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)

BRIEF FOR APPELLANT PAUL KAMIENSKI

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

DOCKETED CASES

UNITED STATES CONSTITUTION

STATUTES

RULES

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Jersey had jurisdiction over Appellant Paul Kamienski's application for a writ of *habeas corpus* under the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), since he is serving a prison term pursuant to a judgment of a New Jersey state court and his *habeas* petition alleges he is being held in violation of the Constitution of the United States. 28 U.S.C. § 2254

This Court has jurisdiction over the instant appeal because it seeks review of the final order of the United States District Court denying Kamienski's *habeas* petition. 28 U.S.C. §§ 1291 and 2253

STATEMENT OF ISSUES

A. Should Kamienski's murder convictions be vacated under 28 U.S.C. § 2254(d)(1) on the ground that they were contrary to the Due Process Clause and also represent an unreasonable application of *Jackson* and its progeny, in that, viewed objectively, the prosecution adduced insufficient evidence of Kamienski's guilt as an accomplice to murder and felony murder, as the trial court had ruled in dismissing the jury's murder convictions?

B. Alternatively, should the New Jersey appellate court's decision reinstating the murder convictions against Kamienski be vacated under 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) because the appellate court's overall conclusion as to

sufficiency of evidence resulted from a flawed fact-finding process so that its factual determinations were unreasonable in light of the evidence presented in the New Jersey court proceedings as well as because the specific factual findings the appellate court made in reaching its conclusion were clearly erroneous?

STANDARD OF REVIEW

Because the district court relied exclusively on the state court record and did not hold an evidentiary hearing in denying Kamienski's sufficiency of evidence ground for relief, this Court's review is plenary.

STATEMENT OF THE CASE

A. Preliminary Statement

Paul Kamienski appeals from the final order of the United States District Court for the District of New Jersey (Chesler, J.), dated July 25, 2005, denying his *habeas* application. A-20.[1] There is no reported decision associated with this judgment, however, a supporting opinion was published as a non-reported slip opinion, *Alongi v. Hendricks*, 2006 WL 2129107 (D.N.J. 2006).

B. Nature of the Case

This is an appeal of the denial of a Kamienski's *habeas* petition to vacate his

[1] Citations herein to "A-" refer to the accompanying Appellant's Appendix.

convictions for murder and felony murder under an accomplice liability theory that were obtained by the State of New Jersey (Ocean County Prosecutor's Office), in 1989. These charges arose from the murders of Henry ("Nick") DeTournay and his wife Barbara, which occurred in 1983 in Toms River, New Jersey, during a drug deal that turned into a drug robbery and two execution-style shootings. For general background on the drug deal and homicides See 3T123-45, 145-64, 181-193; 4T17-120, 120-151, 184-194; 5T30-129, 137-191, 191-206, 207-238; 6T41-91; 7T123-211; 8T7-227; 9T79-99; 10T4-83; 14T4-292; 15T21-271.[2]

The DeTournays had come to New Jersey from Florida to sell three kilos of cocaine that they had gotten on consignment from Colombian drug lords. The drugs were supposed to be sold to Joseph Marzeno and Anthony Alongi. The record shows that Kamienski introduced the DeTournays to Marzeno and Alongi about two weeks before the robbery-murders knowing that the parties were intending to engage in a drug transaction, but it further shows that Kamienski had

[2] Citations in this "T" format refer to trial transcripts with the first number being the volume and the number after the T referring to the page. There were a total of 23 volumes for the trial and post trial proceedings from 10/18/88-12/21/88. For some unknown reason the State's volume designation numbers vary by one, so that for example, Kamienski's 4T is the same as the State's 5T and so on. Kamienski was unable to reconcile this difference in the district court proceedings. Accordingly, in this memorandum he will use the designations in the transcripts as he has them.

no financial interest in the drug deal and played no role in the killings themselves. He is currently serving his 19th year of a double-life term of incarceration for the DeTournay homicides.

The case against Kamienski was both legally strained and factually weak. At trial the State put in evidence and argued that the shootings were committed by Marzeno and that Alongi was Marzeno's partner in the drug deal and was primarily responsible for disposing of the victims' bodies after the killings. The State has repeatedly acknowledged that Kamienski played no part in the homicidal act itself or in its planning or execution, either alone or in concert with Marzeno or Alongi; that he was not a member of the conspiracy to rob the victims of drugs and then murder them; that he had no foreknowledge of those crimes; and that he did not help plan the robbery or murders or knowingly lend assistance with respect to these crimes prior to when they occurred or even during their occurrence. Instead, the State prosecuted Kamienski for what he supposedly did at some unspecified time after the killings.

Kamienski was charged and convicted of murder for his alleged role in helping Alongi to dispose of the victims' bodies. As manifested in the prosecuting attorney's closing argument, (19T276-77, 296), the State sought Kamienski's conviction on the grounds that, while Marzeno and Alongi "murdered [the

DeTournays] in cold blood," Kamienski was "present" (one is not sure if by this one meant in the room, in the house, near the property, or elsewhere) at the time of the murders and helped get rid of the bodies afterwards. The State applied to these factual assertions the legal theory that a fatal shot does not "end a murder" offense, but rather, "a murder is finished and the murder ended when that body is disposed of." In other words, the State argued that murder is a continuing criminal offense and Kamienski was culpable as an accomplice for the DeTournays' deaths because he helped get rid of their bodies sometime after they were killed. [3]

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[3] Calling this a "strained" legal theory is an understatement. Counsel for Kamienski has been unable to locate another reported New Jersey murder conviction that in any way resembles his prosecution: (1) no other case which holds that "murder" (as opposed to "conspiracy to commit murder" to which Kamienski was acquitted) is a continuing criminal offense that runs through the disposal of the body (and indeed this notion is contrary to Supreme Court cases holding that a criminal offense is completed when each of the essential elements has been satisfied, e.g., *U.S. v. Local 807 of International Broth. of Teamsters*, 315 U.S. 521, 541 (1942)(noting that "under [robbery] statute, the robber's use of force and its intended effect on the victim are essential elements of the crime both of which the prosecutor must prove [and] when both are present the crime is complete"); here murder is completed under N.J.S.A. 2C1-3 when the actor purposefully causes death); (2) no other case where the defendant was convicted of murder on an accomplice theory because of what he allegedly did in the wake of the killings; (3) no other case where a defendant was convicted of accomplice murder for his role in disposing of a body; (4) no other case where the prosecutor stood before the jurors and said the defendant was not guilty of the charge of conspiracy to commit murder and still submitted it for their deliberation. This may well be one of the most unusual accomplice liability murder convictions reported in New Jersey case law.

Even as to Kamienski's charged role as an accomplice in helping to get rid of the bodies, the State had no direct evidence. There were no eyewitnesses to the killings or the disposal of the bodies; no forensic proof linking Kamienski to these acts; no admissions by Kamienski to any role in the robbery, murders or disposal of the bodies; and no testimony from any cooperating witnesses involved in the crimes. There was not even a tiny piece of direct evidence placing Kamienski at Alongi's house (let alone in the same room) at the time Marzeno shot the DeTournays. Indeed, neither of the two witnesses who were the last people to see the victims alive (Alongi neighbor George F. "Skip" Hunt and the DeTournays' drug courier Sidney Jeffrey, III) saw Kamienski near the victims or the crime scene when the killings occurred. This was particularly significant for Hunt, who knew Kamienski, his car and his boat and who was watching the Alongi house at precisely the time when the murders supposedly took place there (and, parenthetically, he did see Nick DeTournay and Alongi together in Alongi's driveway and yard right before the murders.[4] Rather, Kamienski was convicted

[4] During his testimony Hunt was asked if, on September 19, 1983, he saw anyone else (or anything unusually, which would encompass Kamienski's distinctive silver Avanti with personalized plates and noisy "headers" on the exhaust system to increase its engine sound, 13T195 to 196, and his conspicuous 38-foot yacht with a flying bridge, both of which were familiar to Hunt because he recalled from

exclusively on circumstantial evidence of his "presence" and multiple levels of inferences drawn from this inference.

Moreover, there was not one shred of evidence (either direct or circumstantial) from which one could reasonably infer that Kamienski knew Marzeno was going to kill the DeTournays before it happened or that he, Kamienski, wanted to see them killed. The same is true even of Marzeno's plan to rob the DeTournays of the cocaine. In fact, the only evidence in the record of Kamienski's contemporaneous state of mind showed he did not share Marzeno's murderous intent. According to Donna Sue Duckworth, Kamienski's ex-girlfriend, he said that he "couldn't control" what had happened to the DeTournays and that if both she and he did not keep their mouths shut he "couldn't protect her or himself." (10T47) Additionally, according to Kamienski's acquaintance Arthur "Buddy" Lehman, shortly after the killings Kamienski confided to him that his "friends from Florida" had been murdered. (14T63-64) These two excerpts of testimony show that Kamienski considered the DeTournays to be friends; that he had not wanted to see them harmed; and, that he was not in the killer's camp, but rather was in fear of him.

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memory seeing them at Alongi's house on other occasions, (9T251 to 252) and he said he did not. 10T40-6 to 12.

Kamienski's own words stand in stark contrast to those of Alongi, who said of the DeTournays after the killings, "well, who cares about them? They're scum bag drug dealers any way. Nobody's going to care if they're dead." (14T65) And they also differ from the statements of Marzeno, who in a tone similar to Alongi's referred to the DeTournays as "those lousy m.f.'ers" (14T343), who had to be "[taught] a lesson" (15T32). The lack of shared intent between Kamienski on the one hand and Alongi and Marzeno on the other, as gleaned from the things they said to their trusted acquaintances before and after the murders, could not be more pronounced.

It is hardly surprising that after the jury convicted Kamienski on the murder counts (which verdict might be understood by, among other things, the unfavorable press he received, the last minute substitution of his counsel, lurid and horrific details of execution-style shootings, the failure to sever Kamienski from Alongi and Marzeno, previously convicted felons who looked the part, extraneous evidence that Kamienski was leading the life of a reckless, drug-imbibing playboy, a confusing jury instruction on accomplice liability, which the jury needed to have clarified (21T22-23), and prosecutorial misconduct during closing (19T219-299)), the trial judge acquitted Kamienski of murder and dismissed these charges.

What is surprising, however, is that the state appellate court reinstated

Kamienski's murder convictions more than three years later. Perhaps, the best explanation for this turn of events is that the appellate court unduly relied on the State's appellate brief, dated July 10, 1989 ("State App. Br."), and not the actual record of the trial proceedings. That brief repeatedly misstated the record. Among other things, contrary to the evidence as well as to its own trial counsel's frequent and unequivocal representations that Kamienski had no foreknowledge of the DeTournay killings, the State App. Br. invented facts and inferences to support the wild assertion that Kamienski "premeditated" the DeTournays' murders, or in the brief's colorful words, he savagely "participated in the hunt to share in the kill." The Appellate Division may have been influenced by the State's fanciful brief and ended up getting very important facts relating to sufficiency of evidence very wrong.

While Kamienski raised six grounds for relief in his *habeas* petition the only issue certified for appeal thus far (see n. 16, *infra*) is this glaring insufficiency of evidence.

C. <u>Course of Proceedings</u>

The lengthy procedural history of this matter with respect to Kamienski is set forth below and reflects a nearly twenty-year legal struggle to establish his innocence on the murder charges.

On October 7, 1987, Kamienski was indicted by an Ocean County, New Jersey grand jury on various drug, robbery, murder and conspiracy charges, all stemming from the twilight September 19, 1983 execution-style shootings of the DeTournays and the disposal of their bodies in the Barnegat Bay later that evening or shortly thereafter.[5] Ocean County Indictment No. 692-10-87. A-140

The killings occurred during what was supposed to be a three kilogram cocaine transaction between the DeTournays and Marzeno and Alongi. The State surmised that the killings took place at Alongi's Toms River, New Jersey home, which was located on a lagoon that fed into the Barnegat Bay, and that a small motorboat which Alongi kept at his dock was used to transport the bodies into the Bay. The State never tried to establish when the disposals took place: based on the record it was certainly hours after the shootings and maybe even a day or two later. The State further theorized that Marzeno single-handedly shot the DeTournays and then absconded by himself with the stolen cocaine.

A jury trial against Kamienski began on October 18, 1988, in New Jersey Superior Court, Law Division (Ocean County). The trial was covered extensively by the local press; this coverage was unfavorable to Kamienski. On November 18,

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[5] Kamienski was indicted and ultimately tried with Alongi and Marzeno.

1988, following 18 trial days (during which Kamienski testified on his own behalf and denied any knowledge of, or participation in, the charged crimes), the jury returned a "mixed" verdict against Kamienski. It acquitted him of conspiracy to commit robbery and conspiracy to commit murder, but convicted him on two counts of conspiracy to possess with intent to distribute a CDS (cocaine) and two counts of aiding and abetting first degree murder and two counts of felony murder.[6]

Following trial, Kamienski moved for a judgment of acquittal and, in the alternative, a new trial. On December 21, 1988, the Superior Court judge who oversaw the trial (Steven P. Perskie, P.J.Cr.) entered a judgment of acquittal on behalf of Kamienski on the murder charges based on, among other grounds, insufficient evidence.[7] See Order and Opinion at A-136. The court upheld the drug conspiracy convictions against Kamienski. At the conclusion of the hearing on post-trial motions the court sentenced Kamienski principally to an aggregate

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[6] The jury also convicted co- Marzeno of being the principal in the murders and convicted Alongi on the same charges as Kamienski. Marzeno died in prison in 1991 while his direct appeal was pending. Like Kamienski, Alongi had adverse rulings on direct appeal and in state post-conviction relief proceedings and then sought and was denied relief under 28 U.S.C. § 2254.

[7] Judge Perskie ruled similarly with respect to Alongi's convictions.

term of incarceration of 24 years with 10 years of parole ineligibility. A-134.

The State appealed Judge Perskie's ruling to the Superior Court of New Jersey, Appellate Division and Kamienski appealed his conviction on the remaining counts which the trial court left standing. That appeal was decided on February 19, 1992. In a reported opinion, *State v. Kamienski*, 254 N.J. Super. 75 (App. Div. 1992) (referred to in this memorandum as the "App. Opinion"),[8] the court reinstated the murder charges against Kamienski. It held, among other things, that there was sufficient evidence to support Kamienski's conviction on these charges. The appellate court also affirmed Kamienski's drug-related convictions.[9] It then remanded Kamienski's case for re-sentencing on the murder convictions.

On April 10, 1992, Kamienski was resentenced to two concurrent life sentences on the murder charges (with 30 years' parole ineligibility) and 12 years imprisonment on the drug convictions to run consecutive to the sentence of 30 years. A-113.

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[8] Citations to the App. Opinion, refer to the page number in the official reported decision, 254 N.J.Super. 75. The opinion is included in Appellant's Appendix beginning at A-115.

[9] The appellate court likewise reinstated the murder charges against Alongi and affirmed his drug convictions as well.

On June 26, 1992, the New Jersey Supreme Court summarily denied Kamienski's petition for review of the Appellate Division's ruling. *State v. Kamienski*, 130 N.J. 18 (1992). Between 1992 and 2002, Kamienski unsuccessfully sought relief in State post-conviction relief (PCR) proceedings. The main thrust of those efforts was to overturn his conviction because of a *Brady*[10] *(Giglio)* violation: a reasonable inference drawn from the chronology of events suggested that the key witness on behalf of the prosecution (Kamienski's ex-live in girlfriend, Duckworth) was promised pre-trial intervention (PTI) in lieu of a possible prison sentence on a pending drug charge based on a 1985 arrest in Ocean County, which case was also being handled by Kamienski's trial prosecutor, in exchange for her testimony. This was an inference that Duckworth and the State repeatedly denied. The state PCR litigation of this *Giglio* issue effectively ended with the submission of a bare-bones sworn statement from, E. David Millard, who had tried the case as an Assistant Prosecutor, which stated, in sum and substance, that there was no such deal.

Kamienski also unsuccessfully pursued in a separate State PCR proceeding a claim relating to ineffective assistance of counsel. The events underlying this

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[10] *Brady v. Maryland*, 373 U.S. 83 (1963)

prong of PCR litigation arose from the last minute substitution of Kamienski's trial counsel. The attorney who had represented him during the roughly five years that the State investigated the matter and engaged in pre-trial litigation was recused from the case on September 20, 1988, because of a conflict (he had been Duckworth's counsel on the aforementioned drug charge). New counsel was substituted in on September 30, 1988—just 18 days before the start of a trial that would lead to Kamienski receiving two life sentences. The PCR focused on Kamienski's absence from the hearing at which his counsel was relieved and that attorney's continuing behind-the-scenes role in Kamienski's defense. An ineffective assistance claim arising from these facts was rejected with a ruling from the bench by the Superior Court, Law Division (Ocean County), on October 30, 1992. The lower court's denial of that claim for relief was upheld on appeal by the Appellate Division, *State of New Jersey v. Kamienski*, A-1577-92T2 (App. Div. October 19, 1993). Both a New Jersey Supreme Court petition for review, *State of New Jersey v. Kamienski*, C-489, 37,713 (S.Ct. January 27, 1994) and a United States Supreme Court petition for *certiorari*, *Kamienski v. New Jersey*, 511 U.S. 1108 (1994), were summarily denied by those courts.

On June 26, 2002, Kamienski filed the instant *habeas* petition setting forth four separate grounds for relief, namely, insufficient evidence; a *Brady-Giglio*

violation; improper jury selection; and wrongful failure to sever Kamienski from his two co-defendants. A-142.[11] The petition also alluded to allegations of prosecutorial misconduct. Before the State answered his original petition, on October 15, 2003, Kamienski filed a supplement and amendment to his petition. A-151. That supplement added a *Brady-Kyles*[12] claim (arising from unproduced FBI materials Kamienski had recently obtained by FOIA which showed hair and fiber tests and lab notes exculpated him on the murder charges in that they suggested key pieces of evidence --namely, the blankets used to secrete the victims' bodies-- came from the victims' own car and not from Kamienski's boat, as Duckworth insinuated during her testimony for the State) as well as an ineffective assistance of counsel claim. The supplement also augmented certain claims in the original petition, including, particularly those relating to prosecutorial misconduct during closing argument (including vouching, misstating the evidence and presenting a charge to the jury which the prosecutor did not himself believe was warranted by

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[11] Procedural and jurisdictional facts from the district court proceedings are set forth in Civil Docket Sheet for Case #: 2:02-Cv-03091-SRC, obtained via PACER. A-5.

[12] *Kyles v. Whitley*, 514 U.S. 419 (1995)

the facts, namely, conspiracy to commit murder).[13]

By Order dated May 10, 2005, the district court ruled that the supplemental *Brady-Kyles* and ineffective assistance of counsel grounds for relief were time-barred under the AEDPA, but permitted the other grounds in the supplemental petition to go forward. A-87. The court issued a supporting opinion. A-87. And, ordered the State to answer the petition. A-110.

By Order dated July 6, 2005, the court denied Kamienski's request for reconsideration of the time-bar ruling on the ground that it was premised on a number of factual errors. A-70. In an accompanying opinion, A-71, the court concurred with many of Kamienski's claims of factual error, but concluded that they did not affect the correctness of the court's initial ruling. See A-74-75.

On August 18, 2005, the State responded to Kamienski's petition. A-173. It denied his central allegations and opposed Kamienski's request for relief.

By letter dated June 16, 2006, Kamienski sought leave to file a motion to reconsider his claim to the "actual innocence" exception to the AEDPA's statute of

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[13] Thus, Kamienski's *habeas* "petition" includes: (1) the original petition filed, June 26, 2002; and (2) the corresponding joint brief, declaration and appendix dated, November 22, 2002; as well as, (3) the supplemental petition, filed October 15, 2003 and; (4) the corresponding brief, declaration and appendix dated December 15, 2003 and filed December 16, 2003, all of which Kamienski respectfully incorporates by reference into this proceeding.

limitation in light of the then just-announced Supreme Court ruling in *House v. Bell*, 126 S.Ct. 2064 (2006), and his assertion that the district court had not conducted a "holistic judgment" of all the evidence pointing to his innocence before denying Kamienski's tolling claim, as required by that case.

On July 26, 2006, the clerk of the district court entered the final order in the Kamienski matter. A-20. The order denied Kamienski's *habeas* application as well as denied him leave to seek reconsideration of his *Brady-Kyles* claim in light of *House v. Bell*. The district court issued a supporting opinion, dated July 25, 2006 (referred to in the brief as the "Supporting Opinion"). See A-21. The Supporting Opinion addressed Kamienski's four non-time barred claims, including sufficiency of evidence. Id. at 19-29.[14] It also addressed in a footnote Kamienski's application for leave to seek reconsideration of the timeliness of his *Brady-Kyles* claim in light of *House v. Bell*. Id. at 15 n. 4.

On October 12, 2006, Kamienski filed a notice of appeal of this order.[15] A-19.

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[14] Citations to the Support Opinion refer to the page number of the opinion itself beginning with page 1 at A-21.

[15] Procedural and jurisdictional facts concerning proceedings in this Court are set forth in USCA Docket Sheet for 06-4536, obtained via PACER. A-1.

On October 26, 2006, the district court on its own motion filed a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c) and LAR 22.2 certifying for appeal only one of the six grounds for relief set forth in Kamienski's combined *habeas* petition, namely, the district court's denial of his claim of insufficient evidence. A-16. The district court's *sua sponte* filing of a COA on sufficiency of evidence is, in its own right, a noteworthy ruling.

On November 16, 2006, the district court filed an order deeming Kamienski's October 12, 2006 notice of appeal timely under Fed.R.App.P 4(a)(6) and 28 U.S.C. § 2107(c). A-18.

On December 8, 2006, Kamienski moved this Court, under 28 U.S.C. § 2253 and LAR 22.1(b), to expand the scope of the COA. Kamienski's motion sought to include a review of the district court's denial of his claims of a *Brady-Kyles* violation, prosecutorial misconduct and ineffective assistance of counsel. By order dated July 24, 2007, on the parties' submissions, the motion panel of the Court denied Kamienski's Section 2253 application.[16] A-14.

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[16] Kamienski respectfully requests that the merits panel of the Court review two aspects of motion panel's order denying his application to expand the COA under 28 U.S.C. § 2253. First, the order concludes that "Reasonable jurists *would* not debate whether the district court was correct in denying Kamienski's claims." (Emphasis added.) Id. This standard seems at odds with the Supreme Court's holding *Miller-El v. Cockrell*, 537 U.S. 322. There, the Court held that the correct

D. Disposition Below

The district court concluded, among other things, that the State adduced sufficient evidence at trial to support Kamienski's murder conviction, Supporting

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standard of review under Section 2253 is whether reasonable jurists "*could* debate" whether the petition should have been resolved in a different manner. Id. at 336. (citations and quotations omitted) (emphasis added). "Could debate" is a lesser standard of persuasion than "would debate" and the former should have been applied here, but apparently was not.

Second, the order appears to have ruled on the ultimate merits of the specific appellate issues Kamienski sought to include in the expanded COA. With respect to Kamienski's claims of ineffective assistance of counsel and a *Brady-Kyles* violation, the order concludes that they "are time-barred." And regarding his claim of prosecutorial misconduct, the order concludes that it "is without merit." Id. These are precisely the issues that Kamienski sought to argue on appeal.

The Supreme Court had cautioned in *Miller-El v. Cockrell*, that a court considering a Section 2253 motion should not attempt to consider whether the movant would or would not prevail on the merits. Id. at 336-37. ("When a court of appeals sidesteps …[the threshold] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.") That admonition may not have been fully heeded in this case.

Notwithstanding the motional panel's ruling, this Court may find that some or all of the claims Kamienski raised in his Section 2253 motion should be considered on this appeal. Accordingly, Kamienski respectfully requests pursuant to LAR 22.1(b) that the merits panel review his denied motion and invite further briefing in the instant appeal on the issues raised therein. See *Villot v. Varner*, 373 F.3d 327, 337 n. 13 (3d Cir. 2004) (and citations therein) (merits panel can expand COA beyond that which motions panel has permitted and may do so on request or *sua sponte*).

Opinion at 29, and thus denied his petition for *habeas* relief on this ground, as well as on all other non-time barred grounds in the petition.

It appears from the face of the Supporting Opinion that the district court's ruling was based on its acceptance of trial-court facts as they were set out in the appellate brief which the State had previously submitted to the Appellate Division in seeking reinstatement of Kamienski's murder convictions and resubmitted without change in the *habeas* proceedings.[17] The consequence of proceeding in this fashion is that the Supporting Opinion repeats factual errors made first by the

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[17] Indicia that the district court adopted the State's factual characterizations include: citing exclusively to the State's appellate appendix as the sole source for the Supporting Opinion's factual underpinning. See Supporting Opinion at n. 2, This was despite Kamienski's warning to the court about relying unduly on the State's appellate brief because it was full of factual errors and distortions. The Supporting Opinion as adopted the State's number system for the trial transcripts, id. at n. 3., which again Kamienski had alerted the court differed from his own. The Supporting Opinion also cites trial exhibits listed in the State's appellate brief (for example, what was denominated S-3 and S-4, id. at 2) that, upon information and belief, were never submitted to the district court by the State--despite Kamienski's request for an order that the State file all transcripts and physical evidence with the court since there was a dispute over what the evidence was and how it should be interpreted. These instances may seem trivial at first glance, until one realizes that seldom in the Supporting Opinion concerning sufficiency of evidence does the district court cite or discuss or even allude to a fact, piece of evidence or line of testimony put before the court by Kamienski in his original petition, supplemental petition or numerous affidavits he submitted in connection with the *habeas* proceedings.

State and then the Appellate Division in its ruling against Kamienski (most notably, that a knot on Nick DeTournay's ligature was "peculiar" to Kamienski). [18]

[18] The district court concluded that the trial record established that one of the knot's on one of the victim's ligatures was "peculiar" to Kamienski. Id. at 26. This factual determination is simply wrong. The record establishes that the knot was commonplace. See A-265-281. So how did the district court find that the knot was "peculiar" to Kamienski when the record said just the opposite? It was either from the State App. Br., where the term apparently first originated, App. Br. at 36 ("Kamienski used a *peculiar* 'hitch' knot to secure a boat, rather than that taught to Duckworth. S-35 in evidence depicted the bodies wrapped and secured by rope in hitch knots, the same knots that Kamienski tied.") (emphasis added), or from the Appellate Division's opinion, where the term was repeated from the State brief. App. Opinion at 103 ("The bodies were tied with a hitch knot *peculiar* to the kind which Kamienski customarily made.") (emphasis added).

The district court also incorrectly described the recovery of Nick DeTournay's body, saying it was wrapped in a blanket that was stuffed inside a sleeping bag. Id. at 2. This also repeated verbatim an error in the State's appellate brief. See State App. Br. at 7. In fact, the record shows just the opposite: the body was first entombed in the bag and then the bag was wrapped on the outside by the blanket. See A-187. This difference has great significance to Kamienski's *Brady-Kyles* claim because unproduced FBI lab notes showed that one of Nick DeTournay's pubic hairs was found on the blanket. The presence of that hair on the outside blanket, combined with the fact that Nick DeTournay was fully clothed and encased in a mummy style sleeping bag helped allow Kamienski's forensic hair and fiber expert to conclude that blanket came from the DeTournays' car and not Kamienski's boat. It would have been virtually impossible for the hair to migrate from Nick DeTournay's body, through his underwear and blue jeans and the zipped sleeping bag and then affix itself to the blanket. The only reasonable conclusion is that Nick DeTournay had used or had contact with the blanket prior to his killing.

The Supporting Opinion also omits key pieces of evidence which undercut the State's contention that there was sufficient evidence to support Kamienski's conviction on the murder charges.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Co-defendant Alongi is appealing the denial of his *habeas* petition in *Alongi v. Hendricks*, 06-4419 (3d Cir. 2006). The Alongi COA (limited to his ineffective assistance of counsel claim) and appeal do not overlap substantively with Kamienski's appeal concerning insufficient evidence as to him.

The Supporting Opinion also mistakenly says that neighbor Hunt saw Alongi suspiciously operating a boat "in the two weeks leading up to [the murders]." Id. at 7. In fact the testimony was that this event occurred "in the same 10 days to two weeks" of the murders, (8T250:18-251:1) which meant it could have been before, after or on the night of the murders. The significance of this error is that Hunt has since clarified that Alongi was operating the boat at night without running lights and he was by himself. (See Habeas Exhibits Tab 15, A-339). That would seem to suggest that Alongi alone took the bodies out to the Bay and that Kamienski had no role in that part of the crime.

STATEMENT OF FACTS[19]

In the summer of 1983, Kamienski was 35, single and living with his girlfriend Duckworth on a yacht that was moored at a marina in Lavallette, New Jersey. At the time, he was nominally the president of his family's multi-location funeral home business in northern New Jersey, but had no day-to-day involvement in its operations. Rather, he and Duckworth spent a good deal of their lives partying at the Jersey Shore—using drugs, drinking, hanging out at bars and restaurants until late, and sleeping until noon.

Around Labor Day that year, Kamienski was unexpectedly contacted by Henry ("Nick") DeTournay and his wife Barbara (*nee* Boutsikaris). They had driven from Florida, where they lived with her adolescent son, to New Jersey in small part to visit Barbara's family in Newark, which is where she was from originally. The main purpose of their trip, however, was to establish a distribution channel for large quantities of cocaine that they intended to secure on consignment from Colombian drug lords in Florida (7T171-172) and sell in the northeastern

[19] The facts set forth below, as well as those referred to throughout this brief, are contained in (1) the record of Kamienski's lower court proceedings, Volumes 1-23, dated October 18, 1988 through December 21, 1988; and (2) the affidavits and exhibits submitted with the Affirmation of Timothy J. McInnis, filed in the district court December 16, 2003, with Kamienski's Reply Memorandum (See Appendix Volume III, A-187 et seq. ("Habeas Exhibits").

United States. The DeTournays had tried a few different people in New York and Massachusetts without success before reaching out to Kamienski in New Jersey. The reason they thought he might be able to help them is that they had socialized with him at boat yards and marinas in New Jersey and Florida (where Nick was a marine mechanic) and Kamienski had previously bought small quantities of drugs from them for his own use. (10T16-17) Nick had a regular marijuana business going, but in the summer of 1983, despite his initial hesitancy, Barbara persuaded him to try the cocaine business, where with one big transaction they could be "set for life." (5T37) Although they knew Kamienski was not a drug dealer, since he was only a recreational user, they thought he might know someone else who would take kilo-size shipments from them on a regular basis.

The record reflects that Kamienski did play a part in the DeTournays' cocaine conspiracy. Over Labor Day Weekend he introduced the DeTournays to Alongi at barbecue at Alongi's Toms River house knowing that the purpose of the introduction was to facilitate the drug conspiracy that the DeTournays had devised. Kamienski and Duckworth had met Alongi around Toms River shortly before the barbecue and they had spent a lot of time together during the prior few weeks. Among other things during that time, Alongi supplied Kamienski with cocaine for his own use (Alongi himself was not a drug user). Incidentally, Alongi was then a

53-year old, silver-haired ex-con from the Newark area who bragged about his involvement in "Scared Straight," the Oscar and Emmy award documentary film at Rahway State Prison in the late 1970s. Marzeno was Alongi's friend from Newark; he also had a long criminal rap sheet that coved nearly every decade from the 1950s through the 1980s. In the summer of 1983, Marzeno was also living in the Toms River area and hanging out with Alongi, including at the Labor Day barbecue. (10T29-30) Marzeno and Alongi were to be "partners" on the drug deal with the DeTournays. (14T62) Kamienski had no stake in it at all.

After the initial meeting at Alongi's house, the DeTournays had various meetings and telephone conversations with Alongi (either alone or with Marzeno), where the details of an exchange were negotiated and finalized. Neither Kamienski nor Duckworth attended any of these meeting or participated in any of the calls.[20] In fact, they were in Garfield, New Jersey (10T33-34) when the final terms for a three kilo deal were hammered out at a face-to-face meeting among the DeTournays and Alongi and Marzeno in Toms River. Likewise, they were not

[20] The appellate opinion, presumably influenced by the same mistake in the State's brief, State App. Br. at 62, erroneously finds the record shows Kamienski and Duckworth met with Nick at the Holiday Inn in the evening of September 18, 1983. Duckworth actually testified that there was a group, including herself and Kamienski drinking in the Holiday Inn bar that night, but she says nothing about the DeTournays being among the participants or even in the place. (10T37 to 40)

present when Nick and Barbara DeTournay showed up at Alongi's house on the day of the originally scheduled hand-off. (17T140-2 to 143-21) It bears emphasizing that the DeTournays were comfortable dealing with Alongi without Kamienski's on-going involvement because they found out at the barbecue that Alongi had longstanding ties to Barbara's ex-husband in Newark, Bill Rispoli, a/k/a, Bill Dickey.[21] Additionally, Nick had hand-written directions to Alongi's house in his wallet at the time his body was recovered. This is further evidence that there was no need for Kamienski's continued involvement in the deal. The Appellate Division's conclusion that Kamienski continued to participate in the drug deal after the first introductions is clearly erroneous.

The first deal between the DeTournays and Alongi and Marzeno was to take place during the day of September 18, 1983. (7T135-140) The DeTournays had taken elaborate steps with a courier to safeguard the drugs (which had a wholesale

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[21] Barbara told a number of people (including, her sister Christine Longo, veterinarian Dr. Fred Adams and his wife, and courier Sidney Jeffrey) that the men she was doing a big drug deal with were mutual acquaintances of her ex-husband in Newark and that she derived comfort and trust from that association. (5T35-37, 5T217-220, 6T47-48, 7T133-134, 10T23-25) Kamienski had no connection with Barbara's ex-husband. The record also shows that when she wanted to describe Kamienski to her acquaintances and family she referred to him as "Paul," and the "funeral director" (5T31-32). She never included him by these words, or any others, in her description of the people she and Nick were dealing with.

value of around $300,000) until that time. The courier had driven the drugs up separately from Florida and was secreted at the Toms River Holiday Inn waiting for a signal to deliver the drugs to Barbara, who was then going to take them to the hand-off once Nick confirmed that Alongi and Marzeno had the money for the purchase price.[22] In the hours leading up to the deal, the date and times and logistics of the meetings change rapidly. But ultimately, it was scheduled to take place at Alongi's house, on an occupied residential street, around 6 p.m. on September 19, 1983.[23] In furtherance of that plan, Nick met with Alongi at the house around 3 p.m. and they were last seen walking from the DeTournays' car in the drive way around to the back yard of Alongi's house. A few hours later Barbara came to the Holiday Inn, picked up the drugs from the courier and soon departed the hotel and got into Alongi's car, with him at the wheel and no one else

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[22] Nick was so cautious about the impending drug deal that he would not even drive his car into the Holiday Inn parking lot to meet Jeffrey. 8T138-11 to 138-23 and 9T14-2 to 15-22.

[23] According to Jeffrey, he met with the DeTournays around 11:30 a.m. on the 18th at which time he learned that the deal had already been put off until 3 p.m the next day. (8T138-12 to 139-3). It was then changed again to 5 or 6 p.m on the 19th. Jeffrey also testified that Nick said on the 18th that they had just come from meeting with the people who were putting the money together, (8T13-12 to 139-14). This group did not include Kamienski, as Duckworth did not place him and herself at any such meeting.

in the car. (7T142-146, 8T60)

What happened immediately after Barbara left the Holiday Inn is shrouded in mystery—even 25 years later. The only certainty is that five days after they were last seen alive, Nick's body was found floating in the Barnegat Bay, wrapped in bedding and tied to a cinderblock. And a day after that, Barbara's body drifted in the currents from where it had been dropped and was found washed up on Marsh Elder Island in the Barnegat Bay. (5T109) She also had been wrapped in bedding. An autopsy later revealed each had been shot numerous times at close range by the same 9 mm pistol. Barbara had been fatally struck with a bullet fired from a gun pressed against her head. However, despite the fact that a silencer had not been used on the murder weapon (6T170-2) and that a total of 10 shots had struck the victims and must have caused a tremendous loss of blood, no one in Alongi's neighborhood had heard or seen anything suspicious and forensic tests conducted at Alongi's house revealed no crime scene evidence.

Through testimony the record does, however, reflect some details of the murders and the disposal of the victims' bodies. There is no doubt that Marzeno shot the DeTournays. He boasted about this to his girlfriend Yurcisin, when he described strangling Nick with one hand while shooting him with the other and then shooting Barbara in the back as she tried to run from the room. He said it was

easy because they were like "scared puppies." After killing them Marzeno took the cocaine and "left town" until "things cooled down."

The record also reflects that Alongi disposed of the victims' bodies sometime after Marzeno fled. He used a small open motorboat from his dock to take them out from his lagoon into the Barnegat Bay. Because of things Alongi "screwed up" (like throwing Nick's body in three to four feet deep water that was shallower than the length of the clothesline used to tether him to the cinderblock and not fastening Barbara's body securely enough to a weight) the bodies surfaced and the criminal investigation ensued. (5T109) Thereafter, Marzeno and Alongi had many disputes over splitting up the cocaine because of "Alongi's" mistakes—not "Alongi's and Kamienski's."

The record further reflects that Kamienski's role in either the robbery/murders or the disposal of the bodies was somewhere between attenuated and non-existent. The bulk of this brief backs up that statement and the facts in support of it will not be repeated here.

The authorities always suspected that Kamienski knew something about the drug deal and or murders. But, for nearly four years they could not establish much more than Kamienski's business card was in Nick's wallet, the DeTournays had socialized with Kamienski and Alongi around Labor Day Weekend, and

Kamienski knew the DeTournays were in the drug business and he had bought drugs from them in the past. (6T142-222 and 7T8-111)

All that changed late in the summer of 1987. By then Kamienski and Duckworth had moved to Florida and established a car dealership. After a few years down there they had a falling out and Duckworth came back to New Jersey to get a little breathing room. While she was staying at a motel in Seaside Heights, New Jersey with a group of people who were using drugs and partying including a friend of hers who was wanted for burglarizing houses at the shore, alert authorities showed up at the motel, ushered her outside and over the weekend persuaded her to cooperate with them on the DeTournay murder investigation.

At that time Duckworth had a drug possession charge hanging over her head stemming from a 1985 raid on Kamienski's boat. She had already pled guilty to that charge, but was awaiting sentencing and hoping to get into the PTI program, which she had been rejected by before she started cooperating. Duckworth was upset with Kamienski because she was taking the weight for that offense and for other reasons. She had declared before leaving Florida that she was, "going to cut-off his balls." And she did.

Duckworth met with authorities in September 1987 and later gave grand jury testimony where she implicated Marzeno and Alongi in the murders and robbery

and Alongi and Kamienski is the disposal of the bodies. (See Habeas Exhibits, Tab 3, A-223) With respect to Kamienski she reviewed crime scene photographs and said, in substance, "the blankets on the victims resembled blankets from Kamienski's boat, the towel recovered from Nick's body resembled a rag he used to polish the boat, and the knot shown in one of the pictures was the kind of knot Kamienski used on the boat." At trial, not only did Duckworth back-off from a positive identification of the knot as distinct to Kamienski, but during her cross-examination she likewise backed-off from her ability to swear with any degree of certainty that the blankets and towel were in fact from Kamienski's boat and pier, respectively. (Her testimony on these points does not raise a credibility issue; her testimony if taken as true is exculpatory for Kamienski, provided it is read in its entirety.)

Notwithstanding this weak and uncertain evidence and testimony, that is pretty much how Kamienski got charged and later convicted of first degree murder and felony murder under an accomplice liability theory.

SUMMARY OF ARGUMENT

KAMIENSKI'S MURDER CONVICTIONS SHOULD BE VACATED UNDER 28 U.S.C. §§ 2254(d)(1), (d)(2) AND (e)(1)

There was insufficient evidence at trial to support Kamienski's murder

convictions. The State adduced no direct evidence of Kamienski's actual involvement in the drug robbery or murders of the DeTournays or the disposal of their bodies sometime afterwards. The circumstantial evidence it did put into evidence did not permit the reasonable inference that, by any physical act, Kamienski in any way participated in the robbery or murders. Nor does that circumstantial evidence permit the reasonable inference that Kamienski acted with the requisite scienter, namely, that he knowingly and purposefully assisted co-defendant Marzeno in robbing and killing the DeTournays. This was particularly true after the prosecutor exonerated Kamienski of the conspiracy to rob and murder charges during closing argument.

The trial court was correct when it ruled that there simply was no evidence against Kamienski other than —at most— a circumstantial inference of his "presence" at or near the scene of the shootings and from this an additional circumstantial inference of hindrance (i.e., being an accessory after the fact by helping to get rid of the bodes), a crime with which Kamienski was not charged.[24] This is not nearly enough to lawfully sustain Kamienski's murder convictions, as the trial judge concluded—even if one gives the jury verdict and State the benefits

[24] The offense of hindering apprehension or prosecution is codifed at N.J.S.A. 2C:29-3.

to which they are entitled.[25]

The appellate decision reinstating Kamienski's murder convictions misread and overlooked the facts showing that these convictions were secured through impermissible speculation and, at most, equally competing inferences of guilt and innocence. Due to the sparse evidence adduced at trial, the Appellate Decision should have found that the jury could have only speculated as to what robbery and murder-related conduct, if any, Kamienski had engaged in and what state of mind he possessed at the time. The State encouraged such impermissible speculation

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[25] This appeal presents the atypical scenario where conflicting factual findings by both the state trial and appellate courts are, in effect, vying for deference by the federal court reviewing the *habeas* petition under the AEDPA. Ordinarily, each court would be entitled to such deference. See *Parke v. Raley* 506 U.S. 20, 36 (1993); *Sumner v. Mata*, 449 U.S. 539, 546 (1981). The question thus becomes: how to resolve a split between the two state court determinations? Under the law of this Circuit, when the factual findings of the trial and appellate courts diverge, it is the appellate court that is entitled to enhanced deference. See *Rolan v. Vaughn*, 445 F.3d 671, 679 (3d Cir. 2006); *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d 1996). However, that supremacy rule applies only where the appellate court's findings are reasonable and correct, see *Williams v. Taylor*, 529 U.S. 362, 386-387(2000) ("deference" to state court factual findings under Section 2254(d)(2) does not a require that federal courts actually defer to a state-court conclusion that is, in the independent judgment of the federal court, in error). Accordingly, if one were to determine that the appellate court's fact finding was flawed but the trial court's finding was not, then under the AEDPA it would be the trial court that is entitled to deference by the federal court—even if the federal court did not necessarily agree with the trial court's ruling. Here, the trial court's determination that there was insufficient evidence should be accorded reverse-*Jackson* deference in connection with Kamienski's *habeas* petition.

with respect to both the *actus reus* and *mens rea* elements of the murder offenses by presenting at trial only circumstantial evidence and then drawing from this a "chain of inferences," whereby inferences were drawn from other inferences rather than from evidence itself. Ironically, upon a proper review of the record a plausible conclusion to be drawn from such impermissible speculation is that of innocent conduct and intent.

Even if one were to strain in the course of impermissible speculation to find improper conduct and culpable intent, such conclusions were equal, or nearly equal, to inferences of innocent conduct and intent. Thus, the State never surmounted it obligation to prove guilt as to all elements beyond a reasonable doubt. The state Appellate Division's fact-based conclusion to the contrary was clearly error.

For these reasons, Kamienski's *habeas* petition should be granted on two separate legal grounds. Since the State failed to prove at trial each element of the murder offenses beyond a reasonable doubt his convictions by jury were obtained in violation of the Due Process Clause, as interpreted by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979); see also *In re Winship*, 397 U.S. 358, 364 (1970), and should be vacated under 28 U.S.C. § 2254(d)(1). Additionally, because the Appellate Division's reinstatement of the murder charges against

Kamienski amounted to an unreasonable determination of the facts in light of the evidence presented in the New Jersey court proceedings, as well as clearly erroneous findings as to specific facts in the record, the murder convictions should also be vacated under 28 U.S.C. §§ 2254(d)(2) and (e)(1). See also *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005); *Miller-El v. Cockrell*, 537 U.S. 322, 340 and 348 (2003) and *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

ARGUMENT

POINT ONE

KAMIENKSI'S MURDER CONVICTIONS SHOULD BE VACATED UNDER 28 U.S.C. § 2254(d)(1) BECAUSE THE EVIDENCE FAILED TO PROVE ALL THE REQUIRED *ACTUS REUS* OR *MENS REA* ELEMENTS OF THESE OFFENSES BEYOND A REASONABLE DOUBT

This Court should vacate Kamienski's murder convictions pursuant to Title 28, United States Code, Section 2254(d)(1) because the evidence was insufficient as a matter of law. Section 2254(d)(1) provides that an application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court should be granted with respect to any claim that was adjudicated on the merits in State court proceedings that "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Kamienski's conviction and the subsequent reinstatement of it fail under both prongs of this provision.

A conviction which, under the objective standard of *Jackson*, is not adequately supported by the evidence comes within the purview of Section 2254(d)(1). And, there is no doubt about the constitutional stature of the reasonable-doubt standard inherent in the Due Process Clause, it "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364.

Section 2254(d)(1) applies here because allowing Kamienski's conviction to stand would be contrary to, and be an unreasonable application of, the Due Process Clause (requiring proof beyond a reasonable doubt as to all elements), as interpreted by *Jackson* and its progeny. In short, from an objective vantage, it is clear that the State failed at trial to adequately prove Kamienski's role as an accomplice in the DeTournay homicides and the appellate court's finding to the contrary was manifestly unreasonable and contrary to the *Jackson* doctrine, even

when viewed with heightened AEDPA deference.[26]

At trial, Kamienski was charged with, and convicted of, being an accomplice to first degree murder and felony (robbery) murder offenses that were committed principally by Marzeno. To withstand the instant challenge to these convictions, the trial record therefore must establish that the State proved beyond a reasonable doubt all elements of the underlying charges against Marzeno[27] plus all elements of accomplice liability against Kamienski.

Kamienski's appeal is centered on the State's objective failure to adequately prove the elements of accomplice liability for his alleged aiding and abetting the

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[26] There is some question as to whether a *Jackson*-based challenge triggers the AEDPA's heightened level of deference or whether it is outside or to the side of the AEDPA. See *Bruce v. Terhune*, 375 F.3d 950, 958-59 (9th Cir. 2004) (O'Scannlain, J., concurring). However, under either standard Kamienski's conviction was unreasonable and contrary to established law.

[27] The statutory elements for the offenses of first degree murder and felony murder are set out in N.J.S.A. 2C:11-3a(1) (first degree murder) and 2C:11-3a(3) (felony murder) together with N.J.S.A. 2C:15-1 (robbery).

crimes of murder and felony murder committed by Marzeno. [28] The elements of aiding and abetting liability are set forth in N.J.S.A. 2C:2-6c(1)(b). [29]

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[28] Kamienski assumes for the purpose of this appeal that the State met its burden with respect to the proof of these offenses as to Marzeno. Kamienski likewise assumes that the State met its burden against him with respect to the drug conspiracy offenses—even though the trial record established Kamienski had no financial interest or ownership stake in any of the transactions at issue. Accordingly, by itself, evidence establishing Marzeno's guilt or Kamienski's role in introducing the DeTournays to Marzeno and Alongi and his supposed "brokering" of their coke deal is of no moment here and should not be given undue attention or weight.

[29] As relevant here, N.J.S.A. 2C:2-6 provides:

a. A person is guilty of an offense if it is committed by...the conduct of another person for which he is legally accountable…..

b. A person is legally accountable for the conduct of another person when:

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(3) He is an accomplice of such other person in the commission of an offense;

c. A person is an accomplice of another person in the commission of an offense if:

(1) With the purpose of promoting or facilitating the commission of the offense; he

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(b) Aids ... such other person in planning or committing it.

In particular, the State did not prove each of the elements required for accomplice liability under N.J.S.A. 2C:2-6c(1)(b). Based on the State's case against Kamienski (and in light of his acquittal on the conspiracy to commit robbery and murder charges) the evidence at trial needed (but failed) to show beyond a reasonable doubt that, at the time of the shootings: (1) Kamienski shared Marzeno's intent in robbing and killing the DeTournays; (2) Kamienski somehow physically aided Marzeno in planning or committing those offenses; and (3) Kamienski committed such physical acts knowingly and with the intent to help Marzeno accomplish the robbery and murders. N.J.S.A. 2C:2-6c(1)(b). See *State v. Norman*, 151 N.J. 5, 31-32 (1997) ("to be guilty as an accomplice to murder, the defendant must intend for the principal to engage in the killing, and the defendant must act with purpose or knowledge in promoting or facilitating the killing"); *State v. Bielkiewicz,* 267 N.J.Super. 520, 527-28 (App. Div. 1993); cf. *State v. Franklin*, 377 N.J.Super. 48, 54-56 (App. Div. 2005) (same re attempted murder).[30] As

[30] In discussing the scienter requirement for accomplice liability the Supporting Opinion relied on *State v. Bridges*, 133 N.J. 447, 456, cert. dismissed, 134 N.J. 482 (1993). However, that case deals with *Pinkerton* co-conspirator liability under N.J.S.A. 2C:2-6b(4) and not aiding and abetting liability under N.J.S.A. 2C:2-6c(1)(b). *Bridges* is inapposite here since Kamienski was acquitted of the conspiracy murder charges. Similarly, the lower court mistakenly relied on *State v. White*, 98 N.J. 122, 128-29 (1984), which not only was a conspiracy case, but also

discussed below, the State failed to meet its burden with respect to any of these three elements.[31]

In this appeal Kamienski is, in effect, asked to prove a negative (i.e., establish there no sufficient proof as to all the essential elements). He must also do this in the context of plenary review. So Kamienski's argument stated most broadly is that if the Court scours the entire trial record it will not find adequate support of the elements of accomplice liability for murder and felony murder.

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was concerned solely with Graves Act sentencing enhancement for a previously convicted felon who subsequently used a weapon during a robbery or was part of a conspiracy that did so.

[31] Additionally, Kamienski contends that the State did not refute by proof beyond a reasonable doubt the statutory affirmative defense to felony murder (which Kamienski raised by taking the stand and asserting his innocence to this charge). The elements of this affirmative defense are contained in N.J.S.A. 2C:11-3a(3)(a)-(d). To refute Kamienski's affirmative defense to felony murder under N.J.S.A. 2C:11-3a(3)(a)-(d) the State needed (but failed) to prove that Kamienski either: (a) in some way solicited, requested, commanded, importuned, caused or aided the commission of Marzeno's homicidal acts; or (b) was himself armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; or (c) had a reasonable ground to believe that either Marzeno or Alongi was armed with such a weapon, instrument, article or substance; or (d) had a reasonable ground to believe that either Marzeno or Alongi intended to engage in conduct likely to result in death or serious physical injury. As to these elements, the State did not even try to establish them. In fact, by charging Marzeno with being the lone gunman and by acknowledging to the jury that Kamienski had no foreknowledge of the robbery or murders the State in effect conceded to Kamienski the statutory affirmative defense for felony murder.

Thus, the burden is really on the State to come forward and identify the specific evidence it believes meets the beyond a reasonable doubt standard. Then, Kamienski can properly respond to the State's showing.

However, if history is any guide, the State will argue in this appeal what it has in prior proceedings, and Kamienski can address the State's earlier arguments in anticipation that they will be repeated here. The State has always focused on the "quantity" of evidence not the "quality" of it. Like a mantra it repeats the number of trial days and witnesses and so on. But, this style of reasoning is a smoke screen. What difference does it make how long the trial took, or how many witnesses testified, if in the end the evidence does not meet the reasonable doubt standard as to each essential element?

Here, for example, nearly every witness who testified had nothing to say about Kamienski and his role in the murders and robbery (as opposed to the drug conspiracy). So the pathologist testified to cause of death (4T120-151). So the criminalist found Kamienski's business card with the victims (6T155). So the ballistic expert testified to the type of weapon used (5T149-191) So the victims' family placed the victims on Kamienski's boat two weeks before the killing (4T172-184) and a telephone company employee testified about a call between Kamienski and the victims 10 days before the killing (6T91-93). So a drug courier

testified about the logistics of the drug deal, but never saw Kamienski—at least not around the time of the murders (7T123-221 and 8T7-227)? So a neighbor observed Alongi's house around the time of the murders, but never saw Kamienski there at that time (8T229-333)? For the purposes of this appeal, this kind of testimony is irrelevant.[32]

The State has combined its shot-gun, numbers approach with something

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[32] If the State had been honest on the appeal, it would have said the following with respect to the sufficiency of the evidence against Kamienski on the murder charges. Ignoring exculpatory evidence, the murder case against him comes down to the unaided, oral testimony of Duckworth, with one thing added each by the testimony of Lehman and Yurcisin, whose testimony also was not substantiated by any physical evidence. With respect to the Kamienski's possible role in the robbery/murder, Duckworth says, in sum and substance: (a) the blankets and towel look like Kamienski's, (b) the knot resembles ones he has tied, (c) he dropped her off at her girlfriend's house on the day of the murders, (d) when he took her to Alongi's she saw what could have been two bodies in the back of Alongi's boat while Alongi and Kamienski were talking on the dock, and when Alongi acted hostilely towards her Kamienski asked him to back off, (e) after that incident she went to the mall with Alongi's wife, (f) Kamienski told her later that night that Nick was killed first and Barbara did not suffer and then warned her they both had better not say anything more about it or they would end up dead, (g) Kamienski received cocaine from Marzeno after the shooting, and (h) after the police contacted him, Kamienski reached out immediately to Alongi. (10T4-84) Lehman testifies that Kamienski knew before the police did that both DeTournays had been killed, not just Nick. (14T63-64) Like Duckworth, Yurcisin says Marzeno gave large amounts of cocaine to Kamienski for personal use after the killings. (14T353-356) That is it. The rest of the trial record is either irrelevant to the instant appeal or is favorable to Kamienski.

more sinister. It repeatedly fails to distinguish among the defendants when chronicling significant events (as but just one of countless examples, the State writes that wetness on Alongi's dock "indicated that D*efendants* attempted to hose away evidence of blood." State App. Br. at 53). Is Defendants one or two or three people? We simply cannot tell. The point is the State repeatedly fudges on a simple grammatical matter: identifying the noun (the actor) associated with an act cited as evidence in the record which supposedly withstands the sufficiency challenge. For resolving the instant issue it does not matter what Marzeno or Alongi or "the Defendants" did or thought. The only questions are what did Kamienski do and what did he know and intend at the time he did those things.

Finally, the State opts for ambiguity rather than precision when discussing important facts. Consider the allegation of "presence." What does the State mean when it says Kamienski was "present" at the scene of the murder and the disposal of the bodies? Where was the scene of the murders? Alongi's house? And if so, in what part? The garage, as it insinuated at trial? Where was Kamienski at the moment of the shootings? In the very garage where Marzeno executed them, or some other place in the house or yard, farther away from the actual scene of the shootings? One cannot tell. Other important, but unanswered questions are: when and how did Kamienski get to the actual site of the murders, and so on. The State

never shows where in the record these vital questions about Kamienski's supposed "presences" at the murder scene are answered.

The same can be said about the disposal of the bodies afterward. Is the State saying Kamienski was in the boat with Alongi tossing the bodies overboard or was Kamienski present is some other, more remote sense? And, when did this occur in relation to the killings? A few days afterwards (which could be consistent with Hunt's and the pathologist's testimony)? In other words, how long in time was the State stretching its theory that a murder does not end with death, but continues through to the disposal of the body? One simply cannot tell from the State's submissions and arguments to date.

Notwithstanding these obvious flaws in the manner and substance of its argument, the appellate court was persuaded by the State's overall point about sufficiency of evidence, although it did not necessarily focus on the same specific reasons. Boiled down to its essential findings, that court found four "facts" (really drew four inferences) which it held were sufficient to reinstate Kamienski's murder convictions. They were: (1) Kamienski supplied the blankets; (2) Kamienski supplied the towel; (3) Kamienski tied the knot; and (4) Kamienski sequestered Duckworth. 254 N.J.Super. at 102-05. Indeed, in the court's own summary of its reasoning (shown below with bold type to highlight the importance of the blankets,

towel, knot and drop-off), it even dropped item (2) the towel—making its ruling hinge on just three things:

> Duckworth…testified that the **towel** and **blankets** found wrapped around the bodies were similar to ones she had seen on Kamienski's boat before the murders. The box in which the towel and blanket had been stored was moved from its usual place on the 19th. The bodies were tied with a hitch **knot** *peculiar* to the kind which Kamienski customarily made. *The **blanket** and the hitch **knot** permit an inference that Kamienski lent assistance*."

(103-104) (emphasis added).

> [Duckworth also testified that] [o]n the 19th, Kamienski drove his car to take Duckworth from his boat in Lavallette to visit her girlfriend Janet O'Donnell, in Seaside Heights to spend the day. He **dropped her off at approximately 2:30 p.m**., which was only 30 minutes before the drug deal was to be finalized. Duckworth regarded this conduct by Kamienski to be unusual because she and Kamienski were rarely apart and he never drove a car. His license was suspended.... *The jury could infer that because Kamienski and Duckworth were always together, he needed to be free of her as a potential witness to what was to transpire when the drug deal was finalized.* Kamienski was not with Duckworth between 2:30 and 7:30 or 7:45 p.m., at which time Kamienski took her to Alongi's home and told her to stay upstairs in the kitchen. *The jury could have inferred that by prearrangement, Kamienski **took steps to remove a potential eye witness from the scene of a robbery and murder** and that his conduct constituted facilitating the commission of the crimes with the required shared intent or purpose*.

(102-103 and 104-105) (emphasis added). These passages are, in a nutshell, the case against Kamienski which the Appellate Division found sufficient to establish the act and intent elements needed to sustain a conviction for murder in the first

degree.[33]

In Point Two, *infra*, the unreasonableness and/or incorrectness of each of these conclusions is discussed more fully. But, to list them succinctly here: Duckworth did not say both the blanket and towel were found on the boat or that both were stored in the teak box, as the opinion states. Her testimony was that the blankets were stored on the boat and the towel-polishing rag was stored in a teak box that was stationed on the pier where the boat was moored. (See Habeas Exhibits, Tab 6, A-248). And, she could not say with any conviction that box was went missing the night of the murders or some other time. (See Habeas Exhibits, Tab 7, A-249). The correct location of these items does have significance as to the

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[33] The opinion also says, “"Duckworth testified that... Kamienski *later* threatened her life." (104)(emphasis added). This is another example of fact finding run amok, both here and in the State’s brief, State App. Br. at 35. First, the record shows Duckworth testified that after the one comment Kamienski made to her on the night of the murders they never once discussed the matter again. Thus, he could not have “later threatened her” about revealing them. Second, in what ended up as stricken testimony Duckworth blurted out that she was afraid of Kamienski because they had gotten into a fight in an Atlantic City hotel and he threatened her. Duckworth never provided the fight’s supposed context or stated whether the threat supposedly happened *before or after* the DeTournays’ murders. The court struck the testimony and instructed the jury to disregard it. (12T187-188 and 13T3-10). This supposed threat was, in short, nothing more than an attempt by Duckworth (and later the State and then the appellate court) to improperly blacken Kamienski’s image with impermissible Fed.R.Evid..404(b)-type evidence that was never connected in any way to the charged offenses.

reasonableness of the court's inferences, as discussed, *infra*. Additionally, undisclosed FBI lab tests and notes show that the blankets did not come from Kamienski's boat; they came from the victims' car. (See Habeas Exhibits, Tab 10, A-258) A disclosed FBI report alluded to at the trial shows that the towel was not used as a polishing cloth—as Duckworth testified. Id. The knot was not "peculiar" to Kamienski (according to Duckworth's own testimony it was a commonplace hitch knot, probably the kind one makes when bundling newspapers for recycling). (See Habeas Exhibits, Tab 11, A-265) Moreover, the trial court expressly ruled the knot had absolutely no identification value against Kamienski and would not even allow the ligatures into evidence at the defense's offering. (Id. at A-255-257) The appellate court's conclusion to the contrary is clear error.

Lastly, the prosecution conceded in closing argument that Kamienski did not have foreknowledge of the robbery and murder. (See Habeas Exhibits, Tab 17, A-342-344)[34] Thus, he could not have dropped Duckworth off at her friend's house in anticipation of "what was to transpire when the drug deal was finalized"

[34] To cite one example, at the post-trial hearing, Judge Perskie said to Prosecutor Millard. You indicated to the jury, and I think you had to, and I think you were correct that there is nothing that suggests by the requisite standard that prior to the afternoon of the 19th he [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder." To which Prosecutor Millard responded, "I agree." A-343-344 (and transcript citations therein, 23T60-71).

(robbery and murder), as the appellate court wrongly surmised in a forced leap of imagination. In light of the State's own theory, it certainly would not have been reasonable for any rational juror to reach this conclusion when inferring Kamienski's knowledge and intent.

The appellate court's error in fact finding are clear. This is so without even considering the affidavits recently obtained and submitted by Kamienski in his *habeas* petition showing he and Duckworth were not together all the time as she testified (see Habeas Exhibits Tabs 14 and 15, A-330 and A-335), respectively. And it is true without considering another recent affidavit together with a credit card receipt obtained after trial (see Habeas Exhibits Tab 13 A-297), which establish unequivocally that Duckworth went to the mall on September 13, 1993, and not September 19, as she testified. In short, new evidence shows that Duckworth "confabulated" (meaning: she filled in gaps in memory by fabrication) the chronology of key events on the day and evening of the murders. In fact, she was off by approximately one week as to when she went to O'Donnell's house and

the Bamberger's mall.[35]

But leaving aside the correctness and/or reasonableness of the appellate court's findings with respect to evidence and inferences from the trial record, the point is that even if its three or four factual determinations (regarding the blankets, towel, knot and drop-off) are accepted and given full weight, they still do not satisfy the elements for accomplice liability for murder and felony murder. None of them, for instance, goes to shared intent to commit murder or even to rob. One must add speculation to inference to come up with that result.

The district court also found sufficient evidence to support the murder convictions, but its opinion was similarly flawed, which is not surprising since it essentially relied on the Appellate Division's opinion and the State's appellate brief. Here is what the Supporting Opinion stated as to the sufficiency of the evidence against Kamienski:

> As set forth in the Appellate Division's discussion…there is evidence from which a reasonable jury could have found efforts by Kamienski to facility the robbery and murder. For example, Duckworth testified

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[35] In her own mind and to the investigators, if she assumed Kamienski's guilt Duckworth had to come up with some explanation for how he was present at the murders and the disposal of the bodies and she was not—since they were always together. It appears that, five years after the events, she came up with the O'Donnell visit for the first and the Bamberger's trip for the second. Neither one can withstand scrutiny now.

> about **Kamienski's admission that he was present** at the time of the murders. She further identified that **knots** used to tie the DeTournays' bodies as *peculiar to Kamienski*. Based on this evidence, and other evidence introduced at trial, a reasonable jury could have found Kamienski to have introduced the DeTournays to Alongi and Marseno, arranged the September 19, 1983 meeting, **ensured the absence of an eye witness—Donna Duckworth--**…furnished the instrumentalities of the crime by supplying the **blankets** and a **towel**, was present during the murders and disposal of the bodies, assisted in disposing the, took steps to ensure the secrecy of the crime (including **alluding to physical harm to Duckworth** if she told anyone what she saw), and **partook in the fruits** of the robbery and murders.

Supporting Opinion at 26-27 (emphasis added) (bold used to highlight key evidence or inferences).

However, as shown throughout this memorandum the Supporting Opinion repeats a number of clear errors.[36] For one example, Duckworth did not testify that Kamienski "admitted" to being present during the murders. The conclusion he was there is nothing more than an inference the Appellate Division drew at the State's urging. For a second example, Duckworth did not testify that the knot (it was one knot on one ligature she testified to—not multiple knots on both ligatures) was "peculiar" to Kamienski. She testified that she had seen "many other people" tie

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[36] When the Supporting Opinion ultimately finds that the sufficiency test was met by the highlighted items "and other evidence introduced at trial" one is not sure what the court is referring to by the latter (particularly since it appears the court did not have the trial record before it) and, accordingly, Kamienski cannot address such unspecified findings.

the same "hitch knot" under "many other circumstances." See Habeas Exhibits, Tab 11. For a third example, the Supporting Opinion inexplicably concludes that the jury could have reasonably inferred "Kamienski…arranged the September 19, 1983 meeting" where the DeTournays were killed. This is a clearly erroneous inference that even the Appellate Division did not make. Since the Supporting Opinion does not identify the fact(s) from which it drew this conclusion, Kamienski cannot prove the court's error with razor precision. One can only say there is no such fact in the trial record and the Supporting Opinion essentially pulled this inference out of thin air. And for a final example, the Supporting Opinion implies that there were facts suggesting Kamienski threatened Duckworth to keep her mouth shut about the murders, when her actual testimony was to the effect that he told her both she and Kamienski were in danger of Marzeno.

When these errors are stripped from the district court's stated reasoning, it is even clearer that there simply was no evidence that Kamienski shared Marzeno's purposes or that Kamienski knowingly and intentionally took steps to advance Marzeno's murderous aims, as required by New Jersey's accomplice liability statute. To paraphrase the trial judge here: in the end all one is left with is an inference of presence and then multiple inferences drawn from that which establish nothing more than acts of hindrance and the intent to hinder.

Kamienski recognizes that State has a number of judicially-conceived aids to rely on in trying to withstand a sufficiency-based challenge to his convictions. [37] However, even taking full advantage of these presumptions and standard of review, the State still is unable to show that at trial it proved each of the required elements of accomplice liability for murder and felony murder beyond a reasonable doubt.

As a threshold matter, the State relied on chain of inferences which were self-referential and not on inferences drawn from facts in evidence. This *per se* called for jury speculation. See *U.S. v. Cartwright*, 359 F.3d 281, 290 -291 (3d Cir. 2004) (conviction vacated where prosecution relied on inferences drawn from a "chain of inferences," all of which "could have happened" but where countless other scenarios that did not lead to the ultimate inference of guilt could also have occurred).

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[37] The presumptions and standards on which the State is entitled to rely are set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) and its progeny, and Kamienski does not take issue with their application here. The State is entitled to prove its case by direct and/or circumstantial evidence. The State is entitled to have its evidence and the reasonably permitted inferences drawn therefrom viewed in the light most favorable to it. The State is entitled to have the jury make reasonable credibility determinations and to reasonably weigh the evidence. And ultimately, the State is entitled to have its conviction affirmed if the reviewing court determines that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Still, when juries (or state appellate courts) get it wrong, there is a role for federal courts under the AEDPA.

Even if it were allowed to use one inference to prove another, the State was still entitled to rely on such inferences only if they were "reasonable." As stated in another context: an inference is "reasonable" where it "is a logical consequence *deduced from other proven facts*" and while it need not be the only logical conclusion which a jury could reach, an inference "must be *reasoned from evidence presented*.") *Mele v. All-Star Ins. Corp.*, 453 F.Supp. 1338, 1341 (E.D.Pa. 1978) (citations omitted).

Thus, an inference not deduced from *proven facts* or reasoned from *evidence presented* would be "pure speculation." And, this Court "forbids the upholding of a conviction on the basis of such speculation." *U.S. v. Thomas*, 114 F.3d 403, 406 (3d Cir. 1997).

In this case, the State relied on "pure speculation" to prove not only what Kamienski physically did on the day of the murders, and shortly thereafter, but also to prove what he knew and intended. On this ground alone, his convictions should be vacated. See *U.S. v. DiGilio*, 538 F.2d 972, 981 (3d. Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (pure speculation as to physical element of offense not allowed); *U.S. v. Bamberger*, 456 F.2d 1119, 1135 (3d Cir. 1972) (same); *U.S. v. Thomas*, 114 F.3d at 406 (3d Cir. 1997) (pure speculation as to knowledge element of offense not allowed); *U.S. v. Wexler*, 838 F.2d 88, 91-92 (3d Cir. 1988) (same).

Even if one could characterize the State's inferences as "reasonable" and not speculative, they were on no more than equal, or near-equal, footing with competing inferences of innocence. Under well-established Supreme Court law, such a clash of equal or nearly-equal inferences necessarily creates "reasonable doubt" in the mind of the rational trier of fact. See *Yates v. Evatt*, 500 U.S. 391, 410-411 (1991) (murder conviction overturned on reasonable doubt grounds where prosecution's inference from evidence as to intent was undoubtedly permissible, but inference of innocent intent was of a similar level of certainty). Accord *U.S. v. Suggs*, 230 Fed.Appx. 175, 182, 2007 WL 1231709, **5 (3d Cir. 2007) (Holding that the "beyond a reasonable doubt" standard does not allow convictions based on one of several equally plausible possibilities; this standard requires more certainty in the minds of the jurors.)

Compare *Jackson v. Virginia*, 443 U.S. at 325(Murder conviction upheld where from the "*uncontradicted circumstances*, a rational factfinder readily could have inferred beyond a reasonable doubt that the petitioner, notwithstanding evidence that he had been drinking on the day of the killing, did have the capacity to form and had in fact formed an intent to kill the victim. The petitioner's *calculated behavior both before and after the killing* demonstrated that he was fully capable of committing premeditated murder.") (emphasis supplied).

However, if the reviewing court can only say that the ultimate fact is more likely than not, then the *Jackson v. Virginia's* beyond a reasonable doubt standard has not been met. See *Cosby v. Jones*, 682 F.2d 1373, 1382-1383 (11th Cir. 1982) (and cases cited therein) (robbery conviction was not sustainable based on inferences drawn from possession of stolen goods where evidence viewed in the light most favorable to the prosecution gave equal or nearly equal circumstantial support to competing theories of guilt and innocence); see also *U.S. v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998) (If the evidence tends to give "equal or nearly equal circumstantial support" to guilt and to innocence…reversal is required: When the evidence is essentially in balance, " 'a reasonable jury must necessarily entertain a reasonable doubt.'") (quoting *U.S. v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir.), *cert. denied*, 506 U.S. 918 (1992) (emphasis omitted)).

Here, virtually every key inference of guilt can be matched by an equally certain (or uncertain) inference of innocence. Take for example the inferences drawn from Kamienski's supposed statement to Duckworth describing the killings

("Nick went first. Barbara didn't suffer.")[38] While, if true, that might mean, "I literally saw the killings and this is what happened." It might equally mean, "This is what I was told or learned from another source." Or, it could mean, "This is what I was able to deduce from other information." Even if one were confident it meant that, "I was at the scene at the time" this could still mean, "I was in the garage where the shootings supposedly occurred," or "I was in the next room," or "I was in the back yard," or "I was in the driveway." There are too many equally plausible possibilities just on the issue of presence alone. The State needed to adduce at least one more fact (such as someone seeing Kamienski's car in Alongi's driveway—which no one ever said) before it could go to the next step and reasonably infer his presence at the murder scene with the required certitude.

Take also the example of Kamienski supposedly staging Duckworth at her friend's house on the afternoon of the day in question. If true, it might show that Kamienski did not want her to be present when Marzeno would be robbing and

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[38] It cannot be overemphasized that this is not an analysis of what Kamienski actually said, because no one knows if he indeed said anything and if so what his precise words were. Rather, the paraphrased language is what Duckworth supposedly recalled him saying five years earlier and then testifying to this recollection at trial. During his testimony, Kamienski denied he was an eyewitness to the murders. Thus, unlike the findings in *Jackson*, this was a "contradicted" factual assertion.

executing the DeTournays. It might also show that Kamienski did not want her around a large-scale drug transaction—of a type he had never been involved in before—because the authorities could easily show up and arrest everyone or because the participants wanted to minimize the number of people involved. That would be not uncommon behavior by drug dealers. Of course, the underlying factual premise (that Kamienski sequestered Duckworth) makes no sense since shortly after the murders took place he picked her up and brought her right back to Alongi's house anyway. And, comparing times when Kamienski allowed Duckworth to be there during small drug purchases for his own use (e.g., 10T12-25) with his supposedly sequestering her from the three-kilo deal is like comparing apples to oranges. It does not allow the reasonable inference that because he allowed her at the small buys but not the big transaction this meant he knew there was going to be a robbery or murder. The events are of such a different kind that they cannot be compared.[39]

Take also the fact that Kamienski supposedly told Lehman that Barbara DeTournay was dead before the authorities had discovered her body and at the time knew only about Nick DeTournay's death. This could mean Kamienski was a

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[39] The first time this improper comparison was made and argued was in the State's appellate brief, see App. Br. at 58. It was not argued by the State at trial.

participant in, or witness, to her murder. It could also mean that, after the killings, but before the authorities found either of the bodies, Kamienski learned from Alongi or Marzeno that she also had been shot; or it could mean that he put two and two together: once the cops had told him Nick had been shot and dumped in the Bay (around the time of the drug deal of which Kamienski had some knowledge or suspicion) Kamienski could have reasonably feared that Barbara had suffered the same fate; or it could even mean Kamienski saw her body at Alongi's dock sometime after Marzeno had killed her and Alongi had moved her body from the garage into his boat.[40] One can only speculate.

And finally, take the example that Marzeno gave Kamienski large quantities of cocaine for personal use after the robbery and did not charge him for it. If true, this might mean that Kamienski was in on the robbery and was getting his cut for that and/or payment for taking care of the bodies. It might also mean that

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[40] Other parts of Lehman's testimony exculpate Kamienski. Lehman makes it crystal clear that when he is buying drugs after the murders it was from Alongi and Marzeno, not Kamienski. (14T59-62) Additionally, when Alongi or Marzeno assured Lehman about a new source of potent cocaine in the wake of the killings they use pronouns indicating that the drugs were theirs alone and not Kamienski's. Lehman also testified that Alongi alluded to a "partner" (singular) "up in Newark" after the murders, meaning Marzeno, not Kamienski. (14T62) And, Lehman testified that Alongi spoke about a falling out he alone had with Marzeno over money. (14T68) Lehman's testimony, read as a whole, takes Kamienski out of the Alongi-Marzeno partnership and any shared intent or purpose with them.

Kamienski was being given "hush" cocaine. That is, Kamienski was being drawn into Marzeno's murderous acts to keep him silent. After all, Marzeno gave Duckworth and his girlfriend Jean Yurcisin coke expressly for that purpose. (10T58-59, 14T349-350) Duckworth said so herself. She described how Marzeno was concerned she could not be trusted when she alluded to the deaths of the DeTournays so he gave her cocaine and told her to shut up. Moreover, when Marzeno gave cocaine to, or withheld it from, Alongi, he made it explicitly clear that they were partners and that Alongi by himself had the lone role in getting rid of the bodies and that Alongi had screwed up his job. Thus, Alongi had a (sometimes disputed) "share" of the stolen drugs (14T68, 14T347-349, 15T34, 15T29). The evidence shows nothing like this with respect to Kamienski.

One could go on and on with these competing versions of what happened. There are simply too few solid facts from which to draw inferences with any reasonable degree of certainty.

In sum, a full and fair review of the record shows that in lieu of concrete evidence and reasonable inferences drawn therefrom the State here impermissibly relied on chains of inferences, speculation and inferences of guilt that were equal, or nearly equal, to inferences of innocence in order to secure Kamienski's convictions on the murder and felony murder charges. Because this record

demonstrates that the State did not meet its Constitution-imposed requirement to prove all elements of these offenses beyond a reasonable doubt, this Court should vacate Kamienski's murder convictions under Section 2254(d)(1).

POINT TWO

KAMIENKSI'S MURDER CONVICTIONS SHOULD BE VACATED UNDER 28 U.S.C. §§ 2254(d)(2) AND (e)(1) BECAUSE THE APPELLATE COURT'S FACT FINDING CONCLUSIONS IN REINSTATING THEM WERE UNREASONABLE AND CLEARLY ERRONEOUS

This Court should also vacate Kamienski's murder convictions pursuant to Sections 2254(d)(2) and (e)(1) because the Appellate Division opinion reinstating those charges was based on an unreasonable determination of the lower court record as well as clearly incorrect findings as to specific factual issues. [41]

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[41] This Court's opinion in *Lambert* explains its understanding of the interplay between Sections 2254(d)(2) and 2254(e)(1) as follows:

[They have an] important distinction: § 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the "evidence presented in the state-court proceeding," while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record.

Lambert v. Blackwell, 387 F.3d at 235.

A. Section 2254(d)(2)

Section 2254(d)(2) provides that an application for a writ of *habeas corpus* on behalf of a state prison should be granted for any claim adjudicated on the merits in state court which resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). See *Miller-El v. Dretke*, 545 U.S. at 265 (granting habeas relief where state court's finding of no *Batson* discrimination was clearly erroneous, unreasonable and reflected a "dismissive and strained interpretation" of the evidence); *Miller-El v. Cockrell*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in a state court and based on a factual determination will … be overturned on factual grounds [if it is] objectively unreasonable in light of the evidence presented in the state-court proceeding."); *Wiggins v. Smith*, 539 U.S. at 528 (granting habeas petition in part under Sections 2254(d)(2) and 2254(e)(1) where state court of appeals' factual conclusions about what the trial record revealed were clearly erroneous as to specific facts as well as generally wrong in its overall conclusion that there was sufficient evidence counsel provided effective representation).

See also *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), cert. denied, 544 U.S. 1063 (2005) ("The fundamental prerequisite to granting the writ

on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted."); see also *Grant v. Stickman*, 122 Fed. Appx 590, 594 (3d Cir.), cert. denied, 546 U.S. 846 (2005); *Beneshunas v. Klem*, 137 Fed. Appx. 510, 514 (3d Cir.), cert. denied, 546 U.S. 1019 (2005) (We may also grant a writ under § 2254(d)(2) if the state court decision was based on an objectively unreasonable factual determination.).

Here, the appellate court's overall factual determination that there was sufficient evidence to sustain Kamienski's murder convictions was unreasonable in light of the entire trial record. This determination was based primarily on the court's conclusion that Kamienski provided two blankets and a towel that were used to secrete the bodies, that he tied one of the knots on one of the ligatures and that he had sequestered Duckworth in advance of the murders. From these "facts" (which were really themselves inferences --after all Duckworth never actually saw Kamienski provide the blankets and towel to anyone or tie the knot) the court then drew further inferences of knowledge and intent. This entire chain of inferences

all emanated from the uncorroborated testimony of Duckworth, recalling events that occurred five years before trial when she was living a drug and alcohol-addled lifestyle, before she had a falling out with Kamienski and before she was awaiting sentencing by the Ocean County Prosecutor's Office on unrelated drug charges. This is how the court concluded that Kamienski knew in advance there would be a murder and that he intentionally "lent assistance" to it by warding off an eyewitness beforehand and by disposing of the bodies afterwards.

The trial record, however, shows that the above determinations were unreasonable. Duckworth admitted on cross-examination that the knot was not "peculiar" to Kamienski and that she had seen many other people tie it under many other circumstances. (That she was even allowed to testify about knot identification was inherently suspect: she was not a knot expert and she based her testimony from only a review of a crime scene photograph, not an examination of the knot itself; indeed, the trial court would not even allow the ligatures into evidence because they had no identification value at all.) The evidence did not show any foreknowledge of the murders on Kamienski's part, a point driven home by the prosecutor during closing and in post-trial proceedings, and in fact, it showed that Kamienski was surprised by and did not want the DeTournays harmed. An FBI report alluded to at trial showed that the towel (a common

Fieldcrest brand hand towel), see Habeas Exhibits at Tab 10, had no petroleum distillates on it, meaning no evidence of boat polish, thus contradicting Duckworth's suggestion that it was a rag used by Kamienski to polish his boat. And with respect to the blankets, the only testimony and evidence was that they looked like ones she had seen on Kamienski's boat. How were they alike? According to Duckworth, because they were similar in color (earth tones) and had "satin borders."

Focusing only on Duckworth's blanket testimony ignored the fact that Kamienski voluntarily gave the State comparison blankets from his boat for the State's analysis—which found no forensic match between them and the victim blankets.[42] That the blankets, towel and knot were of little or no value in connecting Kamienski to the murders can be gleaned again from the prosecution's closing: none of them was even mentioned once. It is therefore all the more perplexing that the appellate court relied so heavily on them in reinstating the murder charges.

The appellate court also ignored other evidence that tended to show

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[42] Although it has no evidentiary value, Kamienski submitted to a State-conduct polygraph examination during the murder investigation. It concludes that Kamienski was deceptive regarding drug-related questions, but does not say anything like that about the murders or disposal of the bodies.

Kamienski's innocence of the murder charges. This included information about Kamienski: he had no criminal history (other than for DWI); he was independently wealthy through his family-owned business and did not need to earn money from or for drugs; he was only a recreational "user" of drugs and had never been a dealer; and he was friends with the DeTournays. In short, Kamienski had no motive to commit robbery or murder and nothing in his personal history suggests he could or did commit such crimes (in sharp contrast to the defendant in *Jackson*).

The court also overlooked facts in the record the showing Kamienski had no active involvement in the drug deal after making the initial introductions. He was not present at the meeting among the DeTournays and Alongi and Marzeno when the deal was finalized (this took place in Toms River, while he was in Garfield, 5T218-220, 10T33-35). He was not present when the DeTournays showed up at Alongi's house on the day of originally scheduled hand-off. He was not identified by the DeTournays to other people as one of the men they were doing business with—even though they did generally speak (for example, to their veterinarian friend and host in New Jersey at the time, Dr. Fred Adams) about someone who fit Alongi's profile (namely, an older gentleman, who did not himself use drugs and who was an acquaintance of Barbara's ex-husband from Newark). There were no phone calls between him and the DeTournays in the days and hours leading up to

the killing as there were between them and Alongi. And, after the murders it was Marzeno, not Kamienski who absconded with the three kilos of cocaine.

Moreover, during all the conversations that Duckworth and Yurcisin heard between Marzeno and Alongi after the murders it was always made clear that they were members of a two-person partnership; that Alongi was due a share of the cocaine; and that Marzeno was angry with him because he (Alongi) had screwed up in getting rid of the bodies. (14T347-349, 15T34)

Of equal significance, the court failed to address the fact that neither the courier Jeffrey (who, from his hotel window, watched Barbara get into Alongi's car just before her murder) nor Alongi's neighbor Hunt (who, while perched in a window overlooking Alongi's house (8T229-237, 242-246, 270, 301-302), saw Nick greet Alongi in his driveway and then walk together to the back of the house only a few hours before the shootings) saw Kamienski or anything to suggest he had contact with the victims or was physically present at the Alongi's house around the time of the murders. Thus, the two people closet to being eye-witnesses to the murders gave zero testimony about Kamienski's "presence." And in terms of disposing of the bodies, Hunt's testimony was that he saw Alongi operating a small boat in the lagoon around the time of the shootings, including one time at night (8T250-251). Again, Hunt did not testify as to anything about Kamienski

being involved in these suspicious boating incidents.

Finally, since reasonability is the touchstone of the sustainability of the appellate court's findings, one needs to take a step back and look at the big picture of the State's case against Kamienski and see if it even makes any possible sense. It does not. Kamienski was said to have provided the blankets and towel used on the victims and to have tied one of the knots on the clothesline used to bind Nick DeTournay. Supposedly the blankets were stored on his boat and the towel was kept in a box stationed on the pier where the boat was moored (at a marina in Lavallette). And supposedly Kamienski was said to have been driving himself around on the day of the murder in his Avanti sports car (with a suspended license). (13T210-211)

What's wrong with this picture? Many things. First, someone other than Kamienski had provided the sleeping bag used on Nick DeTournay, the plastic clothesline used to bind both bodies and the concrete block to which they were tied before being thrown into the Bay. The most logical conclusion is that whoever supplied those items also produced the blankets and towel. Second, there was no need for Kamienski to come up with the blankets or towels. The murders, according to the State, took place at the Alongi residence with the victims' car parked in the driveway. Both the house and the car had towels and bedding.

Kamienski's boat was kept miles away, across a bridge over the Bay, up the peninsula and about ¼ mile out on a pier. If Kamienski were at Alongi's house at the time of the murders and was to supply the blankets and towel after the killings, he would have had to jump in the car, drive out of the labyrinth of small streets at the lagoon in Toms River, travel over the Bay bridge and up the peninsula a few miles to Lavallette, park in the marina lot, run out to his boat, grab two blankets from inside, stop and pluck a rag from the teak box, run back down the pier, hop in the car, fly down the road and over the bridge and pull back into Alongi's driveway and then hand off these items to Alongi. All of this would have had to occur in a very brief time (and without Hunt's notice) since the murders took place around 6:30 p.m. and Duckworth claims Kamienski drove back over the bridge and picked her up at her friend's house in Sea Side Heights, New Jersey, and return with her to Alongi's house, where she and Alongi's wife congregated in the kitchen, around or shortly after 7:00 p.m. (13T211)

It needs to be added that Duckworth testified there was nothing noteworthy about Kamienski's appearance or clothing when he picked her up: no blood or sweat or ashen look—key evidence again overlooked by the appellate court. Add to this the fact that Alongi's small, open-air skiff was used to cart the bodies out to a shallow area of the Bay. If Kamienski were involved in disposing of the bodies,

one would reasonably expect that they would have used his large, ocean-going yacht with a closed cabin to move the bodies out into the Atlantic and submerge them in water many miles deep. When you add up the big-picture facts in the case against Kamienski, they just don't add up. That should have given the appellate court pause; apparently it did not.

A final observation about the construction of the appellate opinion itself is warranted. One senses that the court was aware of the paucity of evidence supporting Kamienski's murder convictions. How else can one explain that in a section of the opinion purporting to lay out "Kamienski's Involvement" in the murderous acts and his homicidal intentions (App. Opinion at 100-106) the opinion mostly describes Kamienski's role in "brokering" the underlying drug deal and Marzeno's heinous conduct and evil intentions? That speaks volumes for what the trial record actually demonstrates: at most Kamienski was guilty of the drug conspiracy and had nothing to do with the robbery and murders.

In sum, by mischaracterizing the evidence it did rely on while ignoring evidence that contradicted it, the appellate court's overall finding as to sufficiency of the evidence was unreasonable. It therefore should be vacated under Section 2254(d)(2).

B. Section 2254(e)(1)

Not only was the Appellate Division's ultimate factual conclusion from its reading of the trial record unreasonable, but, the specific factual findings it made in reaching that conclusion were also incorrect, as demonstrated by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

The Appellate Division's many clearly erroneous factual findings can be illustrated with the following table which contrasts the appellate opinion's version of the facts with a correct reading of the trial record and/or the true facts:

What the Appellate Court found: (page citations) are from the reported opinion, 254 N.J.Super 72	What the trial record actually showed and/or what the true facts are: as shown elsewhere in this brief
Kamienski's phone number was recovered on the male victim and this permitted the **inference that they stayed in close contact about the drug deal**. (84-84, 100, 104)	There were **no calls between Kamienski and the DeTournays** for at least a week leading up to the shootings.
Kamienski **met with the DeTournays and his co-defendants over Labor Day weekend** in 1983. (86, 100)	There were **no meetings between Kamienski and the DeTournay**s (with our without his co-defendants) after this initial introduction
The female victim left a hotel at **5 p.m.** and was never seen again. (87-88)	She left at **6 p.m.**
There is an inference that Kamienski became **the broker** who for his codefendants to purchase large amounts of cocaine from the victims. (100)	Kamienski was **not the broker**. The terms of the three kilo coke deal were finalized on 9/9/83 in Toms River while Kamienski was in northern NJ handling a funeral in Garfield. The drug deal was negotiated between the victims and a Toms River business man who had ties with the female victim's

	ex-husband in Newark, NJ. Kamienski was not a Toms River businessman and did not have any ties to the ex-husband. Kamienski was not at Alongi's house on 9/18/83 when the DeTournays came by for the originally planned exchange.
Kamienski was at a meeting with his co-defendants and the victims at a **Holiday Inn** bar-restaurant on the **night of 9/18/83, at which time the co-defendant shooter was going to rob and/or kill the victims** but chose not too because the location was too public. (102)	By the morning of the 18th the deal had already been postponed until the 19th. There were **no drugs to steal** in the evening of the 18th because the drugs were hidden with the courier. Additionally, as a precaution the **male victim refused to even go into the Holiday Inn parking lot** because that was where the courier was staying. He hardly would go to a party in the bar there. No one who testified about events at the Holiday Inn bar on the night of the 18th placed the DeTournays there, including Duckworth who said she was always with Kamienski.
Kamienski dropped his girlfriend off at a friend's house approximately 2:30 p.m. on 9/19/83, which was **only 30 minutes** before the drug deal was to be finalized. (102) This was suspicious because they were together every hour of every day. (85), (103), (104-105)	On the morning of the 19th the drug exchange had been postponed to 6 p.m. The drop off would have been **3 1/2 hours** before the scheduled exchange not 30 minutes. No one accounts for Kamienski's whereabouts during those 3 ½ hours. Neither his car or boat were seen at Alongi's house. The friend testified at trial and denied that Kamienski's girlfriend was at her house on 9/19/93.

	New evidence shows he dropped the girlfriend off at this friend's house about one week before the murders.
Kamienski had permitted Duckworth to be present at earlier drug purchases and her purposeful exclusion from this one permitted the inference that Kamienski did not want her to be an eyewitness to something more than a drug deal. (103)	Kamienski had never participated in a multi-kilo drug deal. The **earlier transactions which Duckworth observed were for small quantities for personal use**. There was no evidence of any comparable drug deal that could be used to contrast with this one and thereby possibly infer Kamienski's intent.
After seeing what looked like bodies in the back of co-defendant Alongi's boat, Kamienski's girlfriend and Alongi's girlfriend were **sent to the mall to purchase liquor**. (103)	The girlfriends went to the mall on their own initiative as a result of a conversation they had before the supposed sighting of the bodies. That conversation concerned buying linen at Bamberger's. New evidence, a **Bamberger's receipt discovered after the trial, shows the trip actually occurred six days before the homicides, not the night of**.
The **blankets found with the victims came from a teak box** that Kamienski also used to store the towel. (103)	The victim blankets were supposedly stored inside Kamienski's **boat**.
The teak box was moved from its regular place precisely on the **date of the killings**. (103)	The witness who testified about this **could not recall when** the box went missing.
The knot on the male victim's ligature was **"peculiar"** to Kamienski. (103)	The knot was **commonplace**. A forensic knot analyst states that this testimony was not credible and that the knot at issue was a common overhand knot, not identified to any particular person and one that could even be fashioned by birds or apes.
The victims' bodies were wrapped in	Recently obtained FBI lab notes show

blankets and one was found with a towel. (84) Duckworth said they resembled blankets Kamienski kept on his boat and a towel [used by Kamienski to polish the boat]. (103)	that **no Kamienski hairs were found on the blankets**, only the victims' hairs were. FBI test report shows that there was **no polish on the towel**. The victims' car, which they drove up from Florida and was parked at Alongi's house was laden with towels and blankets. Kamienski was never linked to the sleeping bag, cinder block, or plastic clothesline used as the ligatures. Kamienski's boat and the teak box with his rags were located miles away from Alongi's house on the other side of the Bay.
Kamienski had a lot of telephone contact with Alongi **after** the homicides. (104)	There were no records of calls between Kamienski and Alongi leading up to the murders.
Kamienski acted with **premeditation** by sequestering his girlfriend at a friend's house so that she would not be a witness to the murders. (103, 105)	As the trial prosecutor made clear during closing argument and post-trial hearings, no evidence showed Kamienski had **any prior knowledge** of the planned robbery or murders and did not learn of them until they happened or thereafter.
After he learned that she saw the victim's bodies the bodies in co-defendant Alongi's boat, **Kamienski threatened his girlfriend's life**. (104)	Testimony about an unspecified threat was **stricken from the record with a curative instruction to completely disregard** it. There was nothing in the record as to whether the alleged threat occurred before or after the killings or the context in which it was made.

Of course, the most blatant example of a clear mistake of material fact in the above table was the appellate court's finding that the knot on one of the ligatures was "peculiar" to Kamienski. This could not have been a more incorrect conclusion. The knot was "common" not "peculiar." This error had a monumental effect on the court's overall finding of sufficiency of evidence since it is one of the three legs that the appellate opinion rests on. The remaining two are the blankets (with no Kamienski hairs) and the inferred sequestration of Duckworth (which even the prosecutor at trial expressly disavowed).

Thus, as shown by the table above, the process by which the appellate conducted its fact finding on the sufficiency of evidence issue was so flawed that reversal of its conclusion is warranted under Sections 2254(d)(2) and (e)(1). Therefore, his petition for habeas relief should be granted under these provisions.

CONCLUSION

For the above reasons, the district court's denial of Kamienski's *habeas* petition should be reversed and his underlying state convictions as to the murder charges against him should be vacated.

Dated: New York, New York
October 15, 2007

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-COMBINED CERTIFICATIONS

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

Bar Membership
(Pursuant to Third Circuit Local Rule 46.1(e))

I am a member in good standing of the bar of this Court.

Word Count
(Pursuant to FRAP 32(a)(7)(C))

Appellant's Brief does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains more than 14,000, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), (according to MSWord 2003 word count tool) and he is seeking by motion leave to file an over-sized brief, and further

Appellant's Brief complies with the typeface requirements of LAR 32.1(c) and Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using MSWord in 14-point Times New Roman style font.

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

I filed ten hard copies of the Brief for Appellant Paul Kamienski (blue cover), four copies of the accompanying Appendix (white cover) and four copies of the accompanying motion to file an over-sized brief out of time (white cover)

with the Clerk of the United States Court of Appeals for the Third Circuit on the date below by causing them to be deposited with Federal Express for overnight delivery addressed to: Clerk of the Court, United States Court of Appeals for the Third Circuit, Thurgood Marshall United States Court of Appeals for the Third Circuit, Attn: Tina Koperna, Case Mgr, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106-1790, and further

I served two hard copies of the Brief for Appellant Paul Kamienski, one copy of the accompanying Appendix and one copy of the accompanying motion to file an over-sized brief on the Appellees on the date below by causing them to be deposited with Federal Express for overnight delivery addressed to: Samuel J. Marzarella, Esq., Office of Ocean County Prosecutor, Ocean County, 119 Hooper Avenue, P.O. Box 2191, Toms River, NJ 08753, and further

I transmitted an identical version of the Brief for Appellant Paul Kamienski in PDF format to Samuel J. Marzarella, Esq., Office of Ocean County Prosecutor, Ocean County as an attachment to an e-mail addressed and transmitted to <smarzarella@co.ocean.nj.us > on October 15, 2007.

Identical Compliance Brief
(Pursuant to Third Circuit Local Rule)

I submitted an identical PDF version of the Brief for Appellant Paul Kamienski as an attachment to an e-mail addressed and transmitted to <electronic_briefs@ca3.uscourts.gov> on October 15, 2007.

Virus Check

(Pursuant to Third Circuit Local Rule)

I have scanned for viruses the PDF version of Appellant's Brief that was submitted in this case as an e-mail attachment addressed and transmitted to <electronic_briefs@ca3.uscourts.gov> and no viruses were detected. I used the current version McAfee for AOL users to check for viruses.

Dated: New York, New York
October 16, 2007

/S_____
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