

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

CASE NO. 18-1885

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 22, 2019
DEBORAH S. HUNT, Clerk

GEORGE EDWARD CLARK,)	
)	
<i>Petitioner-Appellee,</i>)	
)	
v.)	
)	
NOAH NAGY, Warden,)	ORDER
)	
<i>Respondent-Appellant.</i>)	
)	

Before: BOGGS, BATCHELDER, and STRANCH, Circuit Judges.

The Attorney General for the State of Michigan (“State”) has filed an emergency motion, urging this court to revoke petitioner-appellee George Clark’s bond and order him returned to custody pending appeal. For the reasons stated, we GRANT the State’s motion, REVERSE the district court’s order granting Clark bond, concurrently REVOKE Clark’s bond, and instruct the district court to ORDER Clark returned to custody pending the outcome of this appeal.

On July 3, 2018, the district court granted Clark’s successive (third) § 2254 habeas petition, predicated on an affidavit (newly discovered evidence) that led to a *Brady*-violation claim, and ordered the State to either release or retry Clark within 90 days. *Clark v. Nagy*, No. 2:16-CV-11959, 2018 WL 3239619, at *8 (E.D. Mich. July 3, 2018). The State appealed. Meanwhile, Clark moved for release from custody pending appeal, both sides presented testimony and argument at a hearing on that motion, and on February 26, 2019, the district court granted Clark’s release on personal recognizance, with certain technical restrictions concerning travel and contact.

The State moved this court, pursuant to Federal Rule of Appellate Procedure 23, to act in an expedited and emergency basis to revoke Clark’s bond and return him to custody.

Federal Rule of Appellate Procedure 23, titled “Custody or Release of a Prisoner in a Habeas Corpus Proceeding,” “creates a presumption of release from custody which may be overcome in the appellate court for special reasons shown.” *Nash v. Eberlin*, 437 F.3d 519, 526 (6th Cir. 2006) (quotation marks and citation omitted). The pertinent parts of Rule 23 say:

While a decision ordering the release of a prisoner is under review, the prisoner must—unless . . . the court of appeals . . . orders otherwise—be released on personal recognizance, with or without surety.

An initial order [of] the prisoner’s . . . release, including any recognizance or surety, continues in effect pending review unless *for special reasons shown* to the court of appeals . . . the order is modified or an independent order . . . issued.

Fed. R. App. P. 23(c) & (d) (emphasis added); *see also Jago v. U.S. Dist. Court, N. Dist. of Ohio, E. Div. at Cleveland*, 570 F.2d 618, 623 (6th Cir. 1978) (analyzing this Rule at length).

In *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987), the Supreme Court explained that “the general standards governing stays of civil judgments should also guide [a district court] when [it] must decide whether to release a habeas petitioner pending the State’s appeal,” and listing:

- (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. An appellate court, “reviewing [the district court’s] initial custody determination pursuant to Rule 23(d) must accord a presumption of correctness to the initial custody determination made pursuant to Rule 23(c), . . . but that presumption . . . may be overcome if the traditional stay factors so indicate.” *Id.* That is, a de novo review of the factors can overcome the presumption of correctness. As part of this analysis, courts consider the prisoner’s potential danger to the community or risk of flight and the State’s interest in continuing custody. *Id.* at 777.

In the pending appeal, the State argues that the affidavit underlying the district court’s decision is of questionable veracity and effect, that the district court used the wrong standard in its

analysis, and that even if we accept the affidavit and testimony as credible and reliable, Clark could not establish his right to habeas relief under the proper 28 U.S.C. § 2244(b)(2)(B)(ii) standard. The state also argues, in the alternative, that the district court was required to hold an evidentiary hearing before granting Clark relief. Our preliminary review of the parties' arguments and the record persuade us that the State has made a strong showing that it is likely to succeed on appeal.

The State has also argued that Clark is a flight risk with no incentive to turn himself in because he faces no consequence for fleeing that is any more severe than the life-in-prison-without-parole sentence he was serving for his underlying conviction. The State has made a persuasive showing that the public interest compels Clark's return to prison. Although Clark's interest in remaining at liberty is "substantial," the "State's interest in continuing custody" is "strongest where the remaining portion of the sentence to be served is long." *Hilton*, 481 U.S. at 777.

We conclude, based on our review of the stay factors, that the presumption of correctness provided to the district court's decision is overcome and Clark must be returned to prison pending the resolution of this appeal. We therefore REVERSE the order granting Clark bond, REVOKE Clark's bond, and instruct the district court to ORDER Clark returned to custody pending appeal.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk