

**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
MOTION TO LIFT THE STAY OF THE
DISTRICT COURT'S ORDER RELEASING PETITIONER ON RECOGNIZANCE**

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Petitioner-Appellee Brendan Dassey, by undersigned counsel, files this 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.

This motion follows this Court's decision of June 22, 2017, affirming the district court's August 12, 2016 grant of a writ of habeas corpus. CAR.43.¹ Because this Court's November 17, 2016 decision to stay the district court's order releasing Brendan Dassey from prison applied only "pending resolution of this appeal," CAR.22, Mr. Dassey now moves that the stay be lifted and the district court's release order be given immediate effect.

Petitioner-Appellee begins with a recitation of the procedural history. On October 20, 2014, Petitioner-Appellee Brendan Dassey filed a petition for a writ of habeas corpus. DCR.1. On August 12, 2016, after being fully briefed, the district court granted Mr. Dassey's petition for a writ of habeas corpus. DCR.23. In that decision, the district court ordered the Respondent-Appellant to release Mr. Dassey from custody unless, within 90 days of the date of the decision, the State initiated proceedings to retry him. DCR.23.90. The district court 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." DCR.23.91. On September 9, 2016, the Respondent-Appellant filed a Notice of Appeal, thereby triggering a stay of the judgment. DCR.25.

On September 14, 2016, Mr. Dassey filed a motion before the district court seeking release on recognizance pending appeal under Federal Rule of Appellate Procedure 23, which erects a presumption of release pending appeal to the successful habeas petitioner. DCR.29. That motion was supported by a host of exhibits, including Mr. Dassey's prison records – which showed him to be a model prisoner – and a detailed release plan created by a clinical social worker working with undersigned counsel. The Respondent opposed the motion, arguing that it was likely to succeed on appeal. DCR.31. On November 14, 2016, the district court issued a written order for

¹ The District Court Record is cited as DCR.____, and the Seventh Circuit Court of Appeals Record as CAR.____.

Mr. Dassey's release on bond under the supervision of the United States Probation Office. DCR.37.

On November 15, 2016, the Respondent-Appellant requested that the district court stay its ruling releasing Mr. Dassey, DCR.39, but on November 16, that request was denied because the Respondent-Appellant had presented no new facts or argument. DCR.41.1. The Respondent-Appellant then filed an emergency motion before this Court seeking to stay the district court's order releasing Mr. Dassey, again arguing that it was likely to succeed upon appeal to this Court. CAR.19. This Court granted its request on November 17, staying the order to release Mr. Dassey only "pending resolution of this appeal." CAR.22.

Since this Court has issued an opinion resolving the Respondent's appeal in favor of Mr. Dassey, the Petitioner-Appellee thus respectfully requests that this Court lift its stay of the order releasing Mr. Dassey and that the district court's order releasing him on recognizance be given full and immediate effect. By its own terms, this Court's stay order warrants such immediate action.

Justice, too, warrants an immediate lifting of the stay. *See Hilton v. Braunskill*, 481 U.S. 770, 774 (1987) (establishing likelihood of success on appeal, irreparable injury, and the public interest as relevant factors in determining whether to grant release to a successful habeas petitioner).² Mr. Dassey, now twenty-seven years old, has been held in custody since March 31, 2006 – since he was sixteen years old – for a conviction, based almost entirely on an involuntary confession, that has been overturned. The district court's ruling has now been affirmed, negating the Respondent's earlier arguments that it was likely to prevail upon appeal to this Court – and

² For this Court's convenience, Mr. Dassey presents here a summary of the *Hilton* arguments that have been briefed in great detail in several earlier filings, which he incorporates herein. DCR.29.1; DCR.36; CAR.20. Should this Court wish the *Hilton* factors to be presented in further depth, counsel for Mr. Dassey will submit further briefing immediately.

rendering the Respondent-Appellant highly unlikely to prevail on any further appeal, whether to this Court en banc or to the United States Supreme Court. *See Harris v. Thompson*, No. 12-1088, 2013 U.S. App. LEXIS 16715, at *4 (7th Cir. Feb. 20, 2013) (granting bond after reversing district court's denial of habeas relief); *Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1348 (7th Cir. 1983) (en banc) (separate opinion of Posner, J.) ("This circuit grants rehearing en banc very rarely...an average of fewer than four a year. The basic reason for this parsimony is that a rehearing en banc imposes a heavy burden on an already overburdened court"). And because Brendan's involuntary confession "was essentially the only evidence the State presented against Dassey at trial," the Respondent-Appellant is highly unlikely to prevail should it choose to pursue retrial. CAR.43.102.

As in November, the remaining *Hilton* factors continue to weigh heavily in favor of Mr. Dassey's release. As directed by the district court, he will be released to a vetted location within the Eastern District of Wisconsin, under the supervision of the United States Probation Office and with the support of a team of licensed clinical social workers. And as argued below, Mr. Dassey poses neither a public danger nor a flight risk: he had no criminal record prior to this case; his prison disciplinary records prove him to be a strikingly peaceable and cooperative inmate; he holds no passport or driver's license; his family all resides in northeastern Wisconsin; and he has demonstrated mental limitations, including an I.Q. of 74. Such considerations strongly warrant an immediate lifting of the Court's November 17, 2016 stay.

CONCLUSION

This Court's order affirming habeas relief brought this appeal to resolution. There is no longer any reason to further stay the district court's order releasing Mr. Dassey. Even after the district court ordered his release in November, he has waited behind bars for seven additional

months while the State pursued its appeal to this Court. And his waiting is not necessarily nearing its end: despite two courts that now have awarded habeas relief, the Respondent could nonetheless prolong Brendan's time in prison by months, if not years, by taking its allotted ninety days to decide to release him – or by seeking en banc rehearing, which if granted in such a fact-intensive case would consume an extraordinary amount of time and resources by requiring every active judge of this Court to repeat the three-judge panel's word-by-word review of several multi-hour interrogation tapes, along with hundreds of pages of interrogation transcripts and thousands of pages of state-court records, not to mention the district court's 91-page opinion and this Court's 128-page opinion. Weighed against this irrecoverable loss of time, it is undeniable that “every day Petitioner spends in prison compounds the substantial harm that he has suffered on account of imprisonment based upon an unconstitutional conviction.” *Newman v. Harrington*, 917 F.Supp.2d 765, 789 (N.D. Ill. 2013). Brendan Dassey therefore respectfully asks this Court to lift the stay of the district court's order releasing him and issue any other such orders as may be necessary to give immediate effect to the district court's order releasing him on recognizance.

s/Laura H. Nirider

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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 23, 2017.

s/Laura H. Nirider

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