UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL KAMIENSKI,	)	
	)	
Plaintiff,	)	
v.	)	Civil 02-3091 (SRC)
	)	
ROY HENDRICKS, et al.	)	Reply In Support of Motion for Release
	)	
Defendants.	)	

AFFIRMATION OF TIMOTHY J. MCINNIS

I, Timothy J. McInnis, Esq., affirm under penalty of perjury as follows:

1. This affirmation replies to the June 3, 2009 Affirmation of Samuel J. Marzarella, submitted as the State's "Opposition to [Kamienski]'s Motion for Release" under Federal Rule of Appellate Procedure 23(c).

2. In opposing bail under Rule 23(c) the Marzarella Affirmation relies extensively on *Hilton v. Braunskill*, 481 U.S. 770 (1987), and accordingly, this reply addresses the arguments which the State draws from that opinion.[1]

3. As a threshold point, however, it must be observed that the State's lengthy discussion of *Braunskill* misses its central ruling entirely. In *Braunskill*, the Supreme Court held unequivocally that once a state prisoner's *habeas* petition has been granted by a federal court (as is the case here), "Rule 23(c) *undoubtedly* creates a presumption of

[1] A preliminary question not answered on the face of Rule 23(c) is which court has jurisdiction to make a bail ruling in the first instance. The State does not oppose Kamienski's Rule 23(c) motion in this Court on jurisdictional grounds. Moreover, as the Third Circuit noted in its opinion following remand from the Supreme Court's ruling in *Braunskill*, the initial Rule 23(c) bail ruling should come from the District Court and it should be done on an "expedite[d]" basis. *Braunskill v. Hilton*, 824 F.2d 285, 286 (3d Cir. 1987).

release from custody." *Id*. at 773 (emphasis added). Nowhere in its opposition does the State mention this clearly established presumption. Worse still, the State compounds this error of omission by urging the Court to apply a conflicting standard. It says "an abundance of caution should preclude [Kamienski's] release on bail." (P. 6)[2] As might be expected the State fails to include a single citation as authority for applying this heightened standard to Rule 23(c).

4. According to a broad reading of *Braunskill*, in order to overcome the strong presumption for bail, the party opposing release must address what the Court calls the four "traditional" stay factors used in ordinary civil litigation, and in doing so he must demonstrate that collectively they "tip the balance" in his favor. Id. at 775-76 and 777. [3] "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a rigid set of rules," *id*. at 777, and thus their application and weight under Rule 23(c) must be tailored to the specific nature of each case.

5. The four traditional stay factors, as applied in the instant context, are: (1) whether the State has made a "strong showing that [it] is likely to succeed on the merits" of a sufficiency of evidence argument in its anticipated motions for panel rehearing

[2] The citations in this format are to the indicated page of the Marzarella Affirmation, dated June 3, 2009.

[3] A more narrow reading of *Braunskill* is that the Supreme Court merely held that in appropriate circumstances a court ruling under Rule 23(c) can consider the petitioner's possible "dangerousness" to the community. In doing so it simply overruled the Third Circuit, which, in reliance on *Carter v. Rafferty*, 781 F.2d 993, 997 (3d Cir. 1986), had held that the District Court there could only consider "risk of flight" under Rule 23(c) because that was the only factor allowed in pre-trial bail hearings under New Jersey state law. *Id*. at 777. Here, the State has not even attempted to make any showing that Kamienski poses a danger to the community. Thus, its heavy reliance on *Braunskill* is not only helpful to Kamienski because of the strong presumption of bail, but is completely inexplicable.

and/or rehearing *en banc* under Fed.R.App.P. 40 and 35, respectively; (2) whether the State has demonstrated it will be "irreparably injured" if Kamienski is released on bail now and the State later prevails on its anticipated motions for reconsideration; (3) whether the State has shown Kamienski will not be "substantially injure[d]" if he is held now and the State subsequently loses on its motions for reconsideration; and (4) whether the State has shown that the public interest in detaining Kamienski (to ensure his subsequent court appearances, to prevent him from committing some act of violence against the public while awaiting final resolution of his now successful petition, and/or to continue his "rehabilitation" beyond the 20 plus years he has already spent in jail) outweighs the public interest in seeing that an innocent person is not being held unjustly. *Id*. at 776-77.

6. As seen above, as well as throughout the *Braunskill* opinion, not only is there a clear presumption in favor of release under Rule 23(c), but, equally clearly, the burden to overcome this presumption rests with the State. In characteristic fashion, however, the State's opposition makes no mention of the fact that the burden of persuasion is on it. Indeed, the State repeatedly seeks to improperly shift that burden to Kamienski throughout the Marzarella Affirmation. For example, it says Kamienski was obligated to come forward with "prison records or any other proof that would indicate" he will not flee or pose a danger to the public if he is released and the failure to do so should be held against him. (P. 4)

7. Moreover, in terms of actually applying the *Braunskill* factors to the instant case, the State does nothing more than pay lip service to them at best.

8. As for success on the merits, the State initially criticizes Kamienski for anticipating this issue by explaining why the State is likely to lose its motions for reconsideration. It says Kamienski's predictions about the State's likelihood of prevailing or losing on the merits "do not properly belong in an application for bail pending review." (P. 3) Failing to take heed of its own criticism of Kamienski, the State not only cites *Braunskill's* requirement that the court consider this factor but then purports to show why it has a strong likelihood of upsetting the Third Circuit's holding.

9. But what does the State really say about its likely success on the merits? Without providing the necessary details, the State claims only generally it will establish that the Appellate Court: (1) "modified" the standard of review under the AEDPA; and (2) "failed to abide" by the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979). (P. 6) That is going to be a tall order because, as the State fails to mention, the Third Circuit's opinion begins by acknowledging the existence and constraints of each:

> Based upon our careful review of the record, and despite the very deferential standard that limits our inquiry, we believe that no reasonable juror could conclude that the evidence admitted against Kamienski at his trial established that he was guilty of murder or felony murder beyond a reasonable doubt [*Jackson*], and the New Jersey courts' conclusion to the contrary is an unreasonable application of clearly established Supreme Court precedent [AEDPA].

Moreover, for the present purpose of demonstrating to this Court why bail should be denied, the State needs to do more than simply point to the categories of its anticipated motions for reconsideration. It needs to describe the meat of its argument. How did the Appellate Court erroneously "modify" the standard of review under the AEDPA? And how did it "fail to abide by" the rule of *Jackson*? After reading the State's submission one can only guess. That is not enough to carry the day under *Braunskill*.

10. Thus, in addressing the single most important *Braunskill* factor under Rule 23(c), the State says nothing more than, "Trust us. We've got something good up our sleeves. Just wait 'n see." But, what this winning argument is remains as much of a mystery in this proceeding as it was during oral argument on the appeal as well as in the State's briefs to the Third Circuit.

11. The State also predicts it is going to prevail under Rules 40 and/or 35 by showing that the Appellate Court's review of the record was not as careful as the Court noted in its opinion. It contends that the Third Circuit relied on a "selective" and "incomplete" reading of the prosecutor's closing remarks at trial as well as the trial judge's ruling J.N.O.V.[4] (Pp. 3 and 6) One can only call it ironic that the State is now accusing the Third Circuit of engaging in misleading selectivity when the Appellate Court excoriated the State for doing just that in its briefs. To quote just one of the panel's many critical comments to the State's attorney during oral argument, "Your brief made me apoplectic."

12. Equally ironic is the State's additional contention that the Appellate Court is now the one engaging in impermissible "speculation" that is "not based on any evidence in the record." (P. 2) It was only a few days ago that a unanimous panel at the Third Circuit is a caustic opinion which called the State on the carpet for having sought to oppose Kamienski's appeal by engaging in "rank speculation."

[4] While repeating a number of times that a jury of twelve convicted Kamienski, the State completely ignores, and fails to explain, the ruling of the trial judge, who, after overseeing the entire trial, dismissed the murder charges against Kamienski for want of sufficient evidence.

13. But things get even more bizarre in the State's battle over who is "speculating impermissibly" and who is "drawing reasonable inferences" from the same uncontested fact: namely, Kamienski dropping his girlfriend off at her friend's house a few hours before the scheduled drug exchange. The Appellate Court held that without more (for example, at least some evidence suggesting that Kamienski knew his co-defendant had a gun and/or no intention of paying for the drugs), one can reasonably infer no more than his knowledge of the drug deal. The State now says, incredibly, that the Appellate Court's fundamental inference that Kamienski knew there was going to be a drug deal is "not based on any evidence in the record." (P. 2) The State calls this "speculation." But, how can one persuasively argue it is "speculation" Kamienski knew there was going to be a drug deal, but it is a "reasonable inference" he knew there was going to be a theft of the drugs and the murder of the drug sellers --in connection with the very drug deal about which one can only speculate? It makes no sense. Certainly this argument casts substantial doubt on the State's suggestion that is going to show the Appellate Court engaged in a sloppy reading of the record.[5]

14. Stated differently, having been tarnished by the Third Circuit for its "misleading" and "unhelpful" conduct during the appellate process (to quote from the Kamienski opinion) the State now says it has a strong chance of prevailing on its motions for reconsideration. The State wants this Court to believe that in returning to the

[5] This Court should be aware that on appeal the Third Circuit asked to parties to submit supplemental briefs precisely because there were charges and counter-charges between the litigants over who was properly construing the trial record. That was also the court's focus at the oral argument. Furthermore, as stated on the record during oral argument, the Appellate Court obtained and utilized a diskette containing the entire 5,000 page trial transcript. It will be extraordinary, to say the least, for the Third Circuit to now grant reconsideration on the grounds that it "selectively" misconstrued the record.

Appellate Court with dirty hands it has a good chance of obtaining extraordinary relief.[6] In light of the Third Circuit's harsh criticism of the State for presenting a false and misleading rendition of the trial record, it is certainly ironic in this bail proceeding for the State to predict it is likely to prevail in a contest with the Appellate Court over who read that record more correctly.

15. As to risk of flight, the State provides no evidence suggesting Kamienski will not make any future court appearances or surrender to the State's custody if he is later ordered to do so. All it says is, "Kamienski is 61 years old and won't want to go back to jail once he is out." Of course, those basic facts are true. Kamienski is 61. And, if released he will not want to return to prison. But, more importantly, the State cites nothing in Kamienski's history, background or circumstances suggesting he most likely will respond by fleeing. Nor does the State identify a place to which Kamienski might try to go to avoid renewed imprisonment, such as a foreign country where he is a national and/or has family, friends and financial resources that would provide him with a possible incentive to flee.

16. The State also disregards Kamienski's argument that the trial court deemed him eligible for bail 21 years ago and there is nothing that he has done since then which suggests he is a greater risk of flight now than he was after he being indicted and

[6] One must wonder how seriously the State is taking into consideration the strong admonitions and cautions against seeking relief under Rules 40 and 35 absent exceptional circumstances, which are set forth in both the Federal Rules of Appellate Procedure and Local Appellate Rules. *See, e.g.*, Fed.R.App.P. 35(a) and LAR 35.1 and 35.4

arrested in the fall of 1987, or during the approximately one year he was out on bail prior to his conviction in November 1988.[7]

17. With respect to flight risk, the State also overlooks a crucial difference between Kamienski and most successful habeas petitioners whose writs have been stayed pending reconsideration. That is, in the vast majority of cases, if the petitioner wins on reconsideration he still faces the prospect of retrial and the possibility of a repeated conviction, sentence and term of imprisonment. However, as explained in his opening paper (and not addressed at all by the State in its opposition), if Kamienski's ruling is affirmed during the reconsideration process he cannot be retried because of Double Jeopardy considerations. Thus, Kamienski has even less motive to flee than a typical successful petitioner during the review period, such as Braunskill, who had been released by the federal courts under Rule 23(c) when the sole issue was risk of flight.

18. Similarly, the State proffers no evidence that Kamienski poses a danger to the community. It does not say he did anything before, during or after his conviction which evinces any violent conduct or tendencies. Nor could they. Kamienski had no prior criminal history other than two DUIs. He was never charged with having any role in the actual killings of the victims in the underlying case. He was released on pre-trial bail and committed no violations (violent or otherwise) while he was out. And, he has no record of engaging in any disruptive or violent conduct during the 20 years in which he

[7] The State erroneously says *Braunskill* holds that a higher standard is applied on the issue of flight under Rule 23(c) than at a pre-trial bail hearing. The opinion says nothing of the sort. Rather, as part of its rationale for allowing the Rule 23(c) court to consider dangerousness when the original state trial court could not have (i.e., deflecting a federalism issue) the Court said this could be justified because of the state jury conviction and state appellate court affirmation. *Id*. at 778-79. It had nothing to do with risk of flight, which is a factor in every bail hearing.

has been held by the State --most of that time in the maximum security Trenton State Prison, whose population is comprised of the most violent offenders in the State's prison system.

19. The State faults counsel for not corroborating Kamienski's claim he has no history of violence, but, that is just more improper burden-shifting. The State's obligation here is not to raise questions about Kamienski's track record. Its job is to provide answers. The State has unfettered access to Kamienski's prison record. If there were anything in his file about violent behavior behind bars then it was incumbent upon the State to bring it to the Court's attention. The State did not. So one can only conclude there is nothing in Kamienski's record as to dangerousness which bears negatively on his request for bail.

20. With respect to "rehabilitation" the State does not even try to make an argument that after all the years Kamienski has been in custody there is still some marginal utility in detaining him longer for that purpose. For example, it says nothing about his need for drug and alcohol treatment, education, anger management, anti-gang counseling, job training or similar prison programs.

21. Finally, the State totally sidesteps its need to make a showing of irreparable injury to it and the public if Kamienski is released now and then is later re-incarcerated in the unlikely event the State succeeds on its motions for reconsideration. Irreparable means irreparable. As Kamienski's counsel said in his opening affirmation, the State can always place him back in the penal system if that is what the courts ultimately decide. There may be some costs and inconvenience associated with the process of re-incarcerating him, but one could hardly call it "irreparable damage" to the

State or its citizens. To note this is to be realistic --not "glib"-- as the State mistakenly says. (P. 5)

22. If any party is being glib it is the State, for it seemingly ignores the importance of releasing an innocent man from prison. Ever day of liberty is precious and everyone working in the criminal justice system has an obligation to ensure that a person does not spend even the smallest amount of time behind bars needlessly. This could not be truer than in the case of a man who has spent the last 20 years serving two life sentences for a crime he did not commit.

Conclusion

In its hell-bent quest to win this case at all costs, the State has apparently lost sight of its mission, namely, to do justice. Fortunately, the tide has now turned in favor of Kamienski. With that sea change comes his right to be free on bail while the State obsessively pursues its litigation options no matter what the law says or the facts show. For the foregoing reasons, Kamienski's request to be released under Rule 23(c) should be granted forthwith.

Dated: June 4, 2009

/S Timothy J. McInnis
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