No. 16-3397

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 RESPONSE TO MOTION TO LIFT THE STAY OF THE DISTRICT COURT'S RELEASE ORDER

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INTRODUCTION

After a nine-day trial, a Wisconsin jury concluded that Brendan Dassey brutally raped, murdered, and mutilated Teresa Halbach. When a convicted murderer such as Dassey asks for release while the merits of his habeas petition are being adjudicated by the federal courts, release is regularly denied. *See, e.g.*, *Etherly v. Schwartz*, 590 F.3d 531 (7th Cir. 2009); *Woodfox v. Cain*, 789 F.3d 565 (5th Cir. 2015). The district court in this case violated this established practice by granting Dassey's request for immediate release. A Motions Panel of this Court (comprising Judges Easterbrook, Ripple, and Hamilton) promptly reversed that error, ordering that "[t]he district court's order releasing appellee Brendan Dassey is STAYED *pending resolution of this appeal*." Dkt. 22:2 (emphasis added).[1] Months later, in rendering its decision on the merits of this appeal, the Merits Panel properly respected the Motions Panel's decision, providing that no remedy would apply until after "90 days [from] issuance of this court's final mandate, or of the Supreme Court's final mandate." Dkt. 44.

Dassey now asks this Court to dissolve the Motions Panel's stay—leading to the immediate release of a convicted murderer and rapist—but does not come close to establishing that "substantially changed circumstances . . . now warrant

[1] Citations to "RSA" are to the Required Short Appendix filed with the State's Opening Brief in this case. Citations to "SA" are to the Separate Appendix filed with the State's Opening Brief in this case. Citations to "Dkt." are to this Court's Docket. Citations to "R." are to the District Court Record. Citations to "Slip Op." are to the Merits Panel's Opinion, Dkt. 43.

dissolution of the [already-issued] stay." *Tyrer v. City of S. Beloit*, 516 F.3d 659, 664 (7th Cir. 2008). Indeed, the *only* changed circumstance that Dassey can point to is the Merits Panel's decision itself. But, of course, that sharply divided decision does not "resol[ve] this appeal," Dkt. 22:2, as the State still has the right to petition for en banc review, and if it cannot obtain relief en banc, to seek Supreme Court review. The State intends to begin this process promptly, and will petition for en banc review within the 14-day window provided by this Court's rules. Respect for the en banc (and possible Supreme Court) process, the Motions Panel's well-considered stay decision, the powerful dissenting opinion from the Merits Panel's holding, and the conclusion by a Wisconsin jury that Dassey committed heinous crimes all strongly militate against lifting the stay.

In all, this Court should deny Dassey's motion to dissolve the stay. If, however, this Court chooses to dissolve the stay, the State respectfully requests that any such order not take effect until the en banc court has the full opportunity to rule on a motion by the State to reinstate the stay pending resolution of this appeal.

STATEMENT

A Wisconsin jury convicted Brendan Dassey of first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse. SA 2, 189. The trial court then sentenced him to life in prison, with eligibility for extended supervision on November 1, 2048. R.19-1:2.

After Wisconsin state courts affirmed his conviction, SA 2, 224, Dassey sought federal habeas relief, which the district court granted on August 12, 2016, RSA 1–91.

Although the district court initially provided that its order would be stayed if the State "files a timely notice of appeal," RSA 91, it reversed course on November 14, 2016, and ordered the State to release Dassey under Federal Rule of Appellate Procedure 23(c), R.37.

The State sought emergency relief from this Court, Dkt. 19:8–20, which the Motions Panel granted on November 17, 2016, issuing an order providing that "[t]he district court's order releasing appellee Brendan Dassey is STAYED *pending resolution of this appeal*." Dkt. 22:2 (emphasis added).

On June 22, 2017, a divided panel of this Court affirmed the district court's grant of the writ. Slip Op. 103–04, 128. This Court issued its judgment on the same day, providing: "[t]he decision of the district court is AFFIRMED, with costs, in all respects. The writ of habeas corpus is GRANTED unless the State of Wisconsin *elects to retry Dassey within 90 days of issuance of this court's final mandate, or of the Supreme Court's final mandate*." Dkt. 44 (emphasis added). The next day, Dassey filed a motion to lift the Motions Panel's stay order, thereby asking for immediate release from custody. Dkt. 45 (hereinafter "Mot.").

ARGUMENT

A. To obtain an order lifting an already-issued stay, the movant must show that "substantially changed circumstances since the time of [the] decision [to enter the stay] now warrant dissolution of the stay." *Tyrer*, 516 F.3d at 664 (citing *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260 (7th Cir. 1984)). A motion to lift a stay may not simply make legal arguments that were made in the prior stay

proceedings; rather, the motion must present "new facts . . . which would justify modification" of the stay. *Winterland*, 735 F.2d at 260; *see also Tyrer*, 516 F.3d at 663–64. This is consistent with the "strong presumption that a court ought not to revisit an earlier ruling in a case absent a compelling reason, such as manifest error or a change in the law, that warrants reexamination." *Tyrer*, 516 F.3d at 663 (citation omitted).

B. On November 17, 2016, the Motions Panel ordered that "[t]he district court's order releasing appellee Brendan Dassey is STAYED pending resolution of this appeal." Dkt. 22:2. As the State argued in its stay motion, Dkt. 19 (hereinafter "Stay Mot."), this decision was justified by the factors the Supreme Court articulated in *Hilton v. Braunskill*, 481 U.S. 770, 772 (1987). In particular, Dassey's release would irreparably harm the State, given that the State has an interest in "continuing custody and rehabilitation" of Dassey. *Hilton*, 481 U.S. at 777; Stay Mot. 14–16. Just like the defendants in *Etherly*, 590 F.3d 531, and *Woodfox*, 789 F.3d 565, Dassey stands convicted of murder, the most serious of all crimes. Stay Mot. 15. Dassey's interests do not warrant release, given that he "has been adjudged guilty beyond a reasonable doubt by a [ ] jury, and this adjudication of guilt has been upheld by the appellate courts of the State." *Hilton*, 481 U.S. at 779; *see* Stay Mot. 16–17. Finally, Dassey's release pending full resolution of this appeal would harm the public interest, as he has been convicted of rape, murder, and mutilation of a corpse, thereby establishing his dangerousness to the public. *Hilton*, 481 U.S. at 777; Stay Mot. 17.

In its June 22, 2017, merits decision, the Merits Panel afforded proper respect for the Motions Panel's conclusion that the State need not decide between releasing or retrying Dassey until the "resolution of this appeal." Dkt. 22:2. In particular, the Merits Panel provided that the State must release Dassey "unless the State of Wisconsin elects to retry Dassey within 90 days *of issuance of this court's final mandate, or of the Supreme Court's final mandate*." Dkt. 44:1 (emphasis added). This 90-day window does not start, at minimum, until after en banc proceedings conclude (assuming, of course, that the State does not prevail on the merits before the en banc court). *See* Fed. R. App. P. 41(d)(1) ("timely filing of a . . . petition for rehearing en banc . . . stays the mandate").[2]

C. Dassey has not made the required showing of "substantially changed circumstances," *Tyrer*, 516 F.3d at 664, to warrant lifting the stay, which the Motions Panel issued and the Merits Panel respected. Indeed, the *only* alleged changed circumstance that Dassey cites in his motion is the erroneous claim that this appeal has already been "resolve[d]" by this Court's 2-1 panel decision in his favor. Mot. 2. But the State has the right to petition for rehearing from the en banc court as part of its appeal, Fed. R. App. P. 35, and, if that does not lead to reversal, to petition for certiorari to the Supreme Court, 28 U.S.C. § 1254(1). The State intends to file a timely

[2] In addition, even if the State does not prevail en banc, the State's 90-day window to decide whether to release or retry Dassey would appear not to begin until the Supreme Court finally disposes of any certiorari petition, should such a petition ultimately be filed. Admittedly, the Merits Panel's judgment is not entirely clear as to whether the State would need to seek a stay of this Court's mandate if such a circumstance arose, and the State would seek further clarification on this point should it not prevail before the en banc court and then choose to file a certiorari petition.

petition for en banc review within the 14-day window permitted by this Court's rules. Fed. R. App. P. 35(c); *id.* 40(a)(1). And should the en banc court either decline to consider this case or rule against the State after granting en banc consideration, the State would strongly consider filing a petition for certiorari review in the Supreme Court.

Additional considerations militate against the extraordinary course of overturning the Motions Panel's stay decision. Given the gravity of Dassey's crimes—a brutal murder, rape, and mutilation—he should not be released from confinement unless he can ultimately prevail in federal court. *See Etherly*, 590 F.3d at 532; *Woodfox*, 789 F.3d at 572. Furthermore, intra-circuit comity counsels against lifting the stay. *See Tyrer*, 516 F.3d at 663. The Merits Panel afforded respect for the Motions Panel's stay decision, providing that the State need not choose between releasing and retrying Dassey until after completion of the entire appellate process. *See supra* p. 4. If the Merits Panel were now to reverse course and order the State to release Dassey immediately, this would disrespect the Motions Panel's carefully considered decision. Indeed, if the Merits Panel were to overturn the Motions Panel's stay, the State would need to seek relief from that order from the en banc court, thereby leading to a *third* round of stay-related briefing before this Court. Rather than creating a needless intra-circuit conflict and serial briefing on the same issues, by far the better course would be to permit the en banc process to move forward, while leaving the stay issue properly settled.

D. Dassey also briefly raises two additional points in support of his reconsideration motion, but given that these arguments do not relate to any changed circumstances, they cannot possibly support lifting the stay. *See Tyrer*, 516 F.3d at 664. In any event, these arguments are wrong on their own terms.

First, Dassey claims that the State is "highly unlikely" to obtain en banc or Supreme Court review, or to prevail even if it were to obtain such review. *See* Mot. 3. As a threshold matter, both the Motions Panel and the Merits Panel were fully aware of the stringent standards for en banc and Supreme Court review, but concluded that release need not occur until completion of the entire appeal, not merely through the as-of-right portion of the appeal. *See supra* pp. 4–5. In any event, the State will be able to satisfy the standards for en banc review, Fed. R. App. P. 35(a)(1)–(2), and, if necessary, Supreme Court review, S. Ct. R. 10, and would have powerful arguments on the merits before those courts.

As the dissent from the Merits Panel's decision explained, "the majority's decision breaks new ground [on the law of juvenile confessions] and poses troubling questions for police and prosecutors," across the entire Seventh Circuit. Slip Op. 107 (Hamilton, J., dissenting). The Merits Panel created new constitutional requirements for investigators to ensure that a juvenile has "an adult ally to explain the consequences of his Miranda waiver or his confession in general," and to "remind him not to guess at answers." Slip Op. 102; *but see Fare v. Michael C.*, 442 U.S. 707, 725–27 (1979). It held that "encouraging honesty" can be "considered coercive when used . . . on [an] intellectually challenged[ ] 16-year-old." Slip Op. 21–22, 28, 54–58, 64, 85;

but see Etherly v. Davis, 619 F.3d 654, 658, 663 (7th Cir. 2010). It concluded that law enforcement can coerce a confession through "implied promises," even if they "never ma[ke] [an] explicit and specific promise of leniency." Slip Op. 83; *but see Etherly*, 619 F.3d at 663–64. It held that "bluffing by police about what they know c[an] render a confession involuntary." Slip Op. at 121 (Hamilton, J., dissenting); *see* Slip Op. at 84–86; *but see United States v. Sturdivant*, 796 F.3d 690, 697 (7th Cir. 2015). These sea changes will affect many juvenile confessions—both those reviewed on direct review and on habeas review—across this entire Circuit.

The Merits Panel also departed substantially from a federal court's limited role on habeas review, contrary to the plain text of the Antiterrorism and Effective Death Penalty Act (AEDPA), as well as the precedents of both this Court and the Supreme Court. *See, e.g.*, *Jenkins v. Hutton*, No. 16-1116, 2017 WL 2621321 (U.S. June 19, 2017) (per curiam) (summarily reversing a Sixth Circuit panel for misapplying AEDPA standards). "[N]o Supreme Court case, no cases decided in this circuit, and indeed no case cited by the parties or the majority has found a confession involuntary on facts resembling these, even where the subject is a juvenile." Slip Op. 110 (Hamilton, J., dissenting). Moreover, the majority "depart[ed] from a string of [this Court's] habeas decisions involving confessions by juveniles who were denied relief despite being subjected to far greater pressures than Dassey was." Slip Op. 121–22 (Hamilton, J., dissenting) (collecting cases).

Second, Dassey argues that immediate release will not harm the public because he "will be released to a vetted location," will be "under the supervision of

the United States Probation Office," and will have "the support of a team of licensed clinical social workers." Mot. 3. But this release plan is not a changed circumstance, so cannot possibly justify lifting the stay. *See Tyrer*, 516 F.3d at 664. In any event, the sufficiency of Dassey's release plan was not established through any adversarial proceeding. Accordingly, his factual assertions about, for example, his "team" of social workers are not supported in the record. The release of someone convicted of rape, murder, and mutilation of a corpse, even under limited supervision by the Probation Office and with the benefit of "social workers," jeopardizes public safety. *See Hilton*, 481 U.S. at 777; *Etherly*, 590 F.3d at 532. And Dassey's release plan fundamentally undermines the State's interest, which is for "continuing custody" as punishment for those who broke the State's most serious criminal laws, along with "continuing . . . rehabilitation." *Hilton*, 481 U.S. at 777.

CONCLUSION

This Court should deny the motion to lift the stay. If, however, this Court chooses to dissolve the stay, the State respectfully requests that any such order not take effect until the en banc court has the full opportunity to rule on a motion by the State to reinstate the stay pending resolution of this appeal.

Dated: June 26, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2017, I filed the foregoing Response 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 26, 2017

/s/ Luke N. Berg
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