Nos. 16-3397, 16-3911

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

RESPONDENT-APPELLANT'S EMERGENCY MOTION TO STAY THE DISTRICT COURT'S ORDER RELEASING PRISONER

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INTRODUCTION

The district court—purporting to act under Federal Rule of Appellate Procedure 23—has ordered the release, by **8 p.m. on Friday, November 18, 2016**, of a convicted murderer and rapist. **The State respectfully requests emergency relief by Friday**.

This case involves the brutal rape, murder, and mutilation of Teresa Halbach that 16-year-old Brendan Dassey committed with his uncle, Steven Avery. Dassey admitted to his crimes in extensive detail, in an entirely voluntary confession, during which investigators used techniques that courts around the country have approved time and again. Most relevant here, this Court has rejected a federal habeas challenge to the interrogation of a 15-year-old, illiterate defendant with "borderline intellectual functioning" who was taken from his home at 5:30 a.m. and interrogated without a parent. *See Etherly v. Davis*, 619 F.3d 654, 657–58 (7th Cir. 2010). In *Etherly*, the district court found the confession involuntary and ordered the defendant released during the appeal under Rule 23. On appeal, this Court reversed as to the release order, *Etherly v. Schwartz*, 590 F.3d 531 (7th Cir. 2009) (per curiam), and then on the merits, *Etherly*, 619 F.3d at 663–64.

The State's present motion asks for the same relief this Court provided in *Etherly*: staying the district court's release order. This relief is justified under the factors the Supreme Court articulated in *Hilton v. Braunskill*, 481 U.S. 770 (1987). As demonstrated below, the State has an extremely high likelihood of success on the merits because the techniques the investigators used here have been approved by

numerous courts, and, at a minimum, the state courts' upholding of the interview survives deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA). The remaining *Hilton* factors—which go to the harms to the parties and the public—strongly favor a stay. As in *Etherly*, Dassey was convicted of the most serious of crimes and has many years left on his sentence.

Finally, the State is entitled to relief on an independent basis: the district court's release order was procedurally improper. In its initial order granting Dassey's habeas writ, the district court specifically provided that Dassey would remain in custody during the appeal. Once the district court made that initial custody determination, the plain text of Rule 23(d) prohibits that court from revisiting that decision. If Dassey is to be released pending appeal, it can only be done by order of "the court of appeals or the Supreme Court." Fed. R. App. P. 23(d).

STATEMENT

A. Four months into their investigation of Teresa Halbach's murder, the police decided to re-interview Brendan Dassey. R.19-18:189–90.[1] At this point, investigators assumed that Dassey was just a witness to the murder committed by Steven Avery, his uncle. R.19-19:9. In setting up the interview, investigators sought Dassey's and his mother's permission, SA 14, used a room with a couch, R.19-19:19, and offered food and water, SA 21, 27, 101–02. Although Dassey was not a suspect, the

[1] Citations to RSA __ are to the Required Short Appendix filed with the State's opening brief. Citations to SA __ are to the Separate Appendix. Citations to R.__ are to the District Court Record.

investigators read Dassey *Miranda* warnings, SA 14–16, and reminded him of those warnings at the beginning of questioning, SA 28.

This March 1, 2006, interview took about three hours, with a half-hour break, and did not involve any unusual or coercive techniques. SA 268 Parts 1, 2. At the beginning and throughout, the investigators urged Dassey to "tell the whole truth" and not "make anything up." SA 29, 33, 44, 45, 84, 109. After they explained to Dassey that they thought "some things were left out" of his prior statements, one investigator said, "from what I'm seeing, even if I filled those in, I'm thinkin' you're all right. OK, you don't have to worry about things." SA 29. Shortly thereafter, the investigators warned Dassey that they could not "make any promises." SA 30. The investigators encouraged Dassey to tell the truth by saying to him "it's ok" and that they "already kn[ew]." *E.g.*, SA 36–37. They asked mostly open-ended questions with a gentle tone and used leading questions when they wanted to go back over some detail that Dassey had already told them. *E.g.*, SA 39. Dassey volunteered most of the important details within an hour, SA 268 Part 1, and by the end of two-and-a-half hours of questions, Dassey had given a comprehensive and detailed confession.

Dassey told the investigators[2] that after coming home from school, he "got the mail" and went to drop off "a[n] envelope . . . with [Avery's] name on it." SA 54. As he approached Avery's trailer, he "could hear" someone "screaming" "help me." SA 50–51. He knocked and Avery came to the door "all sweaty." SA 58. Avery explained that

[2] This is an abbreviated version of Dassey's confession. The full version is set forth in the State's opening brief on appeal at pages 4–9.

Halbach was in his bedroom "chained up [to] the bed" and that he had "[r]aped her." SA 49, 112. Avery showed Dassey Halbach's "naked body," SA 61–63, and "asked . . . if [he] wanted [to] fuck the girl," SA 112. Dassey eventually took him up on the offer because he "wanted [to] see how [sex] felt." SA 153. He raped her for about "[f]ive minutes" while Avery watched and while Halbach "cr[ied]" and told him "not to do it." SA 64–65. Avery and Dassey then killed Halbach and disposed of her body. SA 67–68. Avery "stabbed her" and "choked her," SA 67–69, and Dassey "[c]ut her" "[o]n her throat," SA 75. After that, they "tied her up," SA 70–71, and took her into the garage, where Avery shot her "[i]n the head, stomach, and heart." SA 81, 86. They carried her outside on a mechanic's creeper and "thr[ew] her on" a fire out back. SA 88. Avery and Dassey then "t[ook] [Halbach's] jeep down in the pit" and "covered it with branches and [a] hood." SA 122. They "burn[ed]" the "bedsheets" and Halbach's "clothes." SA 96–97. And they used "gas," "paint thinner," and "bleach" to clean up the blood in the garage. SA 98.

Notably, Dassey provided most of these details in response to open-ended questions. *E.g.*, SA 39 ("What did you see and what did he tell you?"); SA 40 ("What did he tell you he did to her?"); SA 45 ("[W]hat happens next?"); *see also* SA 49, 50, 82, 89, 90. On multiple occasions, even after Dassey admitted to his participation, Dassey resisted the investigators' doubts about various details of his story. *E.g.*, SA 86 ("We know you shot her too. Is that right?"); SA 94, 115, 141.

B. The State charged Dassey with first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse. SA 189. A jury found him guilty on

all counts after a nine-day trial. SA 2. In addition to Dassey's confession, the State presented substantial evidence that Halbach was killed on Avery's property, including her charred bones, R.19-17:69–70, 74, and teeth, R.19-17:214–32, her blood, R.19-17:59–60, 62–66, her jeep, R.19-17:54, and its key, R.19-16:106, her camera and phones, R.19-16:223–24, and her jean rivets and zipper, R.19-17:195. Other evidence corroborated various details from Dassey's confession, including handcuffs and leg irons in Avery's bedroom, R.19-16:17–18, two bullet fragments in Avery's garage, one of which had Halbach's DNA on it, R.19-16:62–66, 203–11; 19-17:74–76, Avery's rifle, R.19-16:204, 208–09, eleven shell casings in Avery's garage, R.19-20:54, an empty bleach bottle in Avery's bathroom, R.19-16:19–20, and paint thinner in his garage, R.19-16:59, Dassey's bleach-stained jeans, R.19-15:174, the presence of Halbach's car key in Avery's bedroom, R.19-16:106, a mechanic's creeper in the garage, R.19-16:60, a charred car seat, R.19-16:153, and a charred shovel and rake, R.19-17:190–93.

After the jury found Dassey guilty, the court sentenced him to life in prison, eligible for extended supervision on November 1, 2048. R.19-1:2. Dassey had moved to suppress his confession prior to trial and renewed that argument in a motion for post-conviction relief. The circuit court reviewed the video and transcript of the March 1 interview, carefully considered the relevant factors under the Supreme Court's test for voluntariness, and then denied the motion. SA 168–78.

The Wisconsin Court of Appeals affirmed. It "based [its decision] on" the circuit court's findings, but also carefully reviewed the relevant factors. SA 2–4. Dassey was "seated on an upholstered couch, never was physically restrained and was offered

food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning." SA 4. As to the investigators' techniques, the court found "no hectoring, threats or promises of leniency," and noted that their attempts to "achieve a rapport with Dassey and to convince him [to] be[ ] truthful" were "not coercive conduct." SA 4.

C. Dassey filed a federal habeas petition, which the district court granted on August 12, 2016. RSA 1–91. The court concluded that Dassey's confession was involuntary, and that the state court had unreasonably held otherwise. RSA 60–91. The district court relied primarily on a series of statements that it believed "collectively and cumulatively," "led Dassey to believe that he would not be punished." RSA 77–83, 86. The court also held that the Wisconsin Court of Appeals' "decision d[id] not reflect [ ] application" of the Supreme Court's totality-of-the-circumstances standard for voluntariness. RSA 85. Notably, in this same order, the court stayed its order pending appeal, "in the event the [State] files a timely notice of appeal." RSA 91. The State filed a timely notice of appeal on September 9, triggering the stay. R.25.

D. On September 14, Dassey filed a motion requesting that he be released during the appeal under Federal Rule of Appellate Procedure 23(c), R.29, which the State opposed on substantive and procedural grounds, R.31. Several days later, on October 19, the State filed its opening brief on appeal to this Court. On November 14, the district court granted Dassey's motion for release. R.37. With regard to the State's procedural argument, the court held that the stay "addressed only the order that Dassey be released under 18 U.S.C. § 2254," and "does not govern whether Dassey

should be released pursuant to Rule 23." R.37:3–4. The court then held that Dassey was entitled to release under the factors set forth in *Hilton*. R.37:5–14.

Today, November 16, the district court denied the State's request for a stay, R.39, and ordered Dassey released by 8 p.m. on Friday, November 18, 2016. R.44.

LEGAL STANDARD

The State may challenge in this Court an order to release a habeas petitioner under Rule 23. *See Hilton*, 481 U.S. at 777. During such a challenge, this Court applies a "presumption of correctness [to] the order of a district court." *Id.* at 774.

In *Hilton*, the Supreme Court articulated the "factors . . . to consider in determining whether to release a state prisoner pending appeal of a district court order granting habeas relief." *Id.* at 772. Those factors "are generally the same" as "the factors regulating the issuance of a stay": "(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." *Id.* at 776. This Court has described the last three of these factors as "balanc[ing] [the petitioner's] interest in release against the state's interest in continuing custody pending appeal, and preventing unnecessary danger to the public." *Etherly*, 590 F.3d at 532 (per curiam).

Hilton also provided guidance on how the factors should be balanced. "The balance [of the four factors] may depend to a large extent upon determination of the State's prospects of success in its appeal. 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 (citations omitted). The "preference for release should control" when "the State's showing on the merits falls below this level." *Id.*

ARGUMENT

I. Dassey Is Not Entitled To Release Under Federal Rule of Appellate Procedure 23

A. The State Has A Strong Likelihood Of Success On Appeal

The Wisconsin Court of Appeals' conclusion that Dassey's confession was voluntary was correct, and, at minimum, easily survives AEDPA's "stringent standard of review." *Hardaway v. Young*, 302 F.3d 757, 759 (7th Cir. 2002).

1. The Supreme Court has only found confessions involuntary where there was "a *substantial* element of coercive police conduct." *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (emphasis added). Absent actions such as "psychological intimidation," *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998), or "outright fraud," *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004), the police can "pressure and cajole, conceal material facts, and actively mislead," *see United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990). The Supreme Court's totality-of-the-circumstances test for voluntariness looks to "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Significant factors include whether the police gave *Miranda* warnings, *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (plurality), and how the suspect responded to questioning,

whether "correcting and supplementing the questioner's information" or providing "mere supine . . . response[s] to leading questions," *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944). Juvenile confessions require "special care," but the same general principles "appl[y]." *Etherly*, 619 F.3d at 661.

2. Under these principles, the Wisconsin Court of Appeals' holding that Dassey's confession was voluntary is not only reasonable, but entirely correct.

The interrogation took place under appropriate, noncoercive circumstances. The interviewing investigators asked both Dassey and his mother for permission to speak to him at the police station. SA 14. They had offered to let Dassey's mother participate in a prior interview, but she declined. SA 2; *see Hardaway*, 302 F.3d at 763 ("[T]here were no efforts to keep his parents away."). Even though he was not a suspect at the time, R.19-19:9, the investigators read Dassey *Miranda* warnings and reminded him of his rights before they started asking questions, SA 14–16, 28, which is a "significant factor in considering the voluntariness of statements later made," *Davis v. North Carolina*, 384 U.S. 737, 740 (1966); *Seibert*, 542 U.S. at 608–09 (plurality). The interview "was conducted in a standard-sized room in the middle of the [day]," *Berghuis v. Thompkins*, 560 U.S. 370, 386 (2010), with Dassey "seated on an upholstered couch," SA 4. It lasted roughly three hours, with a half-hour break, and "there is no authority for the proposition that an interrogation of this length is inherently coercive." *Berghuis*, 560 U.S. at 387. Dassey "was offered food, beverages and restroom breaks." SA 4, 21, 27, 101–02; *Gilbert v. Merchant*, 488 F.3d 780, 794 (7th Cir. 2007). The investigators "used normal speaking tones, with no hectoring,

threats or promises of leniency" and Dassey "did not appear to be agitated or intimidated at any point in the questioning." SA 4. Finally, although Dassey had low-average-to-borderline IQ, he was in "mostly regular-track high school classes." SA 4.

The interview techniques used here have repeatedly been upheld, even on de novo review. Investigators here "encourage[d] honesty" and told Dassey not to lie, SA 4, which is "not coercive." *Etherly*, 619 F.3d at 663. They occasionally took a "sympathetic" approach, which "does not rise to a level of psychological manipulation." *Sotelo v. Ind. State Prison*, 850 F.2d 1244, 1249 (7th Cir. 1988). They told Dassey that they "already kn[ew]" what happened, *e.g.*, SA 37, the type of lie "least likely to render a confession involuntary." *United States v. Sturdivant*, 796 F.3d 690, 697 (7th Cir. 2015) (citation omitted). Finally, the investigators made generic statements that they would "go to bat" for Dassey and "that being truthful would be in his best interest," SA 4, statements that are "far from threatening or coercive," even when made to 16-year-olds like Dassey. *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); *Etherly*, 619 F.3d at 658, 661; *Rutledge*, 900 F.2d at 1130–31. The investigators "made clear that [they] could make no promises." *Etherly*, 619 F.3d at 663; SA 30 ("We can't make any promises."). And they did not promise any "specific benefit . . . in exchange for [Dassey's] cooperation." *Etherly*, 619 F.3d at 663–64.

The content of Dassey's confession also "strongly suggests" it was voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984). Even after admitting to participating in Halbach's rape and murder, Dassey repeatedly resisted suggestions that he was being dishonest about various details. *E.g.*, SA 86, 94, 115, 133, 151. Dassey also

volunteered most of the details in response to open-ended questions and within the first hour. *E.g.*, SA 39, 40, 45, 49, 50, 68, 73–75. Because Dassey "correct[ed] and supplement[ed] the questioner's information," his confession is much more likely to be voluntary than simple "yes-or-no answers" to "leading or suggestive" questions. *See Lyons*, 322 U.S. at 605; *Fikes v. Alabama*, 352 U.S. 191, 195 (1957); *Spano v. New York*, 360 U.S. 315, 322 (1959); *Reck v. Pate*, 367 U.S. 433, 439 (1961).

Notably, this Court has consistently rejected challenges to the voluntariness of juvenile confessions where the police applied much more pressure than here, including where the juvenile was arrested, awoken early in the morning, questioned for a full day, and/or detained at a police station for multiple days or overnight. *See, e.g., Etherly*, 619 F.3d at 657–58, 663–64 (15-year-old); *Carter v. Thompson*, 690 F.3d 837, 840–41, 844 (7th Cir. 2012) (16-year-old); *Gilbert*, 488 F.3d at 783–85, 795 (14-year-old); *Ruvalcaba v. Chandler*, 416 F.3d 555, 556–57, 561–62 (7th Cir. 2005); *U.S. ex rel. Riley v. Franzen*, 653 F.2d 1153, 1156–58, 1163 (7th Cir. 1981); *Johnson v. Trigg*, 28 F.3d 639, 640, 645 (7th Cir. 1994). This Court has even denied habeas petitions when facing "the gravest misgivings" about the voluntariness of the confession. *Hardaway*, 302 F.3d at 759, 767–68.

3. Despite this overwhelming contrary caselaw, the district court held that the state court's voluntariness finding was not only wrong, it was so unreasonable as to overcome AEDPA. The district court's decision is indefensible under AEDPA deference and would be clearly wrong even under de novo review.

The district court relied primarily on certain statements that it believed "collectively and cumulatively" amounted to a false promise of leniency: a single statement from one of the investigators early in the interview, "you don't have to worry about things," and multiple statements throughout the interview that "it's ok" and that the investigators "already knew what happened." RSA 77–83, 86. The court did not cite a single case—much less a Supreme Court case, as required under AEDPA, *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012)—finding that similar statements are coercive, either alone or "collective[ly]." *See* RSA 83. Notably, courts have repeatedly held that generic predictions about the benefits of confessing or vague offers to help are "far from threatening or coercive," *Fare*, 442 U.S. at 727, as long as they do not fraudulently promise a "specific benefit . . . in exchange for [ ] cooperation." *Etherly*, 619 F.3d at 663–64; *Rutledge*, 900 F.2d at 1130; *United States v. Villalpando*, 588 F.3d 1124, 1130 (7th Cir. 2009). And "a lie that relates to the suspect's connection to the crime"—such as "we already know," *e.g.*, SA 37—"is the least likely to render a confession involuntary." *Sturdivant*, 796 F.3d at 697 (citation omitted); *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992).

The district court also misrepresented the context of the investigators' statements. Before Dassey's startling confession, the investigators did not view him as a suspect; they interviewed him on the assumption that he was simply a witness, albeit "a witness to something horrific." R.19-19:9. The "you don't have to worry about things" comment came at the beginning of the interview when the investigators were explaining that they thought Dassey may have "left" "some things . . . out." SA 29. So

the investigator caveated his statement with "*from what I'm seeing, . . . I'm thinkin'* . . . you don't have to worry about things." SA 29 (emphases added). Shortly thereafter, they warned Dassey, "[w]e can't make any promises." SA 30. Dassey had also been *Mirandized* and reminded of the *Miranda* warnings, which explained that "anything" he said "can and will be used against [him]." SA 15. As for the investigators' statements that "it's ok" and that they "already know," these are best understood as encouraging Dassey to tell the truth—as in, "it's ok to tell us." SA 109.

The district court also found that the Wisconsin Court of Appeals did not reasonably apply the totality-of-the-circumstances test because it supposedly failed to consider the absence of Dassey's mother and the investigators' "paternalistic" tone. RSA 85–86. This misrepresents both the state court's opinion and the law. The court of appeals did consider the investigators' tone—without labeling it "paternalistic"—it simply found "[non]coercive" attempts to "achieve a rapport with Dassey." SA 4. That finding was consistent with the many cases holding that a "fatherly" approach "does not rise to a level of psychological manipulation." *E.g.*, *Sotelo*, 850 F.2d at 1249; 2 Wayne R. LaFave, et al., Crim. Pro. § 6.2(c) at nn.153–54 and text (4th ed.). The court of appeals also discussed Dassey's mother, noting that she "declined the offer to accompany Dassey" to a prior interview and that she gave "permission" for the March 1 interview. SA 2. In any event, even if the state court had "highlight[ed] only those [factors] that seemed especially pertinent to the voluntariness of the confession," federal courts on habeas review may not assume that the state court did not "t[ake] into account all of the relevant facts." *Carter*, 690 F.3d at 843–44.

B. Release Would Irreparably Harm The State

The second *Hilton* factor is irreparable harm to the State. The State has an interest in "continuing custody and rehabilitation" of those who have been validly convicted. *Hilton*, 481 U.S. at 777. This interest is "strongest where the remaining portion of the sentence to be served is long, and weakest when there is little of the sentence remaining to be served." *Id.* That is, the longer the remaining sentence of the prisoner who has been ordered released, the more harm the release does to the State. Such harm becomes irreparable at least where the prisoner's crime of conviction is particularly grave and where the State has a strong likelihood of overturning the grant of the writ on appeal. *See Etherly*, 590 F.3d at 532.

This Court's decision in *Etherly* is instructive. *Etherly* involved the confession of a 15-year-old, illiterate defendant with "borderline intellectual functioning" who was interrogated early in the morning without a parent. *Etherly,* 619 F.3d at 657–58, 664 (decision on merits). He confessed to murder and was sentenced to 40 years in prison. *See id.* at 658–59. He challenged that confession as involuntary under AEDPA. 590 F.3d at 532. The district court held that his confession was involuntary and ordered his release, which this Court then stayed. *Id.* at 532–33. Applying *Hilton*, this Court concluded that the merits factor weighed in the State's favor and that "[t]he other [*Hilton*] factors" did not weigh in favor of denying the stay. *Id.* at 532. Specifically, the State had a "strong" interest in "continuing custody" "due to the fact that Etherly was convicted by a jury for first-degree murder" and "had several incidents of threatened or actual violence" in prison. *Id.*

Similarly, in *Woodfox v. Cain*, 789 F.3d 565 (5th Cir. 2015), the district court ordered the release of a habeas petitioner—convicted of murder and sentenced to life imprisonment without possibility of parole, *id.* at 571—due to "racial discrimination in the selection of the foreperson of the grand jury," *id.* at 567. The Fifth Circuit stayed that release, concluding that the State had shown a likelihood of success on the merits and that, "[a]s for the state's irreparable injury and the public interest, there is a substantial interest in staying the release of a person . . . convicted of murder . . . [and serving] a life sentence without the possibility of parole." *Id.*

Here, the release of Dassey pending appeal constitutes irreparable harm to the State for the same reasons. Dassey confessed to, and was convicted of, rape, murder, and mutilation of a corpse. *See Etherly*, 590 F.3d at 532 (murder); *Woodfox*, 789 F.3d 565 (same). The court sentenced him to life imprisonment with extended supervision unavailable until 2048. R.19-1:2; *Etherly*, 590 F.3d at 532 (40 years); *Woodfox*, 789 F.3d at 572 (life without parole). These crimes evince Dassey's danger to the public and the State's corresponding interests in his continued incarceration and rehabilitation. And despite the district court's granting of the writ, the State has a high likelihood of success of overturning that decision on appeal, as explained above.

The district court relied on this Court's unpublished decision in *Harris v. Thompson*, No. 12-1088, Dkt. 41 (7th Cir. Feb. 20, 2013), but that case is readily distinguishable. In *Harris*, this Court refused to stay the release of a habeas petitioner convicted of murdering her four-year-old son after this Court itself granted her writ of habeas corpus. *Id.* at 1. *Harris* is inapposite for two independent reasons.

First, *Harris* held that the State did *not* have a substantial likelihood of success on the merits—i.e., the slim chance of the Supreme Court granting the State's certiorari petition and reversing. *See id.* at 2. Here, by contrast, the State appealed as a matter of right and has made a powerful showing on the merits. Second, the error in *Harris* that justified the grant of the writ was one that called into doubt whether the petitioner actually committed the crime—"exclu[sion] [of] probative evidence of *actual innocence*." *Id.* at 3 (emphasis added and citation omitted). Here, by contrast, the district court (wrongly) held that it was erroneous to admit Dassey's confession because it was involuntary. *See* RSA 74. Put another way, this is not a case where there was "no jurisdiction to detain the applicant, that . . . he is entitled to his unconditional release, he ought to be left at large until and unless the order to release him is reversed by a higher court." *See Walberg v. Israel*, 776 F.2d 134, 136 (7th Cir. 1985).

C. Dassey's Interests Do Not Warrant Release

The third *Hilton* factor considers the effect on Dassey of declining to release him. While "[a] petitioner's interest in release is unquestionably important, especially when there is a likelihood that the court will rule in favor of the petitioner" on appeal, *Etherly*, 590 F.3d at 532, "a successful habeas petitioner is in a considerably less favorable position than a pretrial arrestee" because a "state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State," *Hilton*, 481 U.S. at 779. Moreover, a substantial term of incarceration weakens "[t]he interest

of the habeas petitioner in release pending appeal." *Id.* at 777–78. Dassey's interests do not warrant release because the State has a high likelihood of success on appeal, and Dassey was convicted and sentenced to serve life imprisonment with no possibility of extended supervision until 2048.

D. Release Would Harm The Public Interest

The final *Hilton* factor considers the interests of the public as a whole, which broadly include "the possibility of flight," the "risk that the prisoner will pose a danger to the public if released," and, once again, the "State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal." *Hilton*, 481 U.S. at 777. The public's interest in continuing custody "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.* (emphasis added). *Hilton*'s shaping of this factor is not exhaustive: "[s]ince the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.* Accordingly, this Court may also consider other relevant considerations, like the gravity of the crimes. *See Etherly*, 590 F.3d at 532; *Woodfox*, 789 F.3d at 572.

Here, the public interest weighs strongly in favor of not releasing Dassey. The jury found Dassey guilty of the gravest of crimes: rape, murder, and mutilation of a corpse. These crimes themselves show that Dassey is a danger to the public, regardless of his current behavioral record while incarcerated. *See Etherly*, 590 F.3d at 532. In addition, the state court sentenced Dassey to life imprisonment, with extended supervision eligibility delayed until 2048. *Hilton*, 481 U.S. at 777. Finally,

this Court should take into account the emotional impact of Dassey's release on the victim's family, especially considering the high likelihood that the State will succeed in reversing the grant of habeas on appeal.

II. Rule 23(d) Deprives The District Court Of Authority To Release Dassey

A. Rule 23(c) provides that unless a court "orders otherwise," a prisoner must "be released on personal recognizance" "[w]hile a decision ordering the release of [the] prisoner is under review." Fed. R. App. P. 23(c). For example, when a district court "orders otherwise"—by "stay[ing] an order pending appeal," *Hilton*, 481 U.S. at 776—this is an "initial custody determination under Rule 23(c)." *Id.* at 777. Then, under Rule 23(d), this "initial order governing the prisoner's custody or release, . . . 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." Fed. R. App. P. 23(d). "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 (quoting Fed. R. App. P. 23(d)).

B. In this case, the district court made its "initial custody determination" under Rule 23(c), *Hilton*, 481 U.S. at 777, when it decided to stay Dassey's release on August 12, 2016. RSA 90–91. In that order, the district court made two decisions regarding "Dassey['s] [ ] custody." RSA 90. First, the court ruled that the State "shall release Dassey from custody unless, within 90 days of the date of this decision, the State

initiates proceedings to retry him." RSA 90. Second, the court ruled that if the State "files a timely notice of appeal, the judgment will be stayed pending disposition of that appeal," clearly meaning Dassey would not be released. RSA 91.

Having made its initial custody decision under Rule 23(c), the district court has no authority to modify its own "initial order governing the prisoner's custody or release" under Rule 23(d). Rather, an order modifying the "initial order" can be made only by "the court of appeals or the Supreme Court" or a "judge or justice of either court." Fed. R. App. P. 23(d). Put another way, Rule 23(d) bars a district court from modifying an "initial order governing the prisoner's custody or release," Fed. R. App. P. 23(d), and "plainly limits the entities that can modify an initial order" to "the court of appeals or the Supreme Court." *Woodfox*, 789 F.3d at 568 (citation omitted). This plainly prohibits the district court's actions here.

C. In its decision granting release, the district court cited several cases to support its contrary approach, but these cases do not undermine the plain language of Rule 23(d). The district court wrote that "Rule 23 is an exception to the general rule that the filing of a notice of appeal generally 'divests the district court of its control over those aspects of the case involved in the appeal.'" R.37:3 (quoting *Wis. Mut. Ins. Co. v. United States*, 441 F.3d 502, 504 (7th Cir. 2006), and citing *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997)). The cited cases, however, do not hold or even suggest that Rule 23(c) is an exception to Rule 23(d)'s provision that only the court of appeals or the Supreme Court may modify an initial custody decision. In *Wisconsin Mutual,* this Court did not even mention Rule 23 or the release of a

prisoner. 441 F.3d at 504 (factual background). And *Stein* likewise did not discuss Rule 23(d) specifically because that case "merely decid[ed] whether a condition placed on a habeas petitioner's custody ha[d] been met." 127 F.3d at 1190.

Nor does this Court's decision in *Walberg*—also relied upon by the district court, R.37:4—support the district court's position. *Walberg* considered whether *this Court* had the authority to decide a prisoner's application for release, even after the Court had stayed its own decision granting the prisoner habeas relief. *Walberg*, 776 F.2d at 135. This Court's decision that it had such authority is consistent with Rule 23(d), which allows "*the court of appeals*" to "modif[y]" an "initial order governing the prisoner's . . . release." Fed. R. App. P. 23(d) (emphasis added). *Walberg* said nothing about the district court's authority to grant release under Rule 23(c) after it has already entered an "initial order" under Rule 23(d), which is the question here.

CONCLUSION

The district court's release order should be stayed.

Dated: November 16, 2016

Respectfully Submitted,

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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/ Luke N. Berg
LUKE N. BERG