UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

No. 06-4536

PAUL KAMIENSKI,

Appellant,

-v.-

ROY L. HENDRICKS, ADMINSTRATOR;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
OCEAN COUNTY PROSECUTOR'S OFFICE

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. NO. 02-CV-03091(SRC)

MOTION BY APPELLANT PAUL KAMIENSKI FOR RELEASE ON BAIL UNDER RULE 23(C) OR ALTERNAIVELY TO SHORTEN PERIOD FOR MANDATE UNDER RULE 41(B)

TIMOTHY J. MCINNIS, ESQ.
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573
mcinnisesq@aol.com

COUNSEL FOR APPELLANT PAUL KAMIENSKI

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRUIT

PAUL KAMIENSKI,	)	
	)	
Appellant,	)	
	)	
v.	)	Civil 06-4536
	)	
ROY HENDRICKS, et al.	)	
	)	
Appellees.	)	

AFFIRMATION OF TIMOTHY J. MCINNIS

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

1. I am an attorney in good standing in the State of New York and was admitted as *pro hac* vice counsel to appellant Paul Kamienski in the United States District Court for the District of New Jersey, Civ. 02-3091 (SRC), and am also his attorney of record in this appeal.

2. This affirmation is submitted in support of Kamienski's motion pursuant to Fed.R.App.P. 23(c)[1] for an order immediately releasing him from the

[1] Rule 23(c) provides:

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

Fed.R.App.P. 23(c).

custody of the New Jersey Department of Corrections on a personal recognizance bond, or alternatively, pursuant to Fed.R.App.P. 41(b)[2] for a shortened mandate period. I further request that this motion be decided on an expedited basis since Kamienski has been unlawfully incarcerated since this Court's ruling on May 28, 2009.

Procedural and Factual Background

3. On May 28, 2009, in a unanimous opinion, the Third Circuit entered a judgment which reversed the District Court's 2006 denial of Kamienski's *habeas corpus* petition and remanded the matter to the District Court with instructions that it grant the petition. The Court's judgment was also entered on the docket of the United States District Court on May 28, 2009, as well.

4. On June 1, 2009, Kamienski filed a motion for bail under Rule 23(c) with the United States District Court (Hon. Stanley R. Chesler, U.S.D.J.) and simultaneously served it on Appellees. The motion below was materially identical to the instant one.

---

[2] Rule 41(b) provides:

> The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires [i.e., 14 days from the entry of judgment], or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Fed.R.App.P. 41(b).

5. On June 3, 2009, Appellees filed an affirmation in opposition to the motion. (See the Affirmation of Samuel J. Marzarella, Ocean County Prosecutor's Office, appended to this motion.) In their affirmation, Appellees did not oppose Kamienski's Rule 23(c) motion in the District Court on jurisdictional grounds.

6. On June 4, 2009, Kamienski filed an affirmation in reply to Appellees' opposition. There, he cited *Braunskill v. Hilton*, 824 F.2d 285, 286 (3d Cir. 1987), in support of the proposition that the District Court had jurisdiction in the first instance to decide the Rule 23(c) motion.

7. On June 9, 2009, the United States District Court (Hon. Stanley R. Chesler, U.S.D.J.) issued an order denying Kamienski's Rule 23(c) motion without prejudice, ruling that the District Court did not have jurisdiction over the matter as the Appeals Court has yet to issue its mandate in this case. (The District Court's order is appended to this motion.)

8. Because of the Third Circuit's ruling as to insufficient evidence, Kamienski cannot be retried for the first degree and felony murder offenses which were the subject of that ruling. *See Coss v. Lackawanna County Dist. Atty*., 204 F.3d 453, 466 (3d Cir. 2000), *rev'd on other grounds*, 532 U.S. 354 (2001) (citing *Burks v. United States*, 437 U.S. 1, 11 (1978) (Double Jeopardy Clause forbids a second trial where first failed for lack of sufficient evidence)). Appellees do not argue otherwise.

9. Kamienski is currently being held in custody at the South Woods State Prison in Bridgeton, New Jersey.

10. Counsel for Kamienski is aware of no ground on which the State is currently holding Kamienski other than the murder convictions underlying his *habeas* petition. Accordingly, he is now being incarcerated unlawfully.

I. Under a Proper *Braunskill* Analysis Kamienski Should be Released on Bail

11. In the papers submitted below, the parties agree that the instant Rule 23(c) motion should be decided under the four-part analysis set forth in *Hilton v. Braunskill*, 481 U.S. 770 (1987).

12. There, 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 release from custody." *Id*. at 773 (emphasis added).

13. Parenthetically, in its opposition below, the State urged the District Court to apply a different standard. It says "an abundance of caution should preclude [Kamienski's] release on bail." (P. 6)[3] The State did not cite any authority for applying this heightened standard to Rule 23(c), and Kamienski opposes it as contrary to *Braunskill*.

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

14. Under 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. *Id*. at 775-76. [4] These factors are: (1) a strong showing by the applicant for the stay that he is "likely to succeed on the merits"; (2) the applicant's demonstration that he risks "irreparable injury" if the stay is denied; (3) the possible "substantial injury" to other parties in the proceeding; and (4) the public's interest in granting or denying the stay. *Id*. at 776-77.

15. According to the Supreme Court, "[s]ince the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a rigid set of rules." *Id*. at 777. Thus, their application and weight under Rule 23(c) must be tailored to the specific nature of each case.

16. Moreover, as the *Braunskill* opinion makes clear, the burden is on the party opposing bail to demonstrate that an analysis of these four factors collectively "tips the balance" in his favor. *Id*. at 777. (In their opposition,

[4] 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, as shown, *infra*, the State does not even attempt to make any showing that Kamienski poses a danger to the community.

Appellees improperly seek to shift the burden of persuasion to Kamienski, as discussed, *infra*.)

17. Here, the State has indicated that it intends to seek *en banc* review of the Court's May 28, 2009 decision. (P. 6)

18. Accordingly, the four traditional stay factors of *Braunskill*, 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" in a sufficiency of evidence argument in its anticipated motion for panel rehearing 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 motion 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 motion 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. *See* i*d*. at 777.

A. <u>The State has not Shown it is Likely to Succeed Under Rules 40 and 35</u>

19. It appears highly unlikely that the State will prevail on its contemplated Rule 40 or Rule 35 motion for the following reasons.

20. The opinion accompanying the Court's judgment (the "Kamienski Opinion") has been designated as an unpublished opinion without precedential value. (The Kamienski Opinion is appended to this motion.) It announces no new principle of federal law. Nor does it attempt to construe any unsettled question of state law.

21. Rather, according to the Kamienski Opinion this Court found that even with all the deference accorded to the State by the AEDPA and established Supreme Court precedent the State had failed to meet the Fourteenth Amendment's Due Process Clause requirement of proof beyond a reasonable doubt. It concluded:

> [B]ased on our review of the evidence, the picture [of Kamienski's antecedent knowledge of the murders which the State sought to convey by "connecting dots"] is simply not there and its existence can not be inferred absent the kind of guesswork that due process prohibits. Indeed, we can not accept the state's view of the evidence without choking all vitality from the requirement of proof beyond a reasonable doubt.

22. The Kamienski Opinion also forcefully holds that, after carefully reviewing the underlying trial transcript under Black Letter Law standards of review, there was absolutely no evidence to support Kamienski's convictions as an

accomplice to first degree and felony murder under New Jersey State law. It states that:

> 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 [i.e., the *Jackson* standard], and the New Jersey courts' conclusion to the contrary is an unreasonable application of clearly established Supreme Court precedent [i.e., the AEDPA standard]. Accordingly,...we hold that the district court erred in denying Kamienski's petition, and we will therefore remand to the district court Case with instructions to grant relief.

23. The State alludes to a motion for reconsideration based on its contention that the Kamienski Opinion improperly "modifies" the AEDPA and fails to follow *Jackson v. Virginia*. (P. 6) However, the State offers no details on how it intends to support this argument, which on its face conflicts with the actual language of the Kamienski Opinion, as seen above.

24. In reaching its holding, the Kamienski Opinion does not make any credibility determinations of witnesses or draw any inferences from the evidence in favor of Kamienski and against the State. The only point of departure with the State with respect to inferences is that the opinion finds that the State's attempt to show Kamienski had foreknowledge of anything beyond the drug transaction in which the homicides took place, namely, that he also knew in advance there would be a robbery and murders, was based on "rank speculation" not "reasonable

inference," as the State maintains. Refusing to permit a conviction to stand on the basis of speculation is not the same as drawing competing inferences in favor of a defendant, as the State mistakenly argues in its opposition. (P. 2)

25. To counter the Court's finding with respect to speculation, the State hints at a strategy of showing it is the Court that is relying on impermissible speculation. This approach does not bode well for the State in light of the care with which the Court said it exercised in reviewing the underlying trial transcript and the extensive briefing and oral argument on this aspect of the case.

26. Motions for reconsideration in the appellate court are exceptional requests for relief. Both the Federal Rules of Appellate Procedure and the Local Appellate Rules strongly caution against pursuing them except under extremely rare circumstances. *See*, *e.g.*, Fed.R.App.P. 35(a) and LAR 35.1 and 35.4

27. Not only would the State be seeking extraordinary relief if it in fact moves for reconsideration under Rules 40 and 35, but it will be coming into Court with "unclean hands." In the Kamienski Opinion, this Court repeatedly faults the Ocean County Prosecutor's Office for attempting to mislead the Court and for having misled courts in earlier proceedings which addressed the sufficiency of evidence issue. For example, the Court points out the State's reliance on a lay witness' purported forensic knot identification testimony was "selective" and "misleading."

28. The State's answer to this charge is to accuse the Court of being the one that is improperly relying on a "selective" and "incomplete" reading of the record. (Pp. 3 and 6) For the same reason that it is on thin ice in challenging the Court for purportedly relying on speculation, the State is unlikely to find a sympathetic ear for its claim that the Court erroneously relied on selective readings of the record.

29. The Kamienski Opinion likewise says the State's repeated misuse of the word "defendants" to include Kamienski when the State actually meant only one or both of his co-defendants was "unhelpful' and "misleading" and called the State to task for improperly citing evidence that was ruled inadmissible to Kamienski at trial:

> In fact, throughout its brief, counsel for the government has used the term "defendants" in a manner that included Kamienski without specifying which of the three defendants the evidence refers to. In several of those references, the evidence being discussed pertained only to Marsieno and/or Alongi, and not to Kamienski. Moreover, the government's brief frequently includes facts based on testimony that was admitted only against Marsieno and/or Alongi. Although counsel does note that such evidence was admitted only against the other defendant(s), it is clearly irrelevant in determining if the evidence admitted against Kamienski was sufficient. Moreover, including such evidence in the brief is both unhelpful and misleading as only Kamienski's appeal is before us. Counsel for the government has consistently either misunderstood or ignored the limitations and propriety of including such evidence responding to Kamienski's appeal.

30. Additionally, this Court harshly criticizes the Ocean County Prosecutor's Office for failing to provide simple and direct answers to fundamental questions about what evidence was adduced or not adduced at trial as to Kamienski:

> When we asked the state to provide a supplemental brief on appeal identifying the evidence from which a jury could reasonably find Kamienski's shared intent to rob and/or murder (or assist in those crimes) the state repeatedly directed us to evidence showing his complicity in the drug deal or evidence showing his involvement in the disposal of the bodies after the murders had been committed. Neither is sufficient to sustain Kamienski's murder convictions.

31. The Kamienski Opinion also emphasizes that the prosecutor trying the case back in 1988 repeatedly conceded there was no evidence introduced at trial showing that Kamienski knew of the robbery or murders of the victims until after they had occurred. In other words, according to the Kamienski Opinion, at one time the State itself admitted that Kamienski could not be found guilty as an accomplice for assisting in "planning" the robbery or murders before they took place, which is one of the two possible bases for accomplice liability under New Jersey state law.

32. Since it conceded he lacked any foreknowledge of the murders and robbery, in order to be an accomplice under New Jersey criminal law the State had to show that Kamienski somehow helped in the actual commission of the offenses, which is the other bases for accomplice liability.

33. As the Court's opinion explains, the State adduced only the faintest, indirect evidence that Kamienski may have been present at the time of the homicides and corresponding drug robbery. Moreover, the State cited no evidence of any purported role by him in the crimes themselves.

34. Indeed, the State has never proffered any direct or indirect evidence in the record as to what Kamienski was supposedly doing or saying at the precise time of the murders and robbery. In short, the State has never sought to show that Kamienski was an accomplice for assisting in "committing" the underlying crimes of murder and robbery during their actual execution.

35. Nor, according to this Court (as well as the New Jersey trial and appellate courts earlier in this case), could the State sustain Kamienski's guilt as an accomplice based on his supposedly helping to dispose of the victims' bodies in the aftermath of the murders, as the State argued at trial. The Kamienski Opinion characterizes the State's closing argument that murder is an on-going crime which does not end with the fatal bullet but continues through to the disposal of the body as "some abstract notion that the crime of murder is a continuing offense" that is "as unique as it is baseless." The Court further notes that the State did not even bother to pursue this theory on appeal. Perhaps for this reason, in its opposition below, the State does not claim it is going to resuscitate this theory in its Rule 40 and 35 motion or show any remote possibility of success with it.

36. Thus, there is quite a litany of reasons the State is hard pressed to show it will likely succeed on the merits in a motion under Rules 40 and/or 35. Clearly, this is among the most important considerations under *Braunskill*.

B. <u>The State Has Not and Cannot Establish Irreparable Injury</u>

37. Moreover, in the unlikely event the State seeks and ultimately succeeds in getting this Court's judgment reversed it can always re-incarcerate Kamienski for the remainder of any unserved term of imprisonment.

38. Although there would be some cost and inconvenience associated with the process of re-incarcerating him, no one can legitimately call this "irreparable damage" to the State or its citizens. After all, "irreparable" means irreparable.

39. This is probably why in its opposition below, the State does not even try to show irreparable harm. Rather, the only thing it does with respect to this *Braunskill* factor is cast dispersions on Kamienski's counsel, calling him "glib" for pointing out the simple reality associated with releasing Kamienski now and putting him back behind bars later if the State prevails under Rules 40 or 35. (P. 5).

40. Thus, the State has entirely sidestepped its need to make a showing of irreparable injury to it and the public in order to succeed in opposing the release of Kamienski under Rule 23(c). Irreparable harm is often the tipping point in

traditional civil stay litigation. Failing to show it almost invariably results in a denial of the stay motion, or in this case the denial of opposition to release under Rule 23(c).

C. The State Minimizes the Substantial Injury to Kamienski

41. *Braunskill* also requires the Court to consider the impact of a stay on Kamienski. Here, it is the State that is being glib, for in its unyielding quest for victory it seemingly ignores the importance of releasing an innocent man from prison.

42. Ever day of liberty is precious and everyone working in the criminal justice system –particular those invested with the powers of prosecution– has an obligation to ensure that a person does not spend even the smallest amount of time behind bars needlessly and unlawfully.

43. This could not be truer than in the case of a man who has spent the last 20 years serving two life sentences for murders he did not commit. These are the decades in which some of life's most significant events occur for most people.

44. Only yesterday Kamienski learned that yet another of his relatives has passed away during his lengthy imprisonment. There is no reason that he should not be part of the ever dwindling group of friends and relatives who need to be together in times of joy and sorrow.

D. The State Cannot Show the Public's Interest in Continued Custody

45. The final *Braunskill* factor requires balancing the public's interest in continued incarceration (for reasons of risk of flight, dangerousness to the community and on-going rehabilitation) with the its interest in not incarcerating any person longer than is necessary and lawful. Here, the State's opposition to release falls woefully short in substantiating even one of these grounds favoring continued incarceration.

Risk of Flight

46. As to risk of flight, the State provides no evidence in its opposition 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.

47. But, more importantly, the State cites nothing in Kamienski's history, background or circumstances suggesting he most likely will respond by fleeing.

48. 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.

49. 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 was indicted and arrested in the fall of 1987, or during the approximately one year he was out on bail prior to his conviction in November 1988. Indeed, at that time he was facing 30 years of parole ineligibility. Now he is looking at 10 years until such eligibility.

50. 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 renewed conviction, sentence and term of imprisonment. However, as explained, *supra*, 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 during the review period than the typical

successful petitioner, such as Braunskill, who had been released by the federal courts under Rule 23(c) when the sole issue was risk of flight.[5]

Dangerousness

51. 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.

52. 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 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.

53. In its opposition below, 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

[5] 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. This part of the opinion had nothing to do with risk of flight, which is a factor in every bail hearing.

Kamienski's track record. Its job is to provide answers. The State had 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 District 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.

Rehabilitation

54. 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.

55. Nothing more needs to be said with respect to this *Braunskill* factor other than that it clearly tips exclusively in favor of Kamienski after having already spent so many years in the custody of the Depart of Corrections.

56. In short, the State has not shown even one ground, let alone all three listed by *Braunskill,* that weighs in favor of keeping Kamienski in jail for the public's sake while the State considers and pursues its litigation options.

57. For that and all the other reasons stated above Kamienski should be released immediately pursuant to Rule 23(c).

II. Alternatively, the Court Should Issue its Mandate Without Further Delay

58. In the alternative to being released on bail now, Kamienski requests, pursuant to Fed.R.App.P. 41(b) that the period in which this Court issues the mandate in his appeal be shortened so that the District Court can immediately grant his writ.

59. The Court should shorten the time to issue the mandate in this appeal for same reasons that bail should be granted.

CONCLUSION

For the above reasons, Kamienski's motion to be released on bail, or alternatively, for a shortened mandate period should be granted forthwith.

Dated: New York, New York
June 10, 2009

/S_____
Timothy J. McInnis, Esq. [TM-7151]
Attorney for Appellant
Paul Kamienski
521 Fifth Avenue, Suite 1700
New York, New York 10175-0038
(212) 292-4573

CERTIFICATION OF SERVICE UPON COUNSEL
(MOTION BY APPELLANT PAUL KAMIENSKI)

I, Timothy J. McInnis, Esq., counsel for Appellant Paul Kamienski, certify that:

Service Upon Counsel
(Pursuant to Third Circuit Local Rule 32.1)

I served one copy of the accompanying Motion on Behalf of Appellant Paul Kamienski for Bail Under Rule 23(c)/Affirmation of Timothy J. McInnis, Esq., dated June 10, 2009, on Appellees by causing it to be sent by filing it via the Court's Electronic Case Filing system to Samuel J. Marzarella, Esq., Office of Ocean County Prosecutor, Ocean County, 119 Hooper Avenue, P.O. Box 2191, Toms River, NJ 08753 at smarzarella@co.ocean.nj.us.

Dated: New York, New York
June 10, 2009

/S _____
TIMOTHY J. MCINNIS, Esq.
Attorney for Appellant Paul Kamienski