliant bailee who is neither a flight risk nor a risk to the public. It also does not (and cannot) deny that she has already served the significant majority of her sentence, mitigating its punitive interest in immediate custody. Finally, the State does not deny that, sending Jordan immediately back to prison now—while the Court is considering her petition and, if it grants the petition, resolves the merits—would largely defeat the purpose of the Court's review, which is to determine whether Jordan should serve the remainder of her sentence at all or instead be retried.

Against this background, what the State *does* say is wholly unpersuasive. It contends first that Rule 36.4's presumption in favor of release pending appeal automatically terminates if a court of appeals reverses the district court's grant of habeas relief. But that is not what Rule 36.4 says; rather, it states expressly that the presumption in favor of release pending appeal continues through proceedings "in this Court," without conditioning that presumption on the court of appeals' affirmance. Here, the district court *granted* relief and in turn ordered Jordan's release pending the State's appeal. The State is thus wrong to

suggest (at 2) that Jordan "is no differently situated from any state prisoner who seeks this Court's review of an adverse habeas ruling." She has been at liberty for the past two years and remains so now. The relief requested would merely maintain that two-year status quo for the relatively short period needed to resolve Jordan's certiorari petition. It is the State (and the Second Circuit's order) that would unjustly disrupt the current state of affairs. And it would do so for no good reason—if the Court were to deny the petition, as the State insists it will, Jordan would return to custody in just around two months, with no appreciable harm to the State in that modest period of time. In contrast, the harm to Jordan of an immediate return to custody would be tremendous if the Court were to grant the petition and ultimately reverse. Thus, no matter which party bears the burden, the equities strongly favor maintaining the status quo.

## ARGUMENT

### A. The presumption in favor of Jordan's release pending all stages of the appeal is fully applicable here

As we explained in the application (at 7-9) there is a "presumption of release pending appeal where a petitioner has been granted habeas relief" by a district court. *O'Brien* v. *O'Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers) (citing *Hilton* v. *Braunskill*, 481 U.S. 770, 774 (1987)). Similarly, there is "a presumption of correctness to the initial custody determination made" by the district court. *Hilton*, 481 U.S. at 777. Thus, when a district court grants habeas relief and orders release pending appeal, Rule 36.4 presumptively requires that the petitioner remain at liberty "pending review in the court of appeals and in this Court." S. Ct. Rule 36.4. The presumption "can be overcome" on appeal only "if the traditional factors regulating the issuance of a stay" clearly favor the State. *O'Laughlin*, 557 U.S. at 1302 (citing *Hilton*, 481 U.S. at 776).

**1.** The State does not contend that, if the dual presumptions in favor of Jordan's continued release remain valid and applicable in this Court, it has overcome them. Nor could it. As we demonstrated in the application (at 9-10), Jordan is not a flight risk and poses no threat to the public. Moreover, she has served the vast majority of her sentence, undercutting the acuity of the State's penological interests. On the other side of the scale, "[t]he deprivation of a person's liberty has never been taken lightly in our justice system," and "[t]he possibility that [Jordan] will spend additional years in prison despite" the very real possibility that she should not be there at all represents a harm "of great significance." App. C, at 11 (quoting *Waiters* v. *Lee*, 168 F. Supp. 3d 447, 453 (E.D.N.Y. 2016)).

Unable to overcome Rule 36.4's presumption on its own terms, the State asserts instead that the presumption does not apply at all. It says (Opp. 10), in particular, that the presumption automatically terminates "[o]nce an initial grant of habeas relief is reversed" by the court of appeals. This (in the State's view) effectively places the petitioner in the same position as if the district court had originally denied habeas relief and thus had never ordered the petitioner released pending appeal.

That position is flatly inconsistent with Rule 36.4's plain language. The rule states that "[a]n initial order respecting the custody or enlargement of the prisoner * * * shall continue in effect pending review in the court of appeals *and in this Court*." S. Ct. R. 36.4. To be sure, the State's theory might make sense if Rule 36.4 used *different* language—if, for example, it stated that such an order shall remain in effect "unless, in cases where the initial order requires the prisoner's enlargement, the court of appeals reverses the district court's order granting habeas corpus relief." But that is not what the rule says. Instead, the rule creates a presumption of release through the conclusion of appellate review "in this Court," without any kind of appellate-reversal qualifier. Thus, when a district court grants

habeas relief and orders the petitioner released pending appeal (as did the district court below), Rule 36's presumption in favor of release applies during *all* stages of the appeal, including "in this Court."[1]

**2.** It does not change matters that the Second Circuit entered an order on December 19 directing Jordan to return to custody forthwith. See Opp. 10-12. To be sure, Rule 36.4 authorizes a court of appeals to enter an order altering the district court's initial custody order (assuming it has jurisdiction at the time). But it is permitted to do so only for "reasons shown." S. Ct. Rule 36.4. Here, the question posed in the application is whether the Second Circuit's December 19 order was improperly entered because no such reasons *were* shown. Our position—which goes glaringly unchallenged in the opposition—is that there was absolutely no factual showing to overcome the presumption in favor of Jordan's continued release during the proceedings before this Court. In determining whether that contention is correct—and in turn whether the Circuit Justice should enter a new independent order restoring the "initial order respecting custody" under Rule 36.4—the Circuit Justice must make her own judgment whether the presumption in favor of continuing the district court's order was overcome.

In resisting that conclusion, the State appears to suggest (Opp. 10-12) that, once the Second Circuit issued its intervening custody order, that order displaced the district court's

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[1] For contrary support, the State cites two Second Circuit cases, but neither is helpful to its position. In *Ostrer* v. *United States*, 584 F.2d 594 (2d Cir. 1978), the court required the petitioner's immediate surrender because the district court's initial release order expressly expired by its own terms at the conclusion of this Second Circuit's review. *Id.* at 596. And in *Lurie* v. *Wittner*, 228 F.3d 113 (2d Cir. 2000), the court of appeals concluded its opinion with an express direction that the petitioner should be taken immediately into custody. *Id.* at 135. Neither of those outcomes supports the broader notion that every appellate reversal of a grant of habeas relief automatically vacates any interim release order entered by the district court.

prior order and assumed its status as the "initial order respecting the custody or enlargement of the prisoner" within the meaning of Rule 36.4. If that is the State's argument, it is easily rejected. When Rule 36.4 refers to the "initial order," it can only mean the order of "the judge who entered the decision" on the underlying habeas petition. Rule 36.3(b). The Second Circuit's order was entered *subsequently*—and a subsequent order, by definition, is not an "initial" order.

That is also why the State is simply wrong to say (Opp. 11) that Jordan's "application amounts to an extraordinary request for this Court to independently direct petitioner's release from state custody." The whole point is that the district court already entered such an order. Jordan has therefore been at liberty, subject to conditions, for the past two years, and remains so. We are not asking the Circuit Justice to take the "extraordinary" step of directing Jordan's release *from* prison (Opp. 11); rather, we are asking the Circuit Justice simply to prevent Jordan's return *to* prison while the Court considers her petition for a writ of certiorari—an outcome that entails no more than enforcement of this Court's Rule 36.4 according to its plain terms.

To do otherwise would risk defeating the point of the Court's review. Reduced to its essence, the question posed in the underlying petitions for habeas corpus and certiorari is whether Jordan should serve the remainder of her sentence at all or instead must be retried. Ordering her immediately back to prison would prejudge the outcome as a practical matter, thus seriously undercutting the Court's ability to review the Second Circuit's decision.

### B. The Second Circuit's recall of the mandate was an abuse of discretion, and the December 19 order was thus entered without jurisdiction

As we demonstrated in the application (at 15-17), a Rule 36.4 order vacating the Second Circuit's December 19 order and reinstating the district court's initial interim

custody order is warranted for an additional reason: The Second Circuit's recall of its mandate was manifestly an abuse of discretion, and it therefore lacked jurisdiction to enter the order in the first place.

We showed (Application 15) that a court of appeals' authority to recall its mandate may "be exercised only in extraordinary circumstances" as a "last resort" to prevent a "grave" injustice. *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998). The State does not deny that it failed to make any such showing. It offers no explanation at all as to what "extraordinary circumstances" could have justified the recall of the mandate in this case—because none did.

The State's only rejoinder is to assert, instead, that no such showing was necessary. In its view (Opp. 16), "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," and 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." First, the State elides the usual course of events envisioned by the rules—a court can plainly enter such an order while it still has jurisdiction over the case, either expressly in the opinion and judgment or in a separate order issued before issuance the mandate. Nor do we dispute that the court of appeals may *in theory* recall its mandate to enter an independent order respecting custody. The point is that it may do so only in extraordinary circumstances warranting such unusual relief. Such situations might include, for example, a change in factual circumstances indicating that the petitioner had become a serious flight risk or that her behavior suddenly posed a threat to the public safety. But there was nothing remotely like that here.

The State is likewise wrong to suggest (Opp. 17) that extraordinary circumstances are necessary only when the mandate is "be[ing] recalled solely to revisit the merits of an

appellate ruling." The authorities we cited in the application (at 15) uniformly recognize that it is a very weighty matter for a court of appeals to restore its jurisdiction for *any* reason after the mandate has issued and its jurisdiction under 28 U.S.C. § 1291 has terminated. The reason why is clear: To recall the mandate in order to undertake substantive action disrupts the ordinary course of federal litigation and risks interfering with another tribunal's consideration of the case, regardless of whether it is the district court on remand or this Court on certiorari review. See 16 Federal Practice and Procedure § 3938 (3d ed. 2022). The proof of the pudding is in the eating: Whether Jordan should return to state custody is not an issue merely collateral to the question presented to this Court; it is *the* question presented. To allow the Second Circuit to reinsert itself into this appeal while it is pending before this Court, solely to order Jordan immediately back to prison, creates a very serious risk of inconsistent handling of the case by two tribunals.

At bottom, the Second Circuit abused its discretion to recall its mandate in the absence of extraordinary circumstances. And the State does not disagree that, if that is so, the court thus lacked jurisdiction to enter the December 19 order concerning Jordan's custody. For this independent reason, the Circuit Justice should enter a Rule 36.4 order vacating the Second Circuit's December 19 order, which would have the effect of reinstating the district court's initial order respecting Jordan's custody.

### C. Although it is not her burden to prove it at this juncture, Jordan is reasonably likely to obtain a grant of certiorari and reversal of the Second Circuit's May 5 merits decision

The State devotes the bulk of its argument to a contention (Opp. 12-15) that we are unlikely to obtain a grant of certiorari or a reversal on the merits, and therefore that our alternative request for a Rule 23 stay should be denied. But if what we have said so far is correct, it is not Jordan's burden to prove otherwise at this juncture. It was the *State's*

burden to come forward with reasons calling for a vacatur of the district court's initial order respecting custody. It failed to meet those burdens before the court of appeals. Before this Court, the State does not even try to overcome the presumption in favor of release pending appeal. Thus, the question whether Jordan has established the conditions for a stay of the lower court's December 19 order is irrelevant because a Rule 36.4 order restoring the district court's initial order is independently warranted.

Even if Jordan did bear the burden of establishing the conditions for a stay, we have done so. Take first the question whether we have shown a likelihood of success on the pending certiorari petition. On this front, the State says (Opp. 12-14) that a denial is likely "for several reasons," including that (1) "the Court has already denied petitioner's earlier petition requesting direct review of her state criminal judgment on the same Sixth Amendment grounds,"(2) the Court recently denied certiorari in *Smith* v. *Titus*, 141 S. Ct. 982 (2021), and (3) the Court has never held that the public-trial right attaches to the kind of closed proceeding that took place here, which was harmless in any event.

As we will show in greater detail in our reply to the State's forthcoming BIO, none of that is persuasive. As the State knows well, the Court typically reserves grants of certiorari for cases that present conflicts of authority over pressing questions of federal law, and it generally will not grant review to correct lower-court errors. That is why a "denial of certiorari reflects in no way on the merits" of the question presented to the Court. *Redd* v. *Chappell*, 574 U.S. 1041 (2014) (Sotomayor, J., respecting denial of certiorari). There is thus nothing to read into the denial of certiorari on direct review.

The disposition in *Smith* helps the case for review, not the other way around. Most notably, the Circuit Justice expressly acknowledged that "guidance to the lower courts" is "much needed" in cases like this one. 141 S. Ct. at 989. On the merits, the Circuit Justice

described the closed hearing that took place in Smith's criminal trial as "undoubtedly a stage of Smith's criminal trial" to which the public-trial right attached. *Id.* at 985 (cleaned up). "[B]ecause the court failed to consider, much less satisfy, any of the requirements set forth by *Waller*" for closures during criminal trials, as did the trial court in Jordan's case, "the courtroom closure clearly violated Smith's Sixth Amendment right to a public trial." *Ibid.* (cleaned up). The Circuit Justice further described the state court's reasoning—which likened the closure to a mere "bench conference[] or conference[] in chambers," precisely as did the state court in this case—as an objectively unreasonable application of Supreme Court precedent. *Ibid.*

Those facts are eerily similar to the facts of this case, and the exact same conclusions apply here in even greater measure. In *Smith*, the proceeding involved only the announcement of an evidentiary ruling before the commencement of the trial. 141 S. Ct. at 9892-983. In Jordan's case, in contrast, the hearing took place in the middle of the defendant's presentation of evidence, and it involved extensive legal and factual arguments and accusations of misconduct, as to which the accused's interest in public scrutiny is especially strong. See, *e.g.*, *Waller* v. *Georgia*, 558 U.S. 39, 47 (1984). Thus, whatever shortcomings *Smith* may have had as a vehicle for addressing the question presented, those same shortcomings assuredly are not present here—and it remains the case that "guidance to the lower courts" is "much needed." *Smith*, 141 S. Ct. at 989.

On the underlying merits, the State contends (Opp. 13) that the Second Circuit's decision was correct because "the nature and immateriality of the closed proceeding here was not close to the meaningful substantive proceedings at issue in cases like" *Waller* and *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam). But the Circuit Justice's opinion in *Smith* and the district court's grant of habeas relief below both belie that assertion. The

district court correctly concluded that the closed proceeding here, taking place as it did in the midst of the presentation of evidence, was necessarily a component of the trial itself and thus was required by this Court's clear precedents to be held open. A contrary decision would mean that the public trial right applies on-and-off throughout a criminal trial, depending on whether the proceedings taking place are sufficiently "ancillary" or "unorthodox." Pet. App. 12a, 14a. There is no basis whatsoever in this Court's cases for so unmanageable a standard.

The State's characterization (Opp. 14) of the closure as "harmless," which mirrors the state appellate court's reasoning (Pet. App. 7a) and the Second Circuit's reasoning (Pet. App. 12a), is independently very troubling. It is settled beyond all debate that a violation of the public-trial right is among the small number of "structural defects" in trial procedures that "defy analysis by 'harmless-error' standards" and call for automatic reversal on appeal. *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). A harmlessness inquiry was thus expressly, unmistakably foreclosed by this Court's cases. And as the district court concluded below, the closed proceeding caused reverberations throughout the rest of the trial, impacting the prosecutor's conduct, the trial court's perception of Jordan, and everything that followed the proceeding. Indeed, the trial judge continued to fixate on Jordan's interactions with the press many months later, raising it as the final issue before imposing a sentence that was many multiples longer than the average sentence in the United States for defendants in similar factual circumstances. Even though such a showing is not required in the case of a structural error, there is thus every reason to think that, on retrial, Jordan would receive a less severe sentence.

In all events, these are issues for the Court to resolve after granting the petition and taking full merits briefing and argument. For present purposes, it suffices to hold that the

presumption in favor of release pending appeal continues in this Court under Rule 36.4, without regard for whether the court of appeals reverses the district court's grant of habeas relief. It also suffices to hold in addition or the alternative that, before a court of appeals may recall its mandate to enter an order requiring a habeas petitioner to surrender immediately under Appellate Rule 23, it first must find that extraordinary circumstances are present. By either path, the Circuit Justice should vacate the Second Circuit's December 19 order and restore the district court's initial order respecting Jordan's enlargement pending appeal. Alternatively, it should stay the Second Circuit's order while the case is pending in this Court.

## CONCLUSION

The Circuit Justice (or Court upon referral) should enter an order vacating the Second Circuit's December 19 order and reinstating the district court's initial order respecting custody. Alternatively, the Circuit Justice (or Court upon referral) should stay the Second Circuit's December 19 order pending the disposition of Jordan's petition for a writ of certiorari and resolution of the merits in the event the petition is granted.

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Respectfully submitted.


NORMAN H. SIEGEL
*Siegel Teitelbaum & Evans, LLP*
*260 Madison Avenue*
*22nd Floor*
*New York, NY 10016*

EARL S. WARD
*Emery Celli Brinckerhoff Abady Ward & Maazel LLP*
*600 Fifth Avenue*
*Rockefeller Ctr., 10th Floor*
*New York, NY 10020*

MICHAEL B. KIMBERLY
*Counsel of Record*
PAUL W. HUGHES
SARAH P. HOGARTH
CHARLES SEIDELL
*McDermott Will & Emery LLP*
*500 North Capitol Street NW*
*Washington, DC 20001*
*(202) 756-8000*
*mkimberly@mwe.com*

EUGENE R. FIDELL
*Yale Law School Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*