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.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR RELEASE ON PERSONAL RECOGNIZANCE

The instant Memorandum is filed in support of Petitioner Brendan Dassey's Motion for Release on Personal Recognizance pursuant to Federal Rule of Appellate Procedure 23(c) and *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

INTRODUCTION

1. On October 20, 2014, Petitioner Brendan Dassey filed a petition for a writ of habeas corpus. (ECF No. 1.)
2. On August 12, 2016, after being fully briefed, this Court granted Petitioner's petition for a writ of habeas corpus. (ECF No. 23.) It ordered the Respondent to release Petitioner from custody unless, within 90 days of the date of the decision, the State initiated proceedings to retry him. (ECF No. 23 at 90.) It also ordered, *sua sponte*, that "in the event the respondent files a timely notice of appeal, the judgment will be stayed pending disposition of that appeal." (ECF No. 23 at 91.)

3. On September 9, 2016, the Respondent filed a Notice of Appeal, thereby triggering a stay of the judgment till the conclusion of the appeal. (ECF No. 25.)

4. Petitioner Dassey has been held in custody since March 31, 2006 – when he was sixteen years old – for a conviction that this Court has now overturned. That conviction was based on a videotaped confession that this Court has deemed involuntary and about whose reliability the Court harbors "significant doubts." (ECF No. 23 at 72.) As this Court has noted, that confession "was, as a practical matter, the entirety of the case against him." (ECF No. 23 at 89.) Petitioner Dassey is now twenty-six years old.

5. Petitioner hereby requests release on personal recognizance or, in the alternative, upon submission of a reasonable surety. *See Harris v. Thompson*, 2013 U.S. App. LEXIS 16715 at *6-7 (7th Cir. Feb. 20, 2013) (granting a successful habeas appellant release on recognizance in murder case after concluding, in a separate opinion reported at 698 F.3d 609 (7th Cir. 2012), that her right to present a complete defense had been impermissibly abridged and noting that "Harris' confession is essentially the only evidence against her, and there are many reasons to question it") (attached hereto as Pet. Ex. 1); *Newman v. Harrington*, 917 F.Supp.2d 765 (N.D. Ill. 2013) (granting a successful habeas petitioner release on recognizance in murder case after concluding that his attorney rendered ineffective assistance of counsel by failing to challenge fitness to stand trial).

LEGAL STANDARD

6. Whether to grant a successful habeas petitioner's motion for release on bond is controlled by Federal Rule of Appellate Procedure 23(c) and the U.S. Supreme Court's decision in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Rule 23(c) states that "[w]hile 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." Fed. R. App. Proc. 23(c) (emphasis added). Rule 23(c) therefore creates a presumption of release pending appeal when a petitioner has been granted habeas relief. *Hilton*, 481 U.S. at 774.

7. *Hilton*, on the other hand, addresses two commonly intertwined issues that arise upon a State's appeal of a grant of habeas relief: the availability of a stay and the availability of release on bond. In particular, *Hilton* set forth four factors that regulate both these issues, including (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties in the proceeding; and (4) 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). Petitioner Dassey acknowledges that the Court has already determined that its ruling shall be stayed pending the disposition of Respondent's appeal; therefore, this motion will apply these factors only to Petitioner's instant request for release on personal recognizance. (ECF No. 23 at 91.)

8. Under *Hilton*, the presumption of release set forth in Rule 23(c) can only be overcome if these factors weigh in favor of continued incarceration pending appeal. The *Hilton* Court summarized how to weigh whether these factors rebut Rule 23's presumption of release as follows: "Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release." *Hilton*, 481 U.S. at 778. Among the matters that a

court should consider are the possibility of the petitioner's flight; any showing by the respondent of a risk that the petitioner will pose a danger to the public if released; and the state's interest in continuing custody and rehabilitation pending a final determination of the case on appeal. *Id.* at 777.

ARGUMENT

9. The Respondent has demonstrated neither a strong likelihood of success on appeal nor a substantial case on the merits. In granting habeas relief, the Court concluded that Petitioner's March 1, 2006 confession was involuntary under the Fifth and Fourteenth Amendments; that the state court's decision to the contrary was based on an unreasonable finding of fact; and that the state court's decision to the contrary constituted an unreasonable application of federal law. (ECF No. 23 at 90.) This Court's ninety-one-page opinion is grounded in a meticulous understanding of the facts and evidence as it unfurled at every level of this case. Its opinion is consistent, moreover, with the controlling decisions of the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit, including a number of post-AEDPA cases addressing a confession's voluntariness which are cited throughout the opinion. The opinion is also grounded in leading studies and research – all of which had been previously introduced into the record during state-court proceedings – showing not only that false confessions are proven to occur, but that juveniles are particularly likely to make false confessions. (ECF No. 23 at 68-69.) Indeed, one study that the Court cited has been similarly cited by the U.S. Supreme Court as an authority on false confessions on two separate occasions. (ECF No. 23 at 68 (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 933-43 (2004))); *Corley v.*

United States, 556 U.S. 303, 320-21 (2009) (citing same); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (citing same).

10. This Court further made clear that its decision was reached with a full understanding of the infrequency with which habeas relief is granted, noting that "[t[he present decision is made in full appreciation of the limited nature of the habeas remedy under AEDPA and mindful of the principles of comity and federalism that restrain federal intervention in this arena." (ECF No. 23 at 88.) Nonetheless, it rightly concluded that the instant case is "extraordinary" and "the sort of extreme malfunction in the state criminal justice system that federal habeas corpus relief exists to correct." (ECF No. 23 at 88 (internal citations omitted).)

11. In short: The Court's factual analysis was thorough and accurate; its legal framework was proper; and its decision was reached with full awareness of the exacting standard for habeas relief. The Respondent now faces an uphill battle during its appeal. The first *Hilton* factor, therefore, weighs in favor of release.[1] *Hilton*, 481 U.S. at 778; *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).

12. Petitioner now turns to the second and fourth *Hilton* factors: whether the applicant will be irreparably injured absent a stay, and where the public interest lies. *Hilton*, 481 U.S. at 778 ("Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits,

[1] Petitioner notes that the Court granted a stay of judgment *sua sponte* without argument from the parties (ECF No. 23 at 91); but such a grant does not automatically translate into a finding that the State has shown that it is likely to succeed upon appeal.

continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release").

13. To begin with the second *Hilton* factor: The injury inflicted on Brendan Dassey by further detention – the continuing loss of the basic liberty enjoyed as a matter of right by every citizen of this country – is irreparable. "[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. As then-District Judge Williams wrote in addressing similar circumstances:

> It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty. * * * * The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty. Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer. * * * * Little would be left of this, the greatest of all writs * * * * if a jailer were permitted to retain the body of his prisoner during all the weary processes of an appeal.

U.S. ex rel. Cross v. DeRobertis, 1986 WL 12590, at *3 (N.D. Ill. Nov. 3, 1986) (quoting Justice Cardozo's opinion in *People ex rel. Sabatino v. Jennings*, 158 N.E. 613 (C.A.N.Y. 1927) (internal quotations omitted)).

14. As for the fourth *Hilton* factor: the public interest lies with Brendan Dassey's release. "The public has a significant interest in ensuring that individuals are not imprisoned in violation of the Constitution." *Newman*, 917 F.Supp.2d at 789. Anticipating a response

from the State that invokes the seriousness of the alleged offense, Petitioner notes that following its review of the record, this Court developed "significant doubts as to the reliability of Dassey's confession." (ECF No. 23 at 72.) In light of this Court's well-justified doubts, responsibility for the Halbach murder can no longer be placed on the shoulders of Brendan Dassey. He is not the person who belongs in prison for this crime. *See Harris*, 2013 U.S. App. LEXIS 16715 at *6-7 (U.S. Court of Appeals for the Seventh Circuit granting successful habeas petitioner's bond under Rule 23(c) because, in part, "Harris' confession is essentially the only evidence against her, and there are many reasons to question it"). Indeed, "[i]f 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).

15. Like the petitioners in *Newman* and *Hampton*, Brendan Dassey had no criminal record prior to his arrest in the case at issue. *Newman*, 917 F.Supp.2d at 790; *Hampton*, 2001 U.S. Dist. LEXIS 20983 at *5 (noting that the petitioner had no criminal history, not even an arrest, other than the charges that were the subject of the habeas corpus petition). Neither can a plausible case can be made that Brendan Dassey poses a current risk, nearly eleven years after the events at issue. *McCandless v. Vaughn*, 1999 WL 1197468, at *2 (E.D. Pa. Dec. 14, 1999) (finding no current danger resulting from defective seventeen-year-old murder conviction). Instead, Petitioner Dassey's prison records reveal that during the entirety of his nearly ten-year stay in the Wisconsin Department of Corrections, he has acquired disciplinary infractions on only two occasions: the first for obtaining five packets of ramen noodle soup from his "next door neighbor" because, in

Dassey's words, "I was hungry"; and the second for possessing "contraband" items including a checkerboard that had been repaired with Scotch tape and for using a prison form to keep score. (Pet. Ex. 2 (complete copy of Dassey's Wisconsin Department of Corrections conduct reports).) He has never attempted escape, assaulted anyone, or possessed any weapons in the facility.

16. Petitioner Dassey's 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. (Pet. Ex. 3 (Dassey's Offender Performance Evaluation).) He spends his days reading, engaging in correspondence with family and friends, listening to the radio, watching television, and – recently – attempting to learn how to crochet a blanket.

17. It is extraordinarily unlikely that Petitioner Dassey poses a flight risk. He has neither a driver's license nor a passport. His entire family – his immediate and extended family on both the maternal and paternal sides – resides in the Two Rivers-Manitowoc area. They are not people of significant financial means, as exemplified by the fact that Petitioner qualified for representation by a public defender at the time of his trial. The feasibility of flight is further undercut by Petitioner's cognitive limitations, which this Court has noted on previous occasions. (ECF No. 23 at 77.) Such a petitioner cannot reasonably be considered a flight risk. *See Newman*, 917 F.Supp.2d at 790 (concluding that 28-year-old successful habeas petitioner who had been incarcerated since age 16 was not a flight risk because his entire family lived in the area, he had cognitive limitations, and his family did not have significant financial means). Indeed, as a subject of the high-profile

Netflix documentary *Making a Murderer*, Petitioner is highly recognizable and would be unable to successfully go into hiding.

SUMMARY OF RELEASE PLAN

18. In conjunction with Petitioner and his family, undersigned counsel has developed a release plan for Mr. Dassey designed to support his successful reintegration back into society. In particular, undersigned counsel has initiated an ongoing relationship between Brendan Dassey and Bluhm Legal Clinic licensed clinical social worker Katarzyna Majerczak. Ms. Majerczak specializes in working with individuals – including many with intellectual limitations – who have been released from prison to manage their successful transition to the free world. In her role as social worker, she regularly helps such individuals identify and obtain suitable housing options, therapeutic and educational services, and employment prospects that are appropriate for that client's ability, interests, and skill set. Ms. Majerczak typically remains closely involved with each client for months and often even years.

19. Together with undersigned counsel, Ms. Majerczak has been in regular contact with Brendan Dassey and several members of his immediate family, including but not limited to his mother Barbara Tadych, his stepfather Scott Tadych, and his father Peter Dassey. She has developed a detailed and concrete proposed plan for Brendan's potential release, attached hereto as Pet. Ex. 4, that includes residential placement and the identification of supportive local re-entry services like counseling, medical care, and job training.

20. To summarize the proposed release plan: Counsel has identified an arrangement that would allow Petitioner to spend the initial one to three months of his release on bond living in a family-owned trailer with his mother in rural northeast Wisconsin

approximately 100 miles from the City of Manitowoc. By proposing to release Brendan to a private location outside Manitowoc County, counsel seeks to ensure that Petitioner's release would proceed in a way that minimizes disruption for the Manitowoc community, the Halbach family, and Petitioner. Following this period of initial adjustment, counsel proposes that Brendan relocate to a rental apartment in Brown County, Wisconsin, that would be initially paid for by his mother and stepfather. At that time, he would begin participating in educational, vocational, and therapeutic services in the Brown County area as appropriate. Indeed, Brown County has been identified in large part due to the abundance of services offered in that County.

21. If the Court prefers that Brendan be released to a location in Manitowoc County, then his mother and stepfather will happily accept him into their family home, which has an extra bedroom.

22. In order to protect the privacy and safety needs of Brendan and his family, the proposed release plan does not include specific addresses for the proposed release locations. Counsel will immediately provide this information, along with photographs of the proposed release locations' exteriors and interiors, to this Court upon request.

23. Counsel is confident that from the moment of his release, Brendan will receive unwavering support from his immediate family, including his mother, father, stepfather, adult brothers, and his brothers' families. Throughout his time in prison, he has received regular visits from all members of his immediate family, reinforcing a Dassey family bond that remains strong and vital to this day.

24. Ms. Majerczak, too, will remain a fixture in Brendan's life throughout his time on bond – and, should this Court's grant of habeas relief be affirmed, beyond – in order to provide

support, direction, and guidance on a professional level. She has already identified a number of local agencies and programmatic options which will be helpful resources, including the Rent Smart Program in Brown County (which provides individuals with practical education on how to live independently in rental housing), the Wisconsin Department of Workforce Development and Division of Vocational Rehabilitation, and the Wisconsin Job Center. (*See* Pet. Ex. 4 for a detailed description of the services available through each of these agencies.)

25. Of course, Petitioner Dassey will also abide by any conditions of release that this Court sees fit to impose. *See, e.g.*, *Newman*, 917 F.Supp.2d at 792-93 (setting conditions of release pending appeal for successful habeas petitioner in murder case); *Harris*, 2013 U.S. App. LEXIS 16715 at *9-12 (same). He will be supported in this effort by his family, Ms. Majerczak, and his legal team.

THEREFORE, for the reasons articulated herein, Petitioner Dassey hereby respectfully requests that this Court grant him release on personal recognizance pending the Respondent's appeal.

Respectfully submitted this 14th day of September, 2016.

s/Laura H. Nirider
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