No. 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

PETITIONER-APPELLEE'S REPLY IN SUPPORT OF MOTION TO LIFT THE STAY OF THE DISTRICT COURT'S ORDER RELEASING PETITIONER ON RECOGNIZANCE

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

Petitioner-Appellee Brendan Dassey, by undersigned counsel, files this reply in support of his motion to lift this Court's stay of the district court's order releasing him from prison on bond pursuant to Fed. R. App. Proc. 23. In support of this motion, counsel states as follows.

The State of Wisconsin has asked this Court to take an extraordinary step: to block the district court's order releasing an unconstitutionally incarcerated man, despite two written opinions recognizing his entitlement to habeas relief, while the State prepares, files, and litigates a petition for rehearing *en banc* – an exceedingly rare form of relief that is granted only under the most limited of circumstances and the pursuit of which, particularly in such a fact-bound case, may require many months to resolve. *See* Administrative Office of the United States Courts, *The Judicial Business of the United States Courts of the Seventh Circuit* (2016), U.S.C.A. Table 2, *available at* http://www.ca7.uscourts.gov/annual-report/2016_report.pdf (in this Circuit, only two of 670 cases were disposed of via *en banc* rehearing in 2016).

The State asks for this extraordinary relief, moreover, despite its own failure to cite any cases in which a court has blocked a successful habeas petitioner's release pending a State's petition for rehearing *en banc*; and – surprisingly – despite the clear legal significance of this Court's decision to affirm the district court's grant of habeas relief. And it misguidedly suggests that lifting the stay would somehow "disrespect" the Court's November 2016 decision to stay release. Response at 6. But, of course, "[h]aving heard the…appeal after full briefing, [this Court is now] in a position to evaluate the Appellants' probability of success in a more focused way than could the motions panel." *In re World Trade Center Disaster Site Litigation*, 503 F.3d 167, 170 (2nd Cir. 2007) (vacating pre-appeal stay after stay applicant failed to prevail on appeal).

In short: The departure that the State seeks from the common practice of granting bond to successful habeas petitioners in Dassey's position is not warranted. *See, e.g.*, *Harris v. Thompson*, 2013 U.S. App. LEXIS 16715 at *4 (7th Cir. Feb. 20, 2013) (granting bond to successful habeas petitioner in murder case); *Newman v. Harrington*, 917 F. Supp. 2d 765, 792

(N.D. Ill. 2013) (same); *Franklin v. Duncan*, 891 F. Supp. 516, 522 (N.D. Cal. 1995) (same). The State has lost its appeal and is now highly unlikely to prevail in its efforts to seek reversal. This Court should lift its stay of the district court's order releasing Petitioner-Appellee Dassey. He has been unconstitutionally incarcerated long enough.

I. The Seventh Circuit's opinion affirming habeas relief is a material change in circumstances that directly undercuts the State's proffered basis for seeking a stay in November.

In opposing Petitioner-Appellee's Motion to Lift the Stay, the State asserts that this Court may only lift its stay upon a showing of substantially changed circumstances – in essence, that the Court has tied its own hands by issuing its November 2016 stay. Response at 1. But interlocutory orders like this stay may be lifted for any reason, *sua sponte* or upon a party's application, whenever a Court so orders. *See, e.g., Greisch v. Jacobsen*, 1990 U.S. App. LEXIS 8339 at *5 (7th Cir. May 17, 1990) (a "court always has power to modify earlier orders in pending cases") (internal citations omitted)). The State is wrong to suggest otherwise.

It also argues, rather extraordinarily, that there has been no substantial change in circumstances: that the "*only* changed circumstance that Dassey can point to is the Merits Panel's decision." Response at 2 (emphasis in original). But it is hard to envision a change in circumstances more material than this Court's decision. That decision, affirming the district court's grant of habeas relief, directly neutralizes the primary argument advanced in the State's November 2016 stay application: that release should be stayed because the State was likely to succeed on appeal. DCR.39. The State has now lost its appeal as of right. The primary basis for the stay no longer exists.

As a sheer matter of statistics, the State is extremely unlikely to prevail on any effort to seek further review. *See Practitioner's Handbook for Appeals to the United States Court of*

Appeals for the Seventh Circuit 177 (2017) ("It bears repeating that hearings and rehearings are very rare…in fact, it is more likely to have a petition for writ of certiorari granted than to have a request for en banc consideration granted"); *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) ("In the last calendar year, out of the thousands of cases resolved by this court, only one *en banc* opinion has been issued"). Indeed, the State can no longer credibly argue that it is "likely to succeed upon appeal," nor does it cite any case in which a Court has deemed a State "likely to succeed on appeal" when it has not prevailed against a habeas petitioner in either the district court or the court of appeals but files a petition for *en banc* rehearing nonetheless.[1] Its possibility of future success is, at best, remote.

II. The substantive arguments advanced by the State in favor of its future petition for *en banc* rehearing are unlikely to prevail.

The State claims that it is likely to prevail on its future efforts to seek *en banc* rehearing because the majority's decision "created" no fewer than five "new constitutional requirements." Response at 7. In essence, it suggests that the Court blithely disregarded AEDPA and instead seized its chance to issue a constellation of brand-new holdings that, according to the State, upend interrogation law on everything from parental presence to the definition of coercion. Of course, the Court did no such thing.

[1] Neither does the fact that this Court ordered the State either to retry or release Brendan Dassey within ninety days of the mandate's issuance somehow foreclose the Court from lifting its own stay. The State is wrong to conflate these two forms of release. Response at 5. The "release" part of the "retry-or-release" option given to the State in the Court's opinion refers to the permanent resolution of this case, not Mr. Dassey's temporary and conditional release on bond; conversely, the custody orders governed by Rule 23 relate to temporary bond grants pending appellate resolution. This Court's ruling took the standard "retry-or-release" form commonly followed by habeas courts, which has never foreclosed bond. *See, e.g.*, *Newman*, 917 F. Supp. 2d at 792 (granting bond in context of similar "retry-or-release" habeas ruling).

This Court's majority decision amounted to a straightforward, fact-specific application of settled law to largely undisputed facts captured on videotape. It was appropriately based on the state court's unreasonable failure to apply long-held, clearly established U.S. Supreme Court law requiring special caution when evaluating juvenile confessions, as well as its unreasonable factual errors. *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948); *see also Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (describing the "special caution" rule established in these cases). The decision comports with this Circuit's precedent in cases like *A.M.*, which reached a similar result. *A.M. v. Butler*, 360 F.3d 787, 801 (7th Cir. 2004) (confession of mentally unimpaired minor was involuntary on habeas review where officers "continually" challenged him, accused him of lying, and led him to believe that if he confessed, he would go home to a birthday party). The Court also properly distinguished cases like *Etherly*, 590 F.3d 531, which involved a true promise of leniency instead of a false one, and *Hardaway*, 302 F.3d 757, in which the lone factor showing involuntariness was parental absence. Slip Op. at 37-39.

The State protests that the Court misapplied holdings from adult confession cases, but this is also not so. Instead, this Court appropriately applied the U.S. Supreme Court's and Seventh Circuit's long-standing rule that tactics that might not be coercive against adult career criminals – *see, e.g.*, *U.S. v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) – may, in fact, be coercive when deployed against an intellectual disabled, inexperienced sixteen-year-old. *See Haley*, 332 U.S. at 599 (interrogation tactics that "would leave a man cold and unimpressed can overwhelm and overawe a lad"); *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"). Neither does this Court's

application of these long-held principles transform the totality test into a purely subjective one. *See, e.g., U.S. v. Stadfelt*, 689 F.3d 705, 710-11 (7th Cir. 2012) (it is "well-established voluntariness doctrine" that "the defendant's perception of what government agents have promised is an important factor in determining voluntariness") (internal citations omitted); *cf. J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403 (2011) ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis").

Similarly, the State protests that the Court suddenly elevated tactics like "implied promises" or "bluffing by police" to the level of *per se* coercion, Response at 8; but again, this Court did no such thing. Instead, the Court weighed Brendan's vulnerabilities against the cumulative impact of a wide variety of interrogation tactics that it catalogued in painstaking detail over its 104-page majority opinion. It is hard to imagine an opinion that more clearly states that Brendan's confession was involuntary not because of one particular tactic but rather because of many tactics' *cumulative* impact on a vulnerable child. *E.g.*, Slip Op. at 42. In short: the case was carefully considered, correctly decided, and makes no new law. It is not suited for *en banc* rehearing.

Finally: Not only does the State indicate that it intends to file a merits petition for rehearing *en banc*, but it also warns the Court that it also may file a petition seeking a stay from the *en banc* court if Mr. Dassey's instant motion is granted. Response at 2. Such a petition would be highly irregular and unlikely to succeed. As an initial matter, the district court's order granting bond creates neither an intra-circuit split nor raises issues of exceptional importance. *See* Fed. Rule App. Proc. 35(a) (*en banc* rehearing is limited to such cases). Rather, that decision

methodically applies *Hilton v. Braunskill*'s stay factors in a rather unremarkable manner, making it a poor candidate for *en banc* rehearing. DCR.37. And even further, as this Court's longstanding practice shows, issues relating to bond are routine – not of "exceptional importance" – and as such are not appropriate for *en banc* rehearing.

III. The balance of equities, along with considerations of irreparable harm and the public interest, clearly favor Brendan Dassey's release.

Continuing to keep Mr. Dassey behind bars while the State prepares, files, and litigates a petition for *en banc* rehearing and, as it indicates, a subsequent petition for a writ of certiorari – resulting in litigation that will last well over a year – will result in profound injury to Mr. Dassey. *See 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"). Particularly in light of this Court's decision, any remaining interest the State has in keeping him in prison pales in comparison to Brendan's real and daily harm from continued incarceration.

In contrast, Brendan Dassey's supervised release from prison on bond will result in no harm to the State. Brendan presents no public safety threat: he had no criminal record prior to the instant case; his conviction for murder was obtained unconstitutionally and the evidence supporting it has been cast into "significant doubt" by the district court, DCR.23; and his prison records demonstrate him to be a nonviolent, cooperative, and peaceful man. Further, he will be released under the supervision of the U.S. Probation Office and will be supported by a team of multiple social workers retained by undersigned counsel, who have developed plans for his housing, employment, counseling, and security designed to support Mr. Dassey to the fullest while causing minimal disruption to the community. DCR.29.

Finally, the State argues that a jury has convicted Mr. Dassey of serious crimes and thus should be denied release; but the same is true of any habeas petitioner and provides no basis for rebutting the presumption of release embodied in Federal Rule of Appellate Procedure 23. *See Hampton v. Leibach*, No. 99 C 5473, 2001 U.S. Dist. LEXIS 20983, at *5 (N.D. Ill. Dec. 18, 2001) ("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"). Undersigned counsel further notes, in light of the State's continued reliance on the seriousness of the offenses to which Mr. Dassey confessed, that the district court expressed "significant doubts as to the reliability" of his involuntary confession, DCR.23, and that the confession was the "centerpiece" of the State's case against him. Slip Op. at 16.

For all the nuanced attention to detail that review of this case required, at bottom this case represents a simple tragedy. States, and their courts, can err; they can err unreasonably; and err unreasonably they did in the case of sixteen-year-old Brendan Dassey. This Court has painstakingly and thoroughly discharged its role in reviewing this case and granting habeas relief from a conviction that was based on unreasonable and unconstitutional errors. To date, Brendan Dassey has spent 4,137 days in prison in violation of the Constitution of the United States. He respectfully asks this Court to lift its stay and issue such orders as are necessary to facilitate his immediate release.

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

ROBERT J. DVORAK, Esq.
WI Bar No. 1017212
Halling & Cayo, S.C.

375 East Chicago Avenue, 8th Floor
Chicago, IL 60611
Telephone: 312-503-2204
Facsimile: 312-503-8977
E-mail: l-nirider@law.northwestern.edu

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 27th day of June, 2017, 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: June 27, 2017.

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