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

BRENDAN DASSEY,

Petitioner,

v. Case No. 14-CV-1310

MICHAEL A. DITTMANN,

Respondent.

MOTION TO STAY THE ORDER GRANTING THE MOTION FOR RELEASE AND REQUEST TO EXPEDITE DECISION

Pursuant to Fed. R. App. P. 8(a)(1)(A), the State[1] respectfully moves this Court for a stay of its November 14, 2016 order granting Brendan Dassey's motion for release, and its forthcoming order directing the State to release Dassey on a date certain. (Dkt. 37.) **The State respectfully asks this Court to issue an order deciding this motion by 4 p.m. tomorrow, November 16, 2016. The State will be filing an emergency motion in the Seventh Circuit by close of business tomorrow.**

[1] Michael A. Dittmann, the Warden of the Columbia Correctional Institution at which Dassey is confined, is the named respondent. Because the State of Wisconsin is the real party in interest, this motion refers to the Respondent-Appellant as "the State."

LEGAL STANDARDS

Federal Rule of Appellate Procedure 23(c) provides: "While a decision ordering the release of a prisoner is under review, the prisoner must--unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise--be released on personal recognizance, with or without surety." In *Hilton v. Braunskill*, 481 U.S. 770, 774-75 (1987), the United States Supreme Court held that a district court making an initial custody determination under Rule 23(c) should take into account traditional factors governing stays of civil judgments. 481 U.S. at 774-75.[2] The *Hilton* Court also directed district courts to consider the possibility of flight, the risk of danger to the public, and "[t]he State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal." Id. at 777. This interest "will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." *Id.*

Federal Rule of Appellate Procedure 23(d) provides:

> 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,

[2] These include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton*, 481 U.S. at 776.

> or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Federal Rule of Appellate Procedure 8(a)(1) states: "A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of the district court pending appeal . . . ."

The Seventh Circuit has stated the standard for granting a stay pending appeal:

> The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). . . .To determine whether to grant a stay, we consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300. As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707.

In re A & F Enters., Inc. II, 742 F.3d 763, 766 (7th Cir. 2014).

ARGUMENT

The State is likely to prevail on the Seventh Circuit's Fed. R. App. P. 8(a)(2) and 23(d) review of the order granting release because this Court lacked authority to enter the order, there is a strong likelihood that the Seventh Circuit will reverse the underlying order granting habeas relief, the harms to the State and Teresa Halbach's family are real and substantial, and the public interest favors continued custody on appeal.

I. The State is likely to prevail on review because this Court lacked authority to order the motion for release.

In its August 12, 2016 decision, this Court ordered that, if the State sought appellate review, "the judgment will be stayed pending disposition of that appeal." (Dkt. 23:91.) The State then filed a timely notice on September 9, 2016 (Dkt. 25), triggering the stay provision.

This provision stayed the judgment without qualification in the event of an appeal. By its terms, the stay did not apply only to the release-or-retry order. It stayed the judgment while the decision is on review in the Seventh Circuit such that no relief may be granted on the stayed judgment absent an order modifying the stay.

As the State pointed out in its response to the motion for release, stay orders from other district courts indicate that an order staying the judgment without qualification constitutes a decision staying release pending the appeal and the retry-or-release order. *See, e.g.*, *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). The Supreme Court's decision in *Hilton v. Braunskill*, 481 U.S. 770 (1987), also suggests that a stay of the judgment granting a habeas petition constitutes denial of release pending appeal under Rule 23(c). There, the Court addressed the factors to be considered in deciding a Rule 23(c)

motion for release, and indicates that the decision on the motion is about whether *to grant a stay*:

> We do not believe that federal courts, in deciding whether to stay pending appeal a district court order granting relief to a habeas petitioner, are as restricted as the *Carter* [*v. Rafferty*, 781 F.2d 993 (3d Cir. 1986)] court thought. Rule 23(c) undoubtedly creates a presumption of release from custody in such cases, but that presumption may be overcome if the judge rendering the decision, or an appellate court or judge, "otherwise orders."

Hilton, 481 U.S. at 774 (footnote omitted). Later, the court refers to the "common-sense notion that a court's denial of enlargement to a successful habeas petitioner pending review of the order granting habeas relief has the same effect as the court's issuance of a stay of that order." *Id.* at 775-76; *see also Franklin*, 891 F. Supp. at 519 n.2 (observing that *Hilton* treats an order staying the judgment as the denial of release under Rule 23).

Under Rules 23(c) and (d), once a district court has made its initial custody determination, it lacks the authority to modify that decision. Rule 23(c) provides a district court with the authority to make an initial determination about custody while a decision granting habeas relief is on review. *See Hilton*, 481 U.S. at 774. Rule 23(d) provides that a request to modify or replace the initial custody order must be made "to the court of appeals or the Supreme Court." The Fifth Circuit recently adopted this interpretation of Rules 23(c) and (d) in disapproving of a district court's order modifying its original custody order pending appeal. *Woodfox v. Cain*, 789

F.3d 565, 568 (5th Cir. 2015). The court explained: "Rule 23(d) plainly limits the entities that can modify an initial order or issue an independent order regarding custody to 'the court of appeals or the Supreme Court, or to a judge or justice of either court.'" *Woodfox*, 789 F.3d at 568.

Here, because this Court's stay of the judgment on appeal initially decided the issue of custody on appeal, its November 14, 2016 order was a modification of that order. This Court lacked the authority to issue such an order under the plain language of Rules 23(c) and (d).

This Court's November 14, 2016, order does not meaningfully engage the State's arguments about its powers under Rule 23. (Dkt. 37:3-4.) The Court's position is simply that its stay order applied only to the order to release or retry Dassey within 90 days because that was what the Court intended—no matter how other courts, including the Supreme Court in *Hilton*, have viewed substantially similar stay orders. (Dkt. 37:3-4.)

II. Even if the Seventh Circuit rejects the argument that this Court lacked the authority to modify its initial order, it is likely to prevail on Rule 23(d) review because the merits of the State's underlying appeal are very strong, continued custody is in the public interest, and the harms to the State and Teresa Halbach's family are real and substantial.

A. The State's case on the underlying appeal is very strong.

Two state courts previously determined that Dassey's March 1, 2006, confession was voluntary, and all that need be shown on habeas review is

that the state appellate court's determination was one that a reasonable court could have made. 28 U.S.C. § 2254(d). This Court's decision granting relief will be reviewed de novo by the Seventh Circuit. Of course, the fact that there always exists a "not insignificant likelihood" that the State will prevail on appeal is not sufficient grounds for a stay. (Dkt. 37:6.) But there is good reason to believe that *this* decision will be reversed.

First, the Seventh Circuit has been loath to invalidate juvenile confessions on AEDPA review, having denied habeas petitions even in the face of "the gravest misgivings" about the confession. *Hardaway v. Young*, 302 F.3d 757, 767-68 (7th Cir. 2002). Indeed, none of the Seventh Circuit cases cited in this Court's decision addressing the voluntariness of a juvenile's confession support a grant of relief in this case. The only cited case in which habeas relief was granted, *A.M. v. Butler*, involved a preteen suspect who was subjected to significantly greater police pressure than Dassey. 360 F.3d 787, 794 (7th Cir. 2004) (11-year old confessed after detective "pounded on his knees, told him his fingerprints were on the murder weapon, and said that if he confessed, God and the police would forgive him and he could go home in time for his brother's birthday party"). And even this decision was issued over a vigorous dissent. *See A.M.*, 360 F.3d at 802-807 (Easterbrook, J. dissenting). For reasons developed in greater detail in the State's brief-in-

chief to the Seventh Circuit, this Court's decision granting habeas relief on the particular facts of this confession is an outlier within this circuit.

Second, this Court's determination that certain statements by the investigators collectively constituted promises of leniency—a determination that allowed this Court to review the voluntariness issue de novo—is deeply flawed. The conclusion that no reasonable court could have determined that no promises of leniency were made—particularly when, as this Court acknowledged, no single statement of the officers constituted such a promise that overbore Dassey's will (Dkt. 23:86)—failed to show the deference allowed state court factual findings under AEDPA. And, critically, this Court did not even address in its decision what constitutes a "promise of leniency" under the case law. Had it done so, it would have discovered that even statements that imply the possibility of leniency but do not offer a "specific benefit . . . in exchange for [ ] cooperation" generally do not qualify. *Etherly v. Davis*, 619 F.3d 654, 663-64 (7th Cir. 2010).

In the November 14, 2016 order, this Court notes that its decision granting habeas relief rested on two independent grounds, 28 U.S.C. § 2254(d)(1) (unreasonable application of clearly established law) and (d)(2) (unreasonable determination of the facts), and argues that this means this Court's decision is unlikely to be reversed. (Dkt. 37:7-9.) But, no matter their

number, these bases for decision are not well grounded in law for reasons discussed above, and more fully developed in the State's brief-in-chief to the Seventh Circuit. Given the strong likelihood of success on the underlying appeal, the prospects for the Seventh Circuit revoking this Court's release order are very good, even on a more deferential Rule 23(d) review.

B. The harms to the State of Wisconsin and Teresa Halbach's family are substantial, the public interest favors continued custody, and the State's interest in maintaining custody is very strong.

Dassey confessed to extremely violent offenses, and a jury unanimously found him guilty of first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse. And, regardless of the legal challenges to that confession, the record does not support a claim that Dassey is actually innocent. In his confession, Dassey offered a lengthy and detailed narrative of his involvement in the rape and murder of Teresa Halbach before investigators engaged in any alleged "fact feeding." (Dkt. 19-25:37-64.) In this Court's view, a variety of statements by the investigators collectively led Dassey to believe that they were promising leniency, rendering his confession involuntary. But this does not establish that Dassey did not commit the crimes to which he confessed. Accordingly, Dassey's release should be regarded as a serious public safety issue. The public interest favors continued

custody in these circumstances, regardless of Dassey's recent conduct in a controlled prison setting.

Third, the State of Wisconsin and Teresa Halbach's family and friends will suffer real and substantial harm as a result of Dassey's release prior to the Seventh Circuit's review in this case. The State appreciates the Court's recognition of the emotional harm its decision will have on the Halbach family. (Dkt. 37:13.) Respectfully, this harm is unjustified given the strong likelihood that this Court's underlying decision will be reversed and Dassey returned to state custody within the next few months. *See In re A & F Enters., Inc. II*, 742 F.3d at 766 ("[T]he greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa.").

Finally, the State has a strong interest in continued custody as that interest has been defined by *Hilton*. The state trial court sentenced Dassey to a period of life imprisonment on the first-degree intentional homicide conviction,[3] and ordered him eligible for release on supervision in November 2048. (Dkt. 19-1.) Because approximately 32 years remain on Dassey's sentence, the State's interest in Dassey's continued custody and rehabilitation is particularly compelling. *Hilton*, 481 U.S. at 777 (the State's

[3] The court imposed shorter, concurrent sentences on the sexual assault and corpse-mutilation convictions. (Dkt. 19-1.)

interest in custody is "strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served"). This Court did not address this *Hilton* factor in its decision granting release.

CONCLUSION

The State therefore moves this Court for a stay of its order granting the motion for release, and its forthcoming order directing the State to release Dassey on a date certain.

Dated this 15th day of November, 2016, in Madison, Wisconsin.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 266-9594 (Fax)
wittwerjj@doj.state.wi.us