IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRENDAN DASSEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 14-CV-1310**
	)	
MICHAEL A. DITTMANN, Warden, Columbia Correctional Institution,	)	**The Honorable Magistrate Judge William E. Duffin, Presiding**
	)	
Respondent.	)	

PETITIONER'S REPLY TO
RESPONDENT'S RESPONSE IN OPPOSITION TO
MOTION FOR RELEASE ON PERSONAL RECOGNIZANCE

Pursuant to Federal Rule of Appellate Procedure 23(c) and *Hilton v. Braunskill*, 481 U.S. 770 (1987), Petitioner Brendan Dassey, by his undersigned attorneys, respectfully files this Reply to Respondent's Response in Opposition to Petitioner's Motion for Release on Personal Recognizance.

ARGUMENT

I. This Court has not already addressed Petitioner's request for bond.

The Respondent has engaged in a convoluted over-reading of this Court's August 12, 2016 Decision and Order and relevant caselaw in an effort to tell this Court that it has already denied Petitioner Dassey's request for bond. This Court has not issued any such denial.

This Court's August 12, 2016 grant of habeas relief was ninety-one pages long. (ECF No. 23.) Its Decision and Order was filled with meticulous detail and careful analysis of legal arguments that had been fully briefed and counter-briefed by both sides. But across those ninety-

one pages, this Court did not once mention the word "bond." Neither did it address the presumption of release contained within Federal Rule of Appellate Procedure 23(c), discuss the factors that govern a Rule 23(c) motion under *Hilton v. Braunskill*, 481 U.S. 770 (1987), or order the parties to provide information necessary to analyze such fact-bound *Hilton* factors as risk of flight or future dangerousness. There is a simple reason for these omissions: the Court was not issuing a bond ruling. Indeed, to suggest that the Court's otherwise careful and deliberate Decision and Order contains a *sotto voce* denial of bond – when no bond motion was pending or even possible – is like trying to find a hidden message in a record played backward: it is a misguided and futile exercise.[1]

The Respondent argues that this Court's stay order may be interpreted as a bond ruling; but the identical argument was roundly rejected in *Woods v. Clusen*, 637 F. Supp. 1195, 1197 (E.D. Wis. 1986). There, the Respondent argued that the district court's stay order, which had been issued before the petitioner filed his Rule 23 bond motion, should be interpreted as an unstated "initial order" denying bond that, in turn, meant that the petitioner's bond motion should have been directed to the Seventh Circuit Court of Appeals pursuant to Rule 23(d). *Id.* Quite logically, the district court dismissed this argument and ordered the petitioner released on bond, finding that "[n]o such 'initial order' has been entered in this matter" notwithstanding the earlier stay. *Id.* The same is true here.

[1] In contrast, the Court appropriately issued its stay ruling without a motion or briefing from the parties, in keeping with the axiom that a court may stay its own rulings *sua sponte*. *See, e.g.*, *Jackson v. Van Kampen Series Fund, Inc.*, 2007 U.S. Dist. LEXIS 37835 (S.D. Ill. 2007) (internal citations omitted) (collecting cases, including U.S. Supreme Court caselaw, establishing that "a federal court has inherent power to stay, *sua sponte*, an action before it"); *Brown v. Watters*, 2007 U.S. Dist. LEXIS 53344 (E.D. Wis. 2007) (district court determining that "I may grant a stay sua sponte" in a habeas action).

The Respondent attempts to transform this Court's silence into a decision against release by proposing a new rule of law that is neither authorized by Rule 23 nor supported by caselaw. According to the Respondent, when a district court intends to stay its grant of habeas relief while also releasing a petitioner on bond pending appeal, it does so by either by issuing a partial stay or denying a stay altogether. (ECF No. 31 at 5-6 (citing *Pouncy v. Palmer*, 2016 U.S. Dist. LEXIS 27695, 168 F. Supp. 3d 954 (E.D. Mich. Mar. 4, 2016); *Kelley v. Singletary*, 265 F. Supp. 1305, 1309 (S.D. Fla. 2003); *Franklin v. Duncan*, 891 F. Supp. 516, 522 (N.D. Cal. 1995))). On the other hand, the Respondent posits, a court that means to deny bond pending appeal "simply orders the judgment stayed on appeal." (ECF No. 31 at 6 (citing *Bauberger v. Haynes*, 702 F. Supp. 2d 588, 598 (M.D.N.C. 2010); *DeWitt v. Ventetoulo*, 803 F. Supp. 580, 586 (D.R.I. 1992))). It draws a contrast, in short, between the bond implications of a *partial* stay (in which case, it suggests, bond is granted) versus a *full* stay (in which case, it suggests, bond is denied).

But there is no such rule of law. Nowhere in Rule 23 is a legal difference drawn between a partial stay and a full stay. Moreover, Respondent's cases do not say what the Respondent suggests they say. It offers *Pouncy v. Palmer* and *Kelley v. Singletary* as instances in which a court paired a grant of bond with a partial stay; but *Pouncy* involves a full stay, not a partial stay. *Pouncy*, 2016 U.S. Dist. LEXIS 27695 at *40-41 ("Respondent's Motion for Stay is GRANTED, and the State is under no obligation to re-try Petitioner during the pendency of Respondent's appeal") (capitalization in original) (internal citations omitted). So does *Kelley v. Singletary*, 265 F. Supp. 2d at 1309 (to the extent that the order granting habeas relief required a retrial within 90 days, "the State's Motion for Stay Pending Appeal is GRANTED") (capitalization in original). These examples alone defeat the Respondent's proposed rule.

The Respondent also misunderstands why other courts chose to issue so-called partial stays. To be sure, the *Newman* court paired a granting of bond with what it called a "grant[] in part and deni[al] in part" of the Respondent's stay motion – a stay ruling that extended the Respondent's time to decide whether to retry Newman from 180 days after the habeas ruling until fourteen days after the conclusion of the appeal. *Newman v. Harrington*, 917 F. Supp. 2d 765, 792 (N.D. Ill. 2013). But the court's decision to issue such a partial stay had nothing to do with bond. *Id.* Instead, the court granted the stay "in part" because its earlier order to retry or release Newman was not stayed in its entirety; rather, only the running of the original 180-day clock was stayed, and only temporarily so. The same is true in *Franklin*, another case offered by the Respondent in which a granting of bond was paired with what the Respondent calls a partial stay; there, the Court granted "respondent's motion for a stay of its Order to the following extent. The State need not retry Franklin during the pendency of appeal…If the appeal is unsuccessful, the State shall have 90 days from the date the appellate decision is final to institute trial proceedings in the State court." *Franklin v. Duncan*, 891 F. Supp. at 522. If such a ruling can even be characterized as a partial stay, the partial nature of the stay again relates only to the temporary pause in the running of the retrial clock – and has nothing to do with the court's concomitant grant of bond. *Id.*

In short: whether a stay is partial or total is unrelated to whether bond was or should be granted; in *Newman* and *Franklin* bond was granted and a partial stay was issued, while in *Pouncy* and *Kelley* bond was granted and a full stay was issued. This is a sensible conclusion, as the purpose of issuing a stay pending appeal (whether partial or full) is not to somehow defeat the petitioner's bond effort. Rather, the purpose is to avoid forcing the respondent to decide whether to retry the petitioner before its appeal is resolved. The flip side of allowing the

respondent that extra time, however, is the conclusion – quite fairly – that a successful habeas petitioner should not continue to languish in prison while the respondent plays out the appeals process with no clock running. *See, e.g.*, *Poindexter v. Booker*, 2007 U.S. Dist. LEXIS 69502 at *10 (E.D. Mich. Sept. 20, 2007) ("Petitioner has an unassailable right not to be incarcerated pursuant to a constitutionally infirm conviction. At the same time, Respondent has an interest in not wasting State and judicial resources by simultaneously pursuing an appeal in the Court of Appeals and re-prosecuting Petitioner in state court. The Court finds that these competing interests are best reconciled by granting Respondent's Motion for Stay Pending Appeal and granting Petitioner's request for release on bond") (attached hereto as Exhibit 1 to the Reply).

II. Even if this Court already issued an initial order on bond, it still retains jurisdiction to modify any such earlier ruling.

Even if this Court did already issue a tacit order on bond, such an order does not now preclude it under Rule 23(d) from considering the additional facts, exhibits, and arguments presented in Petitioner Dassey's motion for release on bond. This precise issue was settled in *Jago v. U.S. Dist. Court et al.*, 570 F.2d 618, 622-23 (6th Cir. 1978), a seminal case that has been cited around the country – including in *Woods v. Clusen*, 637 F. Supp. 1195, 1197 (E.D. Wis. 1986). In *Jago*, the Respondent argued that Rule 23(d) divested the district court of jurisdiction to modify its initial custody order; but the Sixth Circuit Court of Appeals adopted the district court's view that the Respondent was "clearly" engaging in a "misreading of the provision." *Jago*, 570 F.2d at 620. Adopting the district court's reasoning, the *Jago* court found that Rule 23(d) "neither states nor implies that the district court is divested of jurisdiction to modify or reconsider its orders concerning custody." *Id.* To the contrary, it concluded that a district court that earlier denied a successful habeas petitioner's request for bond "not only has jurisdiction to consider the petitioner's [second motion for bond] but also has a special obligation to modify [its

earlier order], if the circumstances require." *Jago*, 570 F.2d at 620; *see also Woods*, 637 F. Supp. at 1197 (concluding notwithstanding Rule 23(d) that "during the pendency of the appeal process the district court retains power to issue *more than one order* respecting the custody or enlargement of the successful habeas petitioner") (citing *Jago*, 570 F.2d at 626) (emphasis added). Accordingly, the Respondent's argument that any bond request must now be directed to the Seventh Circuit Court of Appeals under Rule 23(d) is simply wrong. Petitioner Dassey thus asks this Court to consider the new information provided in his Motion for Release, including his prison records and detailed release plan, as circumstances that warrant the modification of any earlier ruling on bond.

There are no other arguments against jurisdiction that might prevent this Court from adjudicating Petitioner's request for bond. The Respondent's filing of a notice of appeal, for instance, does not divest this Court of jurisdiction to hear Petitioner's request for bond. *See Jago*, 570 F.2d at 622-26; *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) ("[A] district court retains jurisdiction to issue orders regarding the custody or enlargement of a petitioner even after an appeal has been taken from the order granting or denying habeas corpus relief") (citing *Jago*, 570 F.2d at 625-26); *Franklin*, 891 F. Supp. at 518 (same).

Relatedly, to the extent that Respondent is suggesting that Petitioner somehow forfeited his chance to seek bond by filing his bond motion after the State filed its notice of appeal, such an argument is absurd. The plain text of Rule 23(c) makes bond available "[w]hile a decision ordering the release of a prisoner is under review." F. R. App. Proc. 23(c); *see also Hilton*, 481 U.S. at 778 (making the State's "likelihood of success" on appeal relevant to whether bond should be granted). This makes sense: it would have been premature for the Petitioner to seek

bond before he learned whether the State of Wisconsin was going to release him, retry him, or appeal this Court's grant of habeas relief.

And finally, this Court's August 12 stay order cannot be argued to have some sort of preclusive effect that robs this Court of the ability to rule on Petitioner's pending bond motion – or that governs the way in which it must rule. While both stay and bond motions are governed by the *Hilton* test, the two inquiries are obviously separate and distinct; and a granting of a stay does not somehow imply a denial of bond. To the contrary, many courts have granted both a stay and bond. *See, e.g.*, *Newman*, 917 F. Supp. 2d at 792; *Pouncy*, 2016 U.S. Dist. LEXIS 27695 at *40; *Kelley*, 265 F. Supp. at 1309; *Franklin*, 891 F. Supp. at 522.

In sum, this Court is fully empowered to rule on Brendan's request for bond, despite the Respondent's arguments to the contrary. Petitioner now asks that this Court grant his request for release pending appeal.

III. The *Hilton* factors weigh in favor of release on bond.

A. The Respondent has failed to demonstrate a substantial case on the merits.

The Respondent must first demonstrate at least a substantial case on the merits as a pre-condition to an inquiry into the other *Hilton* factors. *Hilton*, 481 U.S. at 778 ("Where the State's showing on the merits falls below [a substantial case], the preference for release should control"); *see also Corey H. ex rel. Shirley P. v. Board of Educ. of City of Chicago*, 2012 U.S. Dist. LEXIS 128342, at *4-5 (N.D. Ill. Sept. 10, 2012) (if a party "fails to make the requisite showing of a strong likelihood of success, or irreparable harm, or both, the analysis must end there") (attached as Exhibit 2 to the Reply). The Respondent has failed to do so here. *See Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (to show a "substantial case on the merits," an applicant must show more than a "mere possibility" of success on appeal); *Newman*, 917 F.

Supp. 2d at 788 (determining that the respondent was not likely to prevail on appeal because the Court "applied the proper legal framework," "the state court did not merely make a questionable ruling," and the "Court's reliance on analogous Seventh Circuit decisions in support of its conclusion bolsters its decision").

To prove a substantial case on the merits, the Respondent offers little more than conclusory statements, a recitation of the text of 28 U.S.C. 2254, and a presentation of the case's unremarkable procedural history. (ECF No. 31 at 11.) It first argues that its appeal is likely to succeed because two state courts earlier determined that Petitioner's confession was voluntary. (ECF No. 31 at 11.) This argument cannot hold weight; if it did, no successful federal habeas petitioner would be eligible for bond under Rule 23(c) – because every successful federal habeas petitioner by definition must have exhausted (unsuccessfully) his state court remedies. 28 U.S.C. 2254(b)(1)(A) (2012). Moreover, these state court decisions include the very decisions that this Court has deemed unreasonable; so the Respondent's citation to them does nothing to demonstrate its likelihood of success.

The Respondent further recites the facts of *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004), in which a district court's grant of habeas relief was affirmed on appeal, as evidence of its own likelihood of success. But *A.M.* comes as no surprise to this Court; indeed, the Court extensively considered the facts in *A.M.* – as well as multiple other Seventh Circuit decisions related to voluntariness – over the course of several paragraphs in its Order granting habeas relief. (ECF No. 23 at 66-67.) The Respondent has identified no error in that analysis that would warrant reversal. To the contrary, *A.M.* mirrors the instant case in many ways; there, as here, a juvenile suspect was convicted of murder based only on a confession obtained outside the presence of any parent or guardian; no physical evidence tied the juvenile to the crime; investigators told the

juvenile he was lying when he denied involvement and led him to believe that he would "go home" if he told "the truth"; and the juvenile immediately recanted to his mother after the interrogation concluded. *See A.M.*, 360 F.3d at 793-94.

Finally, the Respondent complains that the Court did not cite to U.S. Supreme Court caselaw about promises of leniency; but the Court did, in fact, cite to a wealth of governing U.S. Supreme Court law fully explicating the voluntariness standard. (ECF No. 23 at 60-61 (citing, *e.g.*, *Haynes v. Washington*, 373 U.S. 503, 517 (U.S. 1963) (discussing, *inter alia*, the promises made to the defendant that induced his confession))). To the extent the Respondent is suggesting that this Court overlooked U.S. Supreme Court law, it does not identify a single case that it believes should have been cited, much less one that supports a finding of error. (ECF No. 31 at 11-12.) In short, the Respondent cannot be said to have established a substantial case on the merits. Its failure here resolves the issue: this Court should grant Petitioner's request for bond.

B. The other Hilton *factors also weigh in favor of release on bond.*

Even if this Court considers the remaining *Hilton* factors, Petitioner Dassey should be released on bond. As to irreparable harm, the Respondent offers only a blanket assertion that "irreparable harm occurs to the State and the victim's family whenever a person…is released before completing his sentence." (ECF No. 31 at 12.) Again, if this conclusory claim were true, no successful habeas petitioner would be eligible for release under Rule 23(c): "If the mere fact of having been convicted in the case to which a habeas corpus petition is directed was enough to overcome Rule 23(c)'s presumption of release, the presumption would be meaningless." *Hampton v. Leibach*, 2001 U.S. Dist. LEXIS 20983 at *5 (N.D. Ill. Dec. 18, 2001). The same argument also defeats the Respondent's observation that Dassey was convicted by a jury (ECF No. 31 at 12); if that fact operated to bar release, no petitioner who exercised his right to a jury

trial would be released under Rule 23(c). Rather, as argued more fully in Petitioner's opening brief, Dassey is the one who experiences irreparable harm each day that he must remain in prison on an unconstitutional conviction that was based an unreliable confession. (ECF No. 29 at 6.) *See, e.g., Newman*, 917 F. Supp. 2d at 789 ("the injury that Petitioner will suffer by continued detention is undeniably irreparable"). And with respect to the victim's family, counsel for Petitioner wishes to emphasize, once again, that Petitioner's release plan was designed specifically to minimize disruption to the Manitowoc community and the Halbach family. (ECF No. 29 at 10.)

The Respondent also asserts that Dassey's continued custody is in the public interest because he confessed to violent offenses for which he was later convicted, rendering him currently dangerous. (ECF No. 31 at 12.) His confession, however, has been deemed involuntary; its reliability has been cast into "significant doubt" (ECF No. 23 at 72); and his conviction has been thrown out. As reasoned in *Burbank v. Cain*, 2007 U.S. Dist. LEXIS 71032 (E.D. La. Sept. 24, 2007):

> For the Court to consider the dangerousness to the public, the state must *establish* such a risk. There is no blanket exception to the presumption of release for those successful habeas petitioners originally convicted of murder. As this Court has concluded, Burbank's conviction was fatally flawed, and was based on no meaningful corroborative evidence . . . The state has offered nothing beyond its conclusory statements that would show defendant poses a risk to the public.

Id. at *15-16 (citing *Hilton*, 481 U.S. at 777) (attached as Exhibit 3 to the Reply); *see also Newman*, 917 F. Supp. 2d at 789-90 ("With respect to Petitioner's danger to society, the Court recognizes the seriousness of the murder charge of which Petitioner was convicted…yet Petitioner had no record of a violent criminal history prior to his arrest in the case at issue, and Respondent has made no attempt to show that Newman poses a *current* risk, twelve years after the events at issue"). The same is true here; the Respondent has not identified any specific

evidence of Brendan's dangerousness either past or present, precisely because no such evidence exists. Brendan had never been arrested before the instant case, and his prison records are those of a model inmate and peaceable man. And while the Respondent dismisses Brendan's nearly flawless decade in prison as a mere product of the "controlled prison setting," this argument is disingenuous. (ECF No. 31 at 12.) Maximum-security prisons are notoriously dangerous places where inmates must often resort to violence just to defend themselves. *See, e.g.*, *Inviting Trouble? Attacks at Portage Prison Blamed on Staff Shortages*, Portage Daily Register (Jul. 31, 2015), available at http://www.wiscnews.com/ portagedailyregister/news/local/article_7e741ff7-b393-5e85-a007-d01bd09b22b0.html (attributing severe inmate violence at Columbia Correctional Institution, where Petitioner Dassey is incarcerated, to staff shortages and significant overcrowding) (attached as Exhibit 4 to the Reply); *DOC Chief Questions CCI Staff Concerns*, Portage Daily Register (Oct. 8, 2015), available at http://www.wiscnews.com/ portagedailyregister/news/article_5112fecb-4878-512f-ae68-78bc173c9509.html (describing efforts of state lawmakers and Wisconsin Dept. of Corrections officials, including Respondent Warden Michael Dittmann, to respond to prison staff's concerns about "growing violence at Columbia Correctional Institution and other Wisconsin prisons") (attached as Exhibit 5 to the Reply). It is to Brendan's immense credit that he has managed to remain above the fray during his ten years of incarceration.

Finally, the Respondent asserts that it has a "strong interest" in continued custody because approximately thirty-two years remain on Petitioner's sentence. (ECF No. 31 at 13.) Again, this does not overcome the presumption in favor of release. In *Newman*, the petitioner was released after serving only twelve years of his forty-seven-year murder sentence. 917 F. Supp. 2d at 769 (granting habeas relief not due to evidentiary infirmity but, rather, because

Newman's attorney failed to challenge his fitness to stand trial). In *Harris*, the petitioner was released after serving seven years of her thirty-year murder sentence. 2013 U.S. App. LEXIS 16715. This is because courts have concluded that even a lengthy remaining sentence cannot justify continued detention on an unconstitutional conviction – especially where the defendant is not a flight risk or danger to the public. *See O'Brien v. O'Laughlin*, 557 U.S. 1301 (Breyer, J., in chambers) (although the petitioner had 41 years left on his sentence, the state had failed to show that the petitioner posed a "flight risk or danger to the public"); *Newman*, 917 F. Supp. 2d at 790 (same); *Harris*, 2013 U.S. App. LEXIS 16715 at *5-6 (same). The Respondent did not even address flight risk in its brief, presumably because it cannot show that Petitioner presents one. And its conclusory assertions that Petitioner is dangerous because of his now-overturned conviction are equally unsubstantiated, as argued above.

In short, the Respondent's arguments against bond are conclusory, ill-supported, and not worthy of any weight. Petitioner Brendan Dassey therefore respectfully asks this Court to grant him his freedom by issuing a recognizance bond pending the Respondent's appeal or, in the alternative, a bond with a reasonable and affordable surety.

Respectfully submitted this 18th day of October, 2016.

s/Laura H. Nirider
Counsel for Petitioner Brendan Dassey

LAURA H. NIRIDER, Esq.
Bluhm Legal Clinic (IL Bar No. 15245)
Northwestern University School of Law
375 East Chicago Avenue, 8th Floor
Chicago, IL 60611
Telephone: 312-503-2204
Facsimile: 312-503-8977
E-mail: l-nirider@law.northwestern.edu

ROBERT J. DVORAK, Esq.
WI Bar No. 1017212
Halling & Cayo, S.C.
320 E. Buffalo St., Suite 700
Milwaukee, WI 53202
Telephone: 414-271-3400
Facsimile: 414-271-3841
E-mail: rjd@hallingcayo.com