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.

RESPONSE IN OPPOSITION TO MOTION FOR RELEASE

Pursuant to Civil L.R. 7(b), Respondent Michael A. Dittmann, Warden of the Columbia Correctional Institution, files this response opposing Petitioner Brendan Dassey's September 14, 2016 motion for release on personal recognizance. (Dkt. 29.)

BACKGROUND

On August 12, 2016, this Court granted Brendan Dassey's petition for a writ of habeas corpus. (Dkt. 23.) In its decision, this Court ordered Respondent Dittmann to release Dassey from custody unless, within 90 days of the date of the decision, the State initiates proceedings to retry Dassey. (Dkt. 23:90.)

This Court then ordered the judgment stayed if the respondent took an appeal: "In the event the respondent files a timely notice of appeal, the judgment will be stayed pending disposition of the appeal." (Dkt. 23:91.) On September 9, 2016, the respondent filed a timely notice of appeal, triggering the stay provision. (Dkt. 25.) On September 14, 2016, Dassey filed a motion for release on personal recognizance, a memorandum in support of the motion with exhibits, including a proposed plan for release on bond. (Dkts. 29; 29-1; 29-2; 29-3; 29-4; 29-5.)

LEGAL STANDARDS

Under Fed R. App. P. 23(c), a district court has the authority to decide in the first instance whether to release a prisoner while the court's decision granting federal habeas relief is on appeal.[1] 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. These include: "(1) whether the stay applicant has made a strong

[1] Section (c) of Fed. R. App. P. 23 provides as follows:

> 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.

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. Modifying the first factor, the *Hilton* Court indicated that a "substantial case on the merits"—a significantly lower bar than "likely" success on appeal—may be sufficient to justify continued custody, particularly when "the second and fourth factors . . . militate against release." *Id.* at 778.[2] *See, e.g.*, *Bauberger v. Haynes*, 702 F. Supp. 2d 588, 592 (M.D.N.C. 2010) (granting stay and denying release based in part on court's "candid[]" and "disinterested analysis" of whether a substantial case existed on the merits).

The *Hilton* Court also directed district courts to consider certain additional matters relevant to whether release is appropriate under the circumstances. *Hilton*, 481 U.S. at 777. These include 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

[2] "Given the occasional difficulty of asking a district judge to publicly state that his or her order is probably reversible, the appellate courts [interpreting Rule 23(c)] seem content, for the purposes of entry of a stay, to inquire whether the district court regards the appellee's position as 'substantial.'" *Hernandez v. Dugger*, 839 F. Supp. 849, 853 (M.D. Fla. 1993).

appeal," which "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.* at 777.

Once a district court has made the initial custody determination, a party may seek relief from that determination by filing a motion pursuant to Fed. R. App. P. 23(d) in the appellate court. *See Hilton*, 481 U.S. at 777. Rule 23(d) provides that the district court's initial determination "continues in effect pending review" unless the movant in the appellate court shows that "special reasons" warrant modification of the initial order or issuance of an independent order. The appellate court conducting a Rule 23(d) review of an initial custody determination "must accord a presumption of correctness to the initial custody determination made pursuant to Rule 23(c)." *Hilton*, 481 U.S. at 777.

ARGUMENT

I. This Court lacks jurisdiction over the motion for release.

A. By staying the judgment instead of issuing a partial stay, this Court determined that Dassey would remain in custody during appellate proceedings.

This Court's August 12, 2016 decision unambiguously ordered that if the respondent filed a timely notice of appeal, "the judgment will be stayed pending disposition of that appeal." (Dkt. 23:91.) Because the respondent

filed a timely notice on September 9, 2016 (Dkt. 25), the judgment is now stayed, and will remain so until the Seventh Circuit completes its review.

Dassey acknowledges that the judgment is stayed. (Dkt. 29-1:3.) But he appears to argue that the stay applies only to that part of the judgment directing that he be released or retried, and argues that this Court left open the possibility of granting some relief (release) on the stayed judgment while the case is on appeal. (Dkt. 29-1:3-9.) Dassey is mistaken.

This Court's order stayed the judgment without qualification in the event of an appeal. It did not order that only the part of the judgment ordering release or retrial would be stayed on appeal, as Dassey suggests. Rather, the judgment is stayed pending the Seventh Circuit's review, and no relief, including release during the appeal, may be granted on it.

A review of cases in which district courts have addressed requests for release under Fed. R. App. P. 23(c) confirms that this Court determined that Dassey would remain in custody by ordering the judgment stayed. When a district court stays a retry-or-release order while the decision is on appeal but grants a petitioner's request for release under Rule 23(c), it does so by issuing an order staying the judgment in part, or by denying a stay altogether. *See, e.g.*, *Pouncy v. Palmer*, 168 F. Supp. 3d 954, 2016 WL 837168, at *13 (E.D. Mich. Mar. 4, 2016) (ordering stay of judgment in part); *Kelley v. Singletary*,

265 F. Supp. 2d 1305, 1309 (S.D. Fla. 2003) (ordering stay in part); *Franklin v. Duncan*, 891 F. Supp. 516, 522 (N.D. Cal. 1995) (ordering stay in part); *see also Hilton*, 481 U.S. at 774 (equating an order for a stay of the judgment with denial of release under Rule 23(c)).

But when the district court means to deny release on recognizance or bail and puts the retry-or-release order on hold during appellate proceedings, it simply orders the judgment stayed on appeal. *See, e.g.*, *Bauberger*, 702 F. Supp. 2d at 598; *DeWitt v. Ventetoulo*, 803 F. Supp. 580, 586 (D.R.I. 1992).

The primary district court case on which Dassey relies in requesting release, *U.S. ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765, 787 (N.D. Ill. 2012);[3] illustrates that this Court's stay of the judgment is incompatible with an order of release. In *Newman*, the district court's original decision granting habeas relief did not address whether the judgment would be stayed on appeal, and the petitioner and respondent filed competing motions for a stay and for release under Rule 23(c). *Newman*, 917 F. Supp. 2d at 787. Addressing the custody issue for the first time, the district court ordered the petitioner's release on a date certain during appellate proceedings, and

[3] Dassey refers to this case as *Newman v. Harrington*, 917 F. Supp. 2d 765 (N.D. Ill. 2012), in his memorandum in support.

placed the retry-or-release order on hold—a stay of the judgment in part. *Id.* at 792. In contrast, here, this Court's decision to stay the entire judgment was its first consideration of whether to release Dassey pending appeal, which it did not allow.

Hilton itself appears to indicate that a stay of the judgment granting a habeas petition constitutes a denial of release pending appeal under Rule 23(c). For example, in addressing the factors that may be considered in deciding a Rule 23(c) motion for release, *Hilton* refers to the decision on the motion as being 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).

In sum, by staying the judgment without qualification in the event of an appeal, this Court has already determined that Dassey will not be released while this Court's decision is being reviewed by the Seventh Circuit.

B. Because this Court has already made an initial custody determination, it lacks jurisdiction over Dassey's request for release, which should be directed to the Seventh Circuit under Rule 23(d).

Once a district court has made the initial determination on custody while a decision granting habeas relief is on review, it lacks the authority to revisit that decision. That is the only reasonable interpretation permitted by Rules 23(c) and (d).[4] *Woodfox v. Cain*, 789 F.3d 565, 568 (5th Cir. 2015).

As noted, 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. Once made, that

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[4] Federal Rules of Appellate Procedure 23(c) and (d) provide in full:

> **(c) Release Pending Review of Decision Ordering Release.** 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.
>
> **(d) Modification of the Initial Order on Custody.** 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.

determination enjoys a presumption of correctness under Rule 23(d); it may be modified or replaced only for a showing of "special reasons." *Id.* at 777. Rule 23(d) plainly states that a request to modify or replace the initial custody order must be made "to the court of appeals or the Supreme Court." The appellate rules thus leave little doubt that the district court's power to grant release starts and ends with the initial custody determination.[5] The district court lacks jurisdiction to entertain any request to modify or replace that determination, which must be directed to an appellate court.[6]

In *Woodfox*, the Fifth Circuit recently endorsed this interpretation of Rules 23(c) and (d) in reviewing a district court's order modifying an initial custody order. There, the Fifth Circuit indicated that the district court lacked

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[5] Of course, after the district court has made its custody determination, it has the power to issue orders necessary to carry out that determination. *See Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988) ("'[E]very court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.'") (quoted source omitted); *cf. Hilton v. Braunskill*, 481 U.S. 770, 774 (1987) (courts have "broad discretion in conditioning a judgment granting habeas relief"). But, under Rules 23(c) and (d), the basic determination of whether to grant release is not subject to second guessing by the district court.

[6] A party seeking modification of an order addressing custody on appeal contained in the district court's judgment granting habeas relief could arguably do so by filing a timely motion to modify or alter the judgment. *See* Fed. R. Civ. P. 59(e) ("a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment"). Dassey's September 14, 2016 motion for release was not filed within 28 days of the August 12, 2016 decision granting his habeas petition.

the authority to modify its initial custody order: "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.[7] Here, as argued, this Court has made its initial determination on custody pending disposition of the appeal by providing, without limitation, that the judgment would be stayed in the event of an appeal. (Dkt. 23:91.) Dassey's request for release must therefore be construed as a motion to modify the initial custody determination under Rule 23(d). Because a Rule 23(d) motion to modify or replace an initial custody order may be heard only in the court of appeals or Supreme Court, this Court should dismiss Dassey's motion for lack of jurisdiction.

II. Even if this Court had jurisdiction over Dassey's Rule 23(c) motion for release, it would be denied based on application of the *Hilton* factors.

As argued, the respondent's position is that this Court made its initial custody determination by ordering that the judgment would be stayed on appeal, and that this Court lacks jurisdiction over Dassey's motion.

[7] Because the parties had not briefed the issue of whether Rule 23(d) prohibited the district court's order, the appellate court declined to decide the case on this ground. *Woodfox v. Cain*, 789 F.3d 565, 568 (5th Cir. 2015).

Regardless, even if this motion were properly before this Court, Dassey would not be entitled to release under Rule 23(c) (or (d)). As discussed below, the balance of the relevant factors and considerations set forth in *Hilton*, *see* pp. 2-3 above, weigh heavily in favor of continued custody.

First, without asking this Court to publically question the correctness of its August 12, 2016 decision, the respondent submits that there is a "substantial case" on the merits. *Hilton*, 481 U.S. at 778. 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 this 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, and there is good reason to believe that the decision will be reversed.

For example, the Seventh Circuit cases cited in this Court's decision regarding the voluntariness of a juvenile's confession do not 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 this Court's conclusion that the state court unreasonably determined that no promises of leniency were made—the Court concluded that general statements like "It's OK," "we can work through that," and "the truth will set you free" constituted such promises—included no discussion of what other courts, particularly the United States Supreme Court, have determined are promises of leniency. (Dkt. 23:77, 80-84.)

Second, Dassey's continued custody is plainly in the public interest. 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. His release must be viewed as a serious threat to public safety, regardless of his recent conduct in a controlled prison setting.

Third, the State of Wisconsin and the victim's loved ones would be irreparably harmed by Dassey's release prior to completion of the Seventh Circuit's review in this case. The respondent submits that irreparable harm occurs to the State and the victim's family whenever a person convicted by a state court of the gravest of criminal offenses is released before completing his sentence. And here, a jury had a full opportunity to assess the reliability of Dassey's confession to the murder, sexual assault, and corpse mutilation of the victim, and determined him to be guilty beyond a reasonable doubt. *See Crane v. Kentucky*, 476 U.S. 683, 688

(1986) (probative weight of a confession is "a matter that is exclusively for the jury to assess").

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,[8] 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 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").

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

CONCLUSION

This Court should dismiss for lack of jurisdiction Dassey's motion for release. Even if this Court had jurisdiction over the motion under either Rule 23(c) or (d), it would deny the motion because the relevant factors and considerations set forth in *Hilton* weigh strongly against granting release during appellate proceedings in this case.

Dated this 4th day of October 2016, in Madison, Wisconsin.

Respectfully submitted,

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