

IN THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI
43RD JUDICIAL CIRCUIT

STATE OF MISSOURI,	)	
<i>ex rel.</i>	)	
SANDRA HEMME	)	
Petitioner,	)	
	)	
v.	)	Case No. 23L-CC00008
	)	
CHRIS MCBEE,	)	
Superintendent, Western	)	
Missouri Correctional Center,	)	
Respondent.	)	

MOTION FOR RELEASE PENDING FURTHER PROCEEDINGS

Comes now Petitioner, by counsel, and moves this Court pursuant to Missouri Rule 91.14 to authorize her release from custody on her own recognizance pending further proceedings. For her motion, Petitioner states:

1. This Court on June 14, 2024, entered its order finding Ms. Hemme actually innocent of the crime for which she is incarcerated, and that her conviction resulted from violations of her right to due process of law and the effective assistance of counsel. Therefore, this Court ordered the State of Missouri “to discharge Ms. Hemme unless she is brought to trial within 30 days of this order.” Findings of Fact, Conclusions of Law and Judgment Granting the Writ of Habeas Corpus, p. 118.

2. This Court’s judgment rests upon this Court’s finding “the evidence establishing Ms. Hemme’s innocence to be clear and convincing.” *Id.*, p. 105. This

finding is amply supported by the record because the state's evidence is weak or refuted, no physical evidence links Ms. Hemme to the offense, and there is substantial affirmative evidence that she is completely innocent of the charges.

3. Missouri Rule 91.14 provides, "If the person for whose relief a writ of habeas corpus has been issued is charged with a bailable offense, the court in which the answer is to be filed *shall set conditions of release* pursuant to Rule 33." (Emphasis added).

4. Missouri Rule 33.01 (a), revised effective July 1, 2019, provides that "Any person charged with a bailable offense *shall be entitled to be released* pending trial or other stage of the criminal proceedings." (Emphasis added). The newly revised Rule 33.01 strengthens the presumption that the defendant shall be released on her written promise to appear, subject to standard conditions set out in Rule 33.03(b):

The court *shall release the defendant on the defendant's own recognizance subject only to the conditions under subsection (b)* with no additional conditions of release unless the court determines such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses. If the court so determines, it shall set and impose additional conditions of release pursuant to this subsection.

Rule 33.01 (c) (emphasis added).

5. The revised Rule 33 contemplates bail conditions that support a decision

to release the defendant on her own recognizance. In determining the terms and conditions of a defendant's bail:

The court shall set and impose *the least restrictive condition or combination of conditions of release*, and the court shall not set or impose any condition or combination of conditions of release greater than necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.

When considering the least restrictive condition or combination of conditions of release to set and impose, *the court shall first consider non-monetary conditions*. Should the court determine non-monetary conditions alone will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court may consider monetary conditions or a combination of non-monetary and monetary conditions to satisfy the foregoing. After considering the defendant's ability to pay, a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, is impermissible.

Rule 33.01(c) (emphasis added). As this Court knows, Ms. Hemme has been in custody continuously since November 28, 1980, and is without means of her own to post a cash bail.

6. Standard non-monetary conditions of release include:

- (1) The defendant will appear in the court in which the case is prosecuted or appealed, from time to time as required to answer the criminal charge;
- (2) The defendant will submit to the orders, judgment and sentence, and process of the court having jurisdiction over the defendant;
- (3) The defendant shall not commit any new offenses and shall not tamper with any victim or witness in the case, nor have any person do so on the defendant's behalf; and
- (4) The defendant will comply fully with any and all conditions imposed by the court in granting release.

Rule 33.01 (b). There are additional non-monetary circumstances that the Court may impose if the Court finds them necessary to assure Ms. Hemme's appearance until this matter is finally disposed. Rule 33 spells out sixteen special conditions the Court may consider in setting appropriate conditions of pretrial release. *See* Rule 33.01(c)(1) through (16).

7. In Ms. Hemme's case, these factors weigh in favor of her release. Although she is accused of a serious crime, the evidence against her is exceedingly weak. Ms. Hemme is elderly, her movements are limited after her recent stroke, and her medical condition needs to be monitored regularly. Further, Ms. Hemme has a loving and supporting family in Missouri.

8. Ms. Hemme's parents are living, and residing in Missouri. Ms. Hemme has siblings who also reside in Missouri, and when released, Ms. Hemme will reside with them. Their names and address will be provided to the Court. This Court may

have seen them in attendance every day during Ms. Hemme's evidentiary hearing. Ms. Hemme's entire family has been supportive of Ms. Hemme throughout her incarceration, and will be actively involved in her transition to the community.

9. Ms. Hemme will have the support of the New York Innocence Project's Social Work Division, who will assist her with reentry resources and assistance upon her release. *See* INNOCENCE PROJECT, SOCIAL WORK, at <https://innocenceproject.org/departments/social-work/>

10. Due to more than forty-three years of wrongful incarceration, Ms. Hemme is an indigent person, so counsel respectfully request that the Court give serious consideration to the express language of the rule presuming that a person such as Ms. Hemme who presents a low risk of flight be released on her own recognizance.

SUGGESTIONS IN SUPPORT OF MOTION FOR RELEASE

The language of Missouri Rule 33.01 directing that the accused "shall be entitled to be released pending trial" creates a presumptive entitlement to release. *See, e.g., United States ex rel. Barnwell v. Rundle*, 461 F.2d 768, 770 (3rd Cir. 1972), construing the nearly identical language of Fed. R. Crim. Pro. 23.01. Justice Benjamin Cardozo explained the rationale of such a presumption:

It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position

of a wrongdoer, should automatically, by a mere notice of appeal prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty. "The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty." * * * Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer. * * * Little would be left of "this, the greatest of all writs" * * * if a jailer were permitted to retain the body of his prisoner during all the weary processes of an appeal * * *.

People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 158 N.E. 613, 63 A.L.R. 1458, 1459-1460 (1927).

Although the State of Missouri routinely seeks a writ of certiorari challenging a judgment granting habeas corpus relief, that “does not justify prolonging [her] imprisonment now that this Court has found that [s]he was convicted in violation of his federal right to due process of law and must be tried again with due process, removing any presumption as of now that [s]he is guilty as charged.” *Cagle v. Davis*, 520 F. Supp. 297, 312 (N.D. Tenn. 1980). In *Cagle*, the district judge granting release pending the state’s appeal of an order granting a writ of habeas corpus explained the appropriateness of such an order in terms quite applicable to Ms. Hemme’s case. “Without this freedom, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence, and preparing any available defense.” *Id.* The writ of habeas corpus dissolves and vacates the judgment of conviction of

Ms. Hemme for capital murder, and returns her to the status of a pretrial detainee. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). The Court of Appeals, Western District, noted that “If a writ of certiorari was permitted to stay a writ of habeas corpus as to summarily prevent consideration of a motion for release pending further proceedings, Rule 91.14, which directs a court to set conditions of release pursuant to Rule 33 for a person in whose favor a writ of habeas corpus has been issued, would be rendered illusory.” *State ex rel. Koster v. McElwain*, No. WD73211, Order Granting Motion for Release Pending Further Proceedings, p. 5 (filed Dec. 13, 2010) (unpublished).

Were this a federal petition for writ of habeas corpus by a state prisoner, the Supreme Court acknowledges that “[t]here is presumption in favor of enlargement of the petitioner with or without surety” which may only be overcome “if the traditional stay factors tip the balance against it.” *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). That presumption is not overcome where the record reflects “substantial evidence of [the petitioner’s] actual innocence,” and that the prisoner has already undergone trial and “lengthy post-conviction proceedings.” *Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994). Further, Ms. Hemme’s age and infirmity weigh in favor of her release at the present time.

The fact that Ms. Hemme is now a pretrial detainee on a capital murder charge

is no obstacle to release. Noting that "[t]he filing of an information charging a capital offense does not preclude release on bail," the Court of Appeals ordered Dale Helmig released pending further proceedings after the Honorable Warren McElwain granted the writ of habeas corpus based in part on proof that Mr. Helmig is innocent. *Koster v. McElwain*, *supra*, at 7, quoting *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 537 (Mo. banc 1980) (citing Mo.Const. art I., section 20). The Court of Appeals Ordered Mr. Helmig released on bail, setting reasonable conditions, and remanded the case to the circuit court with directions "to enter such orders and to take such actions as are necessary to result in the immediate release of Petitioner Dale Helmig from incarceration at Crossroads Correctional Center in Cameron, Missouri, on his written promise to appear," and specifying conditions of release, which included a \$50,000 bond, authorizing ten percent deposit with the clerk of the court. *Koster v. McElwain*, *supra*, at 10.

Finally, there are no facts suggesting that Ms. Hemme presents a danger to society. All the factors which courts traditionally consider in determining release weigh in favor of allowing Ms. Hemme to be free during further proceedings herein.

Counsel for Ms. Hemme respectfully suggest that the issue of release in this case compares favorably with that in *Simpson v. Camper*, 743 F. Supp. 1342, 1353 (W.D.Mo. 1990), where the district court found "that petitioner does not pose a

substantial risk of flight and that a surety is not required,” and released the habeas petitioner on her own recognizance. Ms. Simpson eventually prevailed in the Missouri courts, as is likely to be the case with Ms. Hemme. *Simpson v. Camper*, 974 F.2d 1030 (8th Cir. 1992). Like Ms. Simpson, Ms. Hemme is on the verge of being restored to freedom because this Court’s order presents her an opportunity to prove her innocence and win her freedom. Under Missouri law, her flight from the jurisdiction or failure to appear as directed would deprive her of the benefit of this court’s ruling. *State v. White*, 81 S.W.3d 561 (Mo. App. 2002). She will not squander that opportunity by fleeing or by violating any order of this Court setting conditions of release.

WHEREFORE, for the foregoing reasons, counsel for Ms. Hemme respectfully move this Court to enter its order releasing her on her recognizance pending further proceedings, including her retrial, and to grant such other relief as the Court deems just and equitable.

Respectfully submitted,

/s/ Sean D. O'Brien

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on June 14, 2024 upon the filing of the foregoing document.

/s/Sean D. O'Brien

SEAN D. O'BRIEN

Counsel for Petitioner