No. 16-3397

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

BRENDAN DASSEY,
PETITIONER-APPELLEE,

v.

MICHAEL A. DITTMANN,
RESPONDENT-APPELLANT.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin, Case No. 14-cv-1310,
The Honorable William E. Duffin, Magistrate Judge

RESPONSE OF PETITIONER-APPELLEE IN OPPOSITION TO RESPONDENT-APPELLANT'S EMERGENCY MOTION TO STAY THE DISTRICT COURT'S ORDER RELEASING PRISONER

LAURA H. NIRIDER, Esq.
STEVEN A. DRIZIN, Esq.
Bluhm Legal Clinic (IL Bar No. 15245)
Northwestern University School of Law
375 East Chicago Avenue, 8th Floor
Chicago, IL 60611
Telephone: 312-503-8576
Facsimile: 312-503-8977
E-mail: l-nirider@law.northwestern.edu
s-drizin@law.northwestern.edu

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

INTRODUCTION

On August 12, 2016, the district court granted Petitioner-Appellee Brendan Dassey's petition for a writ of habeas corpus, finding that the state court's adjudication of the voluntariness of his confession contravened both 28 U.S.C. 2254(d)(1) and (d)(2). The district court also concluded after extensive analysis that it had "significant doubts as to the reliability" of Brendan Dassey's confession, which constituted the primary evidence against him. RSA 72.[1] The Appellant filed a Notice of Appeal on September 9, 2016. R.25.

On September 14, 2016, Petitioner-Appellee Dassey filed a motion before the district court seeking release on recognizance pending the Appellant's appeal under Federal Rule of Civil Procedure 23. R.29. Both parties were given a full and fair opportunity to present legal argument and evidence in support of their positions. Mr. Dassey's brief was supported by several exhibits, including prison records documenting his nearly flawless behavior over the course of ten years in prison, R.29.3, and a detailed re-entry plan developed in consultation with a clinical social worker. R.29.5. For its part, the Appellant submitted a fourteen-page brief arguing that the district court should deny Mr. Dassey release on bond. R.31.

The district court heard these arguments, weighed the evidence, and on November 14 issued a written order for Mr. Dassey's supervised release.[2] R.37. Pursuant to that order, the

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[1] The Required Short Appendix is cited as RSA ___, the Separate Appendix as SA ___, the District Court Record as R. ___, and the Appellant's main appellate brief as AB ___.

[2] The district court imposed a host of conditions which Mr. Dassey must meet or risk re-incarceration. Those conditions include not violating any federal, state, or local law; appearing in court as required; complying with sex offender registration requirements; reporting to and cooperating with the U.S. Probation Office, including being available for home visits; notifying the U.S. Probation Office of any contact with law enforcement; obtaining approval for any change in residence; refraining from travel outside the Eastern District of Wisconsin, except to visit his attorneys in the Northern District of Illinois; not possessing a passport, firearms, or controlled substance; submitting to drug testing; and avoiding all contact with the Halbach family and Mr. Dassey's co-defendant Steven Avery. R.37.16-17.

United States Probation Office for the Eastern District of Wisconsin visited Mr. Dassey's proposed release location; interviewed Mr. Dassey, his mother, and his stepfather; and reviewed documents that detailed Mr. Dassey's nonviolent prison record and his mental impairments, including his I.Q. of 74. After this investigation, the Probation Office approved Mr. Dassey's release plan and notified the district court that it was prepared for Mr. Dassey's release. R.41.1.

On November 15, 2016, the Appellant requested that the district court stay its ruling, R. 39, but on November 16, that request was denied because the Appellant had presented nothing new. R.41.1. In denying the Appellant's motion to stay, the district court ordered the Respondent-Appellant to release Mr. Dassey from prison by 8:00 PM on Friday, November 18, 2016. R.41.2.

The process of investigation and litigation has run its course. The result is hardly a parade of horribles: the release, pending the Appellant's appeal, of a demonstrably peaceful, mentally limited inmate – who has been imprisoned since he was sixteen years old on the sole basis of a confession that was involuntary and about whose reliability the court found "significant doubts," RSA 72 – into the care of his family and a clinical social worker, many miles away from the Halbach family, and under the close supervision of the United States Probation Office.

The Appellant now asks this Court to stay the district court's order that Mr. Dassey be released, but it does so with absolutely no legal or factual foundation. It calls the prospect of Mr. Dassey's supervised release an "emergency," but it identifies no imminent harm that might justify the immediate obstruction of the district court's release order. It acknowledges that it must give this Court "special reasons" to modify Mr. Dassey's bond under Fed. Rule of App. Proc. 23(d), but it identifies no such reasons, much less any change in the relevant facts or law. And it takes the extraordinary step of insisting that the district court denied Brendan Dassey

bond on August 12 without meaning to do so – thus accidentally stripping itself of jurisdiction to issue its November 14 bond order – although the district court has clarified that it in fact did no such thing. R.37.3-4.

The underlying thrust of the Appellant's position is clear: It seeks to characterize the rather benign situation at hand as an emergency that warrants extraordinary intervention from this Court. *Adams v. Walter*, 488 F.2d 1064, 1065 (7th Cir. 1973) (a motion for injunction or stay pending appeal seeks an "extraordinary remedy"); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1454 (11th Cir. 1986) (describing an "extraordinarily high standard of review of motions for emergency stays"). In essence, the Appellant wants this Court to erase the district court's grant of bond, so it can throw its old arguments against a new wall – the Seventh Circuit – to see if they stick. But its request to stay Mr. Dassey's release, which carries no cost to the State, comes at enormous cost to Mr. Dassey. *Harris v. Thompson*, 2013 U.S. App. LEXIS 16715 at *5 (7th Cir. Feb. 20, 2013) ("[M]aintaining the status quo" pending appeal only "increases the length of time [Petitioner] spends in prison on an unconstitutional conviction…Any harm to the State pales in comparison"); *Newman v. Harrington*, 917 F.Supp.2d 765, 789 (N.D. Ill. 2013) ("[E]very day Petitioner spends in prison compounds the substantial harm that he has suffered on account of imprisonment based upon an unconstitutional conviction"). The Appellant may be entitled to appeal the district court's bond ruling, but it has not given any special reasons indicating why it should be entitled to do so while Brendan Dassey remains behind bars in contravention of a court that has seen fit to release him. The district court was correct to deny the Appellant's motion for an emergency stay, R.44, and Mr. Dassey respectfully asks this Court to do the same.

APPLICABLE LEGAL STANDARDS

Federal Rule of Appellate Procedure 23 erects a presumption that a successful habeas petitioner should be released from prison pending the State's appeal. *Hilton v. Braunskill*, 481 U.S. 770, 774 (1987). *Hilton v. Braunskill* set forth factors that regulate the availability of release on bond pending the State's appeal, including whether the party opposing bond has made a strong showing that it is likely to succeed on the merits of the appeal; whether the parties will be irreparably injured if bond is granted or denied; and where the public interest lies. *Hilton*, 481 U.S. at 776; *O'Brien v. O'Laughlin*, 557 U.S. 1301 (2009) (Breyer, J., in chambers). In weighing these factors, a court should consider flight risk, future dangerousness, and the State's interest in continued custody and rehabilitation. *Hilton*, 481 U.S. at 777.

In deciding whether to modify the district court's November 14, 2016 order granting Mr. Dassey bond, this Court is bound by Federal Rule of Appellate Procedure 23(d): "An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued." Such special reasons warranting modification of an existing bond order include "clear error or abuse by the district court" or "the existence of previously unconsidered circumstances." 2-36 Federal Habeas Corpus Practice and Procedure § 36.4 (2015) (citing *Aronson v. May*, 85 S. Ct. 3, 4 (1964) (Douglas, Circuit Justice, in chambers) (denial of bail left intact in absence of showing of new circumstances); *In re Johnson*, 72 S. Ct. 1028, 1031 (1952) (Douglas, Circuit Justice, in chambers) (denial of bail upheld because no "special reasons" for disregarding lower court decision); *Carter v. Rafferty*, 781 F.2d 993, 995 (3rd Cir. 1986) (suggesting that changed circumstances regarding a petitioner's flight risk can constitute "special reasons")). Further, a "court reviewing an initial custody determination

pursuant to Rule 23(d) must accord a presumption of correctness to the initial custody determination made pursuant to Rule 23(c), whether that order directs release or continues custody." *Hilton*, 481 U.S. at 777. In short, the Appellant must now show that it is likely to overcome two presumptions before it may secure a stay: a presumption that Mr. Dassey should be released and a second presumption that the district court's order releasing him was correct.

In deciding whether to grant a stay, this Court must weigh "the moving party's likelihood of success on the merits, the irreparable harm that will result to each sides if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *See, e.g.*, *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007).

ARGUMENT

I. The Appellant is not likely to prevail on its argument that the district court had no jurisdiction to hear the bond motion.

The district court's August 12, 2016 grant of habeas relief was ninety-one pages long. R.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, the district 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 district court was not issuing a bond ruling. To remove all doubt, the district court stated expressly in its November 14, 2016 order granting Mr. Dassey release that its stay order of August 12 was not a bond ruling. R.37.3-4. It is patently absurd for the Appellant to continue arguing that the district court accidentally issued a bond ruling – thus divesting itself of jurisdiction to revisit bond –

despite the court's clear statement to the contrary. *See Woods v. Clusen*, 637 F. Supp. 1195, 1197 (E.D. Wis. 1986) (rejecting identical argument that district court's stay order should be interpreted as an unstated "initial order" denying bond).

The Appellant further argues that the district court was wrong to assert that Rule 23 is an exception to the general rule that the filing of a notice of appeal divests a district court of jurisdiction, but that is black-letter law. *See Jago v. U.S. Dist. Court et al.*, 570 F.2d 618, 622-26 (6th Cir. 1978); *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 v. Duncan*, 891 F. Supp. 516, 518 (N.D. Cal. 1995) (same). Many courts have granted bond while staying grants of habeas relief after a notice of appeal has been filed. *See, e.g.*, *Pouncy v. Palmer*, 2016 U.S. Dist. LEXIS 27695, 168 F. Supp. 3d 954 (E.D. Mich. Mar. 4, 2016) (grant of pond paired with stay) *Kelley v. Singletary*, 265 F. Supp. 1305, 1309 (S.D. Fla. 2003) (same). Indeed, the purpose of issuing a stay of habeas relief pending the respondent's appeal 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. Such logic underscored the district court's decision to grant a stay in this case; but in no way did that decision somehow deprive it of jurisdiction to hear Petitioner-Appellee's bond request.

II. The Appellant is not likely to prevail on Rule 23(d) review of the district court's bond order.

Turning to the issues presented for substantive review, the Appellant is not likely to succeed in convincing this Court to modify the district court's existing bond order. Federal Rule of Appellate Procedure 23(d) establishes that this Court may modify the district court's bond

order only if the Appellant can show "special reasons" that warrant revisiting the bond order. Such reasons might logically include new facts or circumstances not known to the district court. *See, e.g.*, *Aronson v. May*, 85 S. Ct. 3, 4 (1964) (Douglas, Circuit Justice, in chambers) (denial of bail left intact in absence of showing of new circumstances). But no such new facts have been identified here: Mr. Dassey remains a peaceful inmate who poses no current dangerousness or flight risk. The Appellant has identified no special reasons warranting further review at all. To the contrary, the only new fact in the case is the U.S. Probation Office's approval of Mr. Dassey's release.

Even if special reasons to review the district court's grant of bond did exist, the Appellant is still not likely to succeed on the merits of its appeal of the bond order. As an initial matter, the district court's November 14 bond order is entitled to a "presumption of correctness" that builds on Rule 23's original presumption in favor of release. *Hilton*, 481 U.S. at 777. In order to obtain a stay from this Court, the Appellant must show it is likely to succeed in rebutting these dual presumptions; and a mere recycling of those arguments it already presented – twice – to the district court cannot achieve this.

Even further, any assessment of the merits of the Appellant's underlying appeal of the district court's grant of habeas relief necessarily requires a fact-intensive review of Mr. Dassey's hours-long videotaped interrogation as well as the state-court record. *U.S. v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) (when it comes to voluntariness, the "devil was in the details"). The district court took more than twenty months to conduct such a review before granting habeas relief in a 91-page opinion that grappled fully with the governing law and the facts of the case, while explicitly acknowledging the limited nature of the habeas remedy. Especially when cast against such a meticulous district court opinion, the Appellant's arguments on appeal are

unlikely to prevail – and uniquely unsuited for rushed consideration in emergency fashion. *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). This is even more true given that the Appellee's brief has yet to be filed (pursuant to an agreed extension that had been sought by the Appellant), meaning that this Court has currently only been briefed by one side. Nonetheless, the Appellee briefly summarizes some of its arguments here to aid the Court in ruling on the Appellant's stay motion.

In its appeal, the Appellant contends that the state court was not unreasonable to conclude that Brendan Dassey's confession was voluntary.[3] In support, it argues – like the state court below – that no promises of leniency were used to induce Brendan's confession. AB 41. But this conclusion unreasonably ignores the plain meaning of what was said to sixteen-year-old, mentally limited Brendan. *See Watts v. State of Ind.*, 338 U.S. 49, 52 (1949) (when assessing voluntariness, courts may not "shut our minds to the plain significance of what here transpired"); *U.S. v. Lall*, 607 F.3d 1277, 1287 (11th Cir. 2010) (granting relief in AEDPA case because it is

[3] With respect to the district court's order granting habeas relief, the Appellant states that the district court's conclusion that the investigators promised Brendan leniency was based on three interrogation tactics: (1) "a single statement" that "from what I'm seeing…I'm thinking you're all right. Ok, you don't have to worry about things"; (2) the investigators' assertions that they "already knew what happened"; and (3) their repeated statements that "it's OK." Motion to Stay at 12. This is an erroneous characterization of the district court's opinion. After discussing the conditions of Brendan's interrogation, RSA 74-77, the court explicitly considered the above statements along with several others: "No matter what you did, we can work through that"; "As long as you can, as long as you can be honest with us, it's OK. If you lie about it that's gonna be problems"; "If you helped him, it's OK, because he was telling you to do it"; "It's OK, what did he make you do?"; "It's not your fault"; and statements that once Brendan told them everything, "this will be all over with." RSA 80-81. The district court also spent several paragraphs discussing the interrogators' statement that "honesty is the only thing that will set you free," as well as Brendan's expectation that he would be returned to school after confessing to murder and his belief that he was being arrested only for one day. RSA 81-82.

"utterly unreasonable to expect any uncounseled layperson…to so parse [the interrogator's] words"). At the beginning of his March 1, 2006 videotaped interrogation, sixteen-year-old Brendan was told that although he might fear "get[ting] arrested," he would be "all right" and would not "have to worry," even if the case "goes to trial," as long as he "filled in" the blanks with "statements…against your own interest" that "might make you look a little bad or…like you were more involved than you wanna be looked at." SA 29. The interrogators also told Brendan that "[if], in fact, you did somethings, which we believe…it's OK. As long as you [can] be honest with us, it's OK. If you lie about it that's gonna be problems"; "honesty here is the thing that's gonna help you"; "by you talking with us, it's, it's helping you"; "no matter what you did, we can work through that"; "the honest person is the one who's gonna get a better deal out of everything"; and "honesty is the only thing that will set you free." SA 30. Any kid in Brendan's shoes would have heard, loud and clear, that he would not be in trouble so long as he said what the officers accepted as true.

But in truth, these promises were false: because no evidence linked him to Halbach's rape or murder, Brendan was safe *unless* he confessed. These false promises grotesquely distorted this reality, however, and prevented sixteen-year-old, mentally limited Brendan from exercising his already diminished ability to make rational choices about whether to make inculpatory statements. *See, e.g.*, *U.S. v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990) (false promises are impermissible because they "ma[ke] it…impossible for [a defendant] to weigh the pros and cons of confessing and go with the balance as it appears at the time"); *U.S. v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012) (false promises "impede the suspect in making an informed choice as to whether he was better off confessing or clamming up"); *Sprosty v. Buchler*, 79 F.3d 635, 646 (7th Cir. 1996) (false promises "prevent a suspect from making a rational choice by distorting the

alternatives among which the person under interrogation is being asked to choose"). *See also Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994) ("police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child").

Indeed, the videotaped interrogation offers clear and convincing proof that these false promises of leniency hit their mark: Even after confessing to rape and murder, Brendan asked his interrogators if they would return him to school by sixth hour so he could finish a project; and after they placed him under formal arrest, he asked: "Is it only for one day?" SA 102, 156, 157. Brendan plainly believed that since he had held up his end of the bargain by confessing, the officers would hold up theirs by releasing him. The state court's finding that no promises were made to Brendan, accordingly, was unreasonable and ignored the clear and convincing weight of the evidence under 28 U.S.C.2254(d)(2); and its ensuing conclusion that his confession was voluntary was an unreasonable application of clearly established federal law under 28 U.S.C. 2254(d)(1). *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003).

The Appellant also asserts in its appeal – and in its motion to stay – that Brendan's confession was voluntary because he confessed to rape and murder in "narrative" form "before" his interrogators engaged in any fact-feeding. R.39.9; AB 38. But this is flagrantly wrong. Dozens of leading questions preceded Mr. Dassey's admissions – each advancing his story another step down the road towards murder. *E.g.*, SA 54 ("I have a feelin' [Steven Avery] saw you, you saw him."); SA 54 ("I think you went over to [Avery's] house and then he asked [you] to get his mail."); SA 54 ("You went inside, didn't you?"); SA 61 ("You went back in that room…we know you were back there."); SA 60 ("Does he ask you to rape [Halbach]?"); SA 61 ("He asked if you want some, right?...If you want some pussy?"); SA 65 ("Did she ask you not to

do this to her?"); SA 67 ("You were there when she died and we know that"); SA 74 ("He made you do somethin' to her, didn't he? So he would feel better about not bein' the only person, right?"); SA 73 ("What else did you do? Come on. Something with the head."); SA 76 ("Who shot her in the head?"). *See U.S. v. Preston*, 751 F.3d 1008, 1024 (9th Cir. 2014) (mentally impaired 18-year-old's confession was involuntary under AEDPA where, *inter alia*, police "asked him the same questions over and over until he finally assented and adopted the details that the officers posited").

Similarly, the Appellant contends in its appeal and motion to stay that Brendan's confession was voluntary because he resisted suggestion a few times during his interrogation, as when Fassbender decided to test Brendan by telling him – falsely – that Halbach had a tattoo. AB 18. But far from resisting, Brendan went along with that falsehood. SA 151 ("We know that Teresa had a tattoo on her stomach…Do you disagree with me when I say that?" "No, but I don't know where it was."). The Appellant further argues that Brendan resisted the interrogators' suggestions that he shot Halbach. AB 16. But that exchange, which happened 87 minutes after Brendan's major admission to murder, is devoid of any real pressure or promises. SA 120 (Fassbender dropping the subject after this exchange: "Did he ask you to shoot her too or did he tell you ta shoot her?" "No." "You're sure about that?" "Yeah."). A third time, the Appellant claims that Brendan resisted the officers when he said that Avery's knife was left in the "jeep." AB 16. But again, the officers exerted far less pressure than earlier in the interrogation. SA 94 ("He left [the knife] in the jeep." "It's not in the jeep now, where do you think it might be?" "I['m] sure it was." "Did you see it in the jeep?" "Yeah, cuz he set it on the floor." "Where on the floor did he set it?" "In the middle of the seats." "OK."). Indeed, the Appellant's few examples of "resistance" prove Brendan's point: When Brendan "resisted," it was often because

the pressures were not as great at those moments; and when he capitulated, it was because his rational choice had been distorted by false promises, which immediately precede his most damning admissions like clockwork. To hammer the point home, Brendan did later change the knife story to accommodate Wiegert's point that no knife had been found in the "jeep" – but only after Wiegert resorted to pressures and suggestions of leniency: "Wh-What about the knife, be honest with me, where's the knife? It's OK, we need to get that OK? Help us out, where's the knife?" This time, Brendan replied: "Probably in the drawer." SA 134.

Finally, the Appellant argues in its appeal and its motion to stay that Brendan's confession is extensively corroborated; but it does not acknowledge, as the district court did in its order granting habeas relief, that many "purportedly corroborative details" were fed to Brendan through "repeated leading and suggestive questioning." RSA 72. *E.g.*, SA 36 ("We know the fire was going [when you arrived]"); SA 76 ("Who shot her in the head?"); SA 84 ("We know that some things happened in that garage, and in that car, we know that"); SA 90-91 ("[T]he license plates were taken off the car, who did that?"); SA 92 ("Did he raise the hood at all or anything like that? To do something to the car?"). Other purportedly corroborative details had been widely publicized for months before the interrogation. RSA 69 (collecting those details and citing news stories). In short, the purported corroboration on which the Appellant relies is misleading. In a confession where so many details were fed to Brendan Dassey, such claimed "corroboration" is meaningless.

In its stay motion, the Appellant does little to offer this Court anything that was not already meticulously considered by the district court. It emphasizes *Etherly v. Davis*, 619 F.3d 654 (7th Cir. 2010), but the district court spent a paragraph discussing *Etherly* before concluding that it was distinguishable – and for good reason. RSA 64-66. In *Etherly*, the police made a

single promise to "inform the court of his assistance" – which turned out to be true, as the state did inform the trial judge of 16-year-old Etherly's cooperation. 619 F.3d at 654. Such a lone, truthful statement does not make it "impossible for [a defendant] to weigh the pros and cons of confessing." *Rutledge*, 900 F.2d at 1129. This is quite different from the false promises that saturated Brendan's interrogation and prevented him from rationally weighing the costs and benefits of confessing.

In *A.M. v. Butler*, in contrast, this Court granted habeas relief where the interrogation more closely resembled Brendan's. 360 F.3d 787 (7th Cir. 2004). A.M. was 11 years old with no mental limitations; he had no criminal history and was initially regarded as a witness; and like Brendan, he was questioned numerous times and told various versions of the relevant events before eventually admitting to beating and stabbing an 83-year-old woman – an admission he made only after police told him that he had lied and "needed to tell the truth." 360 F.3d at 789, 792-3, 802. During A.M.'s interrogation, the police touched A.M.'s knees (as was done with Brendan) and, strongly reminiscent of Brendan's understanding that he was going back to school, falsely "said that if he confessed…he could go home in time for his brother's birthday party." *Id.* at 794. Like Brendan, no physical evidence tied A.M. to the bloody murder; and like Brendan, A.M. recanted as soon as his mother was allowed into the interrogation room. *Id.* at 793. There, this Court granted habeas relief, noting that the police's tactics "could easily lead a young boy to 'confess' to anything." *Id.* Admittedly, Brendan was five years older than *A.M.*, at least chronologically; but his low I.Q., inability to comprehend abstract language, and extreme suggestibility may make his mental state closer to that of *A.M.*, who had no limitations at all.

Further, the Appellant has made no convincing showing of irreparable harm. Indeed, the Appellant has offered this Court no reason to explain why the court-supervised release of

Brendan Dassey should be considered an emergency at all. He will be released within the Eastern District of Wisconsin under close supervision and will remain within the court's jurisdiction at all times. The Appellant has offered not a single fact to demonstrate that Mr. Dassey poses a risk of fleeing the district court's jurisdiction. To the contrary, he holds no passport or driver's license; his family all resides in northeastern Wisconsin; he has demonstrated mental limitations, including an I.Q. of 74; and as a (unsolicited) subject of the Netflix Global docuseries *Making a Murderer*, he is highly recognizable. The district court rightly concluded that he posed no flight risk. R.37.12.

There is absolutely no reason, furthermore, to suspect that Mr. Dassey will present a danger upon his release. The fact that he was convicted of serious crimes nearly ten years ago cannot suffice: "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). This is all the more true given the district court's "significant doubts as to the reliability" of Mr. Dassey's confession. RSA 72. *Cf. Harris*, 2013 U.S. App. LEXIS 16715 at *6-7 (this Court granting successful habeas petitioner's bond under Rule 23(c) while noting in a separate opinion reported at 698 F.3d 609 (7th Cir. 2012) that "Harris' confession is essentially the only evidence against her, and there are many reasons to question it"). Nor does the fact that the state courts affirmed his conviction suffice to show dangerousness, as this is true of every single habeas petitioner. 28 U.S.C. 2254(b)(1)(A) (2012) (habeas petitioner must exhaust his state-court remedies).

To show that a successful habeas petitioner poses a current risk upon release, the Appellant must "*establish* such a risk. There is no blanket exception to the presumption of

release for those successful habeas petitioners originally convicted of murder." *Burbank v. Cain*, 2007 U.S. Dist. LEXIS 71032 at *15-16 (E.D. La. Sept. 24, 2007) (emphasis in original). There is no such evidence of dangerousness here. *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"). Mr. Dassey had no criminal record whatsoever prior to the instant case. And over the past ten years, he has accumulated a nearly spotless prison record in which he has only been disciplined twice: once for possessing five packets of ramen noodle soup and once for repairing items including a checkerboard with Scotch tape. R.29.3. His prison files reflect a gentle man who, according to a 2010 prison report, always "works in a cooperative manner with staff and other offenders" and "displays responsible behavior" at school. R.29.3. This stands in marked contrast to the defendant in *Etherly*, on which the Appellant relies; there, Etherly was denied bond in part because he had "several incidents of threatened or actual violence according to his Department of Corrections record." *Etherly v. Schwartz*, 590 F.3d 531, 532 (7th Cir. 2009).

While Brendan's release – which has been carefully planned to minimize disruption to the Halbach family and the Manitowoc community – does not threaten the State of Wisconsin with any concrete risk of harm and is neither irreparable nor irreversible, Brendan would experience profound harm if this Court were to grant a stay. "[E]very day Petitioner spends in prison compounds the substantial harm that he has suffered on account of imprisonment based upon an unconstitutional conviction." *Newman,* 917 F.Supp.2d at 789. Indeed, "maintaining the status quo" pending appeal only "increases the length of time [Petitioner] spends in prison on an

unconstitutional conviction…Any harm to the State pales in comparison." *Harris*, 2013 U.S. App. LEXIS 16715 at *5.

CONCLUSION

The Appellant is not entitled to an emergency stay. It has asked this Court to wreak irreparable harm on Brendan Dassey by preventing his supervised release from prison while failing to persuasively identify any harm that would be suffered by the State of Wisconsin if he were to be released. It has not rebutted the presumption of release contained in Federal Rule of Procedure 23, nor has it rebutted the "presumption of correctness" afforded to the district court's order granting release. It has not identified any argument on appeal capable of overcoming the district court's meticulous, ninety-one-page opinion granting relief, and indeed it has erroneously presented the facts of Mr. Dassey's interrogation. The Appellant is entitled to appeal the district court's grant of bond, but not while Mr. Dassey loses more days of his life to incarceration. Brendan Dassey asks this Court to deny the Appellant's Emergency Motion to Stay.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2016, I filed the foregoing Motion with the Clerk of the Court using the CM-ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: November 16, 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

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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