UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT
4444444444444444444
No. 06-4536
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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)
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(Revised) REPLY BRIEF FOR APPELLANT PAUL KAMIENSKI

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

COUNSEL FOR APPELLANT PAUL KAMIENSKI

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER

OVERVIEW

This memorandum replies to Brief for Appellees (the "State's Brief" or "S. Br."). It first demonstrates how the State's Brief distorts the trial record.[1] It then shows that the evidence adduced at trial was insufficient as a matter of law.

Kamienski's argument organizes the evidence against him into three timeframes. First, because he was acquitted of the murder conspiracy, events occurring *before* the killings are irrelevant. Second, there is no evidence of his involvement *during* the execution murders; and, one cannot elongate the crime under the "immediate flight" doctrine. Finally, the State cannot rely exclusively on Kamienski's conduct *after* the murders because there must be at least some evidence he knowingly and intentionally assisted his codefendants in either planning or committing the murders.

ARGUMENT

POINT ONE

THE STATE'S BRIEF DISTORTS THE RECORD

In at least 106 instances the State misleadingly cites to the trial record. These are grouped into eleven categories below (showing in the parentheses the

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[1] The Court has accepted the trial record on a CD consisting of 4773 pages, bate-stamped from SA0001 to SA4773.

number of instances in which each error is repeated).

1. Inconsistent Accusation Kamienski "Premeditated" about Murder (4)

The State says Kamienski "premeditated" about the murders. *See e.g.,* S. Br. at 57 ("Thus, Kamienski premeditated about the murders and executed part of the murderous plan through the removal of a possible witness, Duckworth, before the murders occurred on the 19th.") *See also* S. Br. at 52, 56-57, 77.

In fact, the record establishes Kamienski had no foreknowledge of the murders and therefore did not "premeditate" about them. Prosecutor Millard conceded this at trial and in post-trial motions. *See* SA4325:15-22, 4326:14-16 & 4345:17-25; 4611:4-7, 4612:13-20 (especially) (agreeing there was insufficient evidence Kamienski knew of, or agreed to assist in, either the robbery or murders before their occurrence), 4619:10-17 & 4625-4631.

Moreover, the jury found Kamienski not guilty of conspiracy to commit murder. One cannot reconcile this verdict with the State's new assertion that Kamienski not only "premeditated" about the murders but also knowingly helped "execute" his codefendants' murderous plan. It follows that the event cited by the State, above, requires careful scrutiny. That has to do with Kamienski allegedly dropping Duckworth off at her friend's (O'Donnell's) house hours before the killings. *See e.g.,* S. Br. at 57. O'Donnell denied this. SA3574. So did

Kamienski. SA3687:17-3686:2. Either the jury disbelieved Duckworth or it did not believe dropping her off at O'Donnell's was adequate proof Kamienski acted with foreknowledge of the killings and a shared intent to commit first degree murder.

2. Incomplete Knot Identification Testimony (4)

The State argues one can infer Kamienski tied the knots on the DeTournays' ligatures. *See e.g.*, S. Br. at 4 n. 1 ("The rope that secured the blankets was tied in a peculiar "hitch" knot used by Kamienski to secure his boat.") *See also* S. Br. at 35, 63-64, 76.

It is true that during leading questions on direct examination Duckworth testified she could somehow match the common "hitch" knots in the photo with knots she had seen Kamienski tie on his boat. *See* SA2051:19-2055:17.

However, on cross-examination Duckworth admitted the knots were not "peculiar" to Kamienski. She testified they were common place -- having seen them tied by many other people on "many other circumstances." SA2518:5-12. Moreover, the trial judge refused to even allow the ligatures into evidence on the grounds that the knots had no identification value. SA4044:17-20, SA4045:13-14.

3. False Assertion an "Eyewitness" Saw Kamienski Conceal the Victims' Bodies (5)

The State claims Kamienski was observed by an "eye witness" helping to

conceal the DeTournays' bodies. *See e.g.*, S. Br. at 79 ("Thus, the robbery was still in progress when Alongi and Kamienski were seen by Duckworth at the crime scene concealing the bodies and hosing down the area.") *See also* S. Br. at 50, 52, 65, 76.

Duckworth did not say this. Her entire testimony on this topic is found on three pages. *See* SA2029-2031. There, she describes what she observed Kamienski doing in Alongi's back yard following the murders. She saw him "standing" by the dock. SA2029:3. She saw him "looking" towards Alongi's boat. SA2030:1. And, she heard him "saying" to Alongi "She's all right." SA2023:21-22. That is it. Not even the observation of anything permitting the inference Kamienski had moved the bodies or hosed away blood (such as heavy breathing or perspiration, blood on Kamienski's person or clothes, or water on his pants or shoes).

4. Miscasting this as an "Immediate Flight" Case (4)

The State says Kamienski was observed helping to conceal the DeTournays' bodies during his "immediate flight" from the murders and robbery. *See e.g.*, S. Br. at 77-78 ("The inference is clear – Duckworth will conceal what she saw so that Defendants –still in the course of their crime – may make their immediate flight therefrom.") *See also* S. Br. at 78, 79, 81.

There simply is no evidence Kamienski, or any one else, fled from Alongi's house after the murders, or that Kamienski, or any one else, asportated the stolen cocaine to a safe place. All the evidence demonstrates the opposite. Immediately following the murders, Kamienski picked up Duckworth miles away and drove her back to Alongi's house, SA2028, making this, ironically, "an immediately return to the scene of the crime" case not an "immediate flight" one. Thereafter, Marzeno, Alongi and his wife, Kamienski, and Duckworth stayed at Alongi's house for many hours having drinks. SA2028-2033. No one fled. Indeed, Duckworth testified that, despite her urging they leave Alongi's house sooner, they stayed on because "Paul did not want to leave right away." SA2033:19-23. This is "anti-immediate flight" evidence.

Additionally, there is no evidence that anyone committed a killing or inflicted bodily harm on a victim while fleeing from Alongi's house (to stash the stolen cocaine) or of Kamienski aiding anyone in such immediate flight for the purpose of asportating the stolen drugs.

5. Erroneously Placing Kamienski at a "Failed Deal" and Stating He Lured the Victims to Their Deaths (13)

The State claims Kamienski participated in an aborted drug exchange with the DeTournays during the evening of September 18, 1983 (which it calls the "failed deal" or "failed meeting") and that while he was at this meeting he helped

lure the DeTournays to a deathtrap the next day. *See e.g.*, S. Br. at 65 ("Kamienski was present at the September 18th failed meeting in which there was a gun but no money ever existed, and he no doubt heard the lies told to [Nick] DeTournay that the parties were merely having trouble getting the money together, thereby luring DeTournay into the belief that the parties fully intended to complete the deal they had arranged. Kamienski took part in the subsequent change in plans.") *See also* S. Br. at 8-9 n. 2, 31, 36, 39, 51, 53, 54, 56, 57-58, 58, 61, 74.

The problem with this attempt to connect Kamienski to a "failed deal" on the 18th is that the record clearly establishes two things which eviscerate it. First, not only is there a lack of evidence Kamienski met with the DeTournays during the evening of the 18th, Duckworth's testimony affirmatively establishes Kamienski had no contact with them at any time that day. According to Duckworth, she and Kamienski spent the day alone on his boat, around happy hour they had cocktails at the Holiday Inn (which was unremarkable and the DeTournays were not there), and they were back alone on Kamienski's boat by early evening. *See* SA 2024-2026, 2144, 2147-2148, 2170, 2178, 2179. Duckworth "did not see the DeTournays [because] they were not [at the Holiday Inn]," as prosecutor Millard told the jury. SA4315:22-25. The DeTournays' drug courier (Jeffrey) also testified that Nick DeTournay "never came onto the grounds of the Holiday Inn" at any

time on the 18th. E.g., SA1566:20-21.

Duckworth's testimony about being at the Holiday Inn during happy hour on the 18th was contested. She testified that fellow prosecution witness Lehman was also there. SA2036:5-8. Lehman denied this. SA2908, 2869. Kamienski also denied being there on the 18th. SA3679:22-25. And, Jeffrey testified he was in the bar at the Holiday Inn at the time and could not recall seeing anyone there other than the bartender. SA1577:21-1578:15, SA1648:13-1649:8. Either the jury disbelieved Duckworth's testimony about the Holiday Inn happy hour gathering or they did not give it the meaning the State tries to here. Otherwise, they could not have acquitted Kamienski of the murder conspiracy charge.

The record further establishes that: (1) the key conversation on which the State focuses (the buyers claiming they were "having trouble getting the money together") was between the DeTournays and Alongi (not Kamienski), *see* SA1650:24-1651:16; (2) it took place at 11 o'clock in the morning of the 18th (not the early evening), *see* SA1470-1471, 1566-1567, 1645-1646; (3) the participants met at Alongi's house (not the Holiday Inn), *see* SA3397-3398, 3424-3426, 3435-3437; and (4) most importantly, this meeting took place when Kamienski was on his boat alone with Duckworth. *See* SA2144.

This chronology was accurately summarized by prosecutor Millard during

closing argument and it is worth comparing what he said there to what the State says now. *See* SA4314-4316; see also SA3458:20-22. (The DeTournays met with Alongi at his house around 11 a.m. on September 18th, at which time the deal was rescheduled because Alongi was having trouble getting the money together.) This description of the "failed deal" could not be more different from the one contained in the State's Brief.

By all accounts (except the State's Brief) there was no "failed deal" with the DeTournays at the Holiday Inn during the evening of the 18th--at least not while Kamienski was present.

6. Improper Suggestions of "Suspicious" Behavior (3)

The State insinuates Kamienski engaged in suspicious behavior following the murders and thereby implies his involvement in them. First, it claims Barbara's body was found near the marina where Kamienski moored his boat thereby suggesting he dumped her body there. *See* S. Br. at 11 ("Barbara DeTournay's body was recovered in approximately three to four feet of water…in Barnegat Bay off Marsh Elder Island, approximately one-half mile from Ocean Beach Marine in Lavallette, where Defendant Kamienski kept his boat.").

This misstates the record. Barbara's body was found washed ashore on Sedge Island, not in three to four feet of water off Marsh Elder Island. SA0680-81,

0764-0766. The State's criminalist testified her body apparently broke free of a cinderblock and drifted in the currents for six days before its discovery. SA0766. Additionally, there was no evidence Kamienski's boat was used to transport either body. Thus, there is no meaningful link between the place where Barbara DeTournay's body was recovered and Kamienski's marina.

Second, the State creates a false air of mystery surrounding the loss of a teak box Kamienski kept on his pier. *See* S. Br. at 33 ("Duckworth and Kamienski returned to the Ocean Beach Marina to Kamienski's boat…. She explained that a teak box was kept on the catwalk to the boat in which cleaning rags and other supplies were kept. It was used as a step. On this night [September 19, 1983], the teak box was missing ….").

This representation distorts the record. On cross examination Duckworth recanted her ability to recall whether the box went missing on September 19, 1983, as opposed to some other time. SA2339, 2480. She admitted Kamienski had been searching for the lost box after September 20, 1983, SA2488-2489, which normally was a permanent, makeshift step stool on the pier where Kamienski moored his boat. SA2036. And, there was no evidence of any connection between the teak box and the DeTournays' murders.

Third, the State casts false suspicion on Kamienski for having his boat hauled from the water for repairs. *See* S. Br. at 52 ("Kamienski removed his boat from the water during the week after the murders.").

Once again the State misrepresents the record. Duckworth testified that the boat was pulled from the water to repair a broken windshield and this was pursuant to a long-standing plan. SA2037-2038, 2487. During closing, the prosecution attempted to use the same innuendo to establish consciousness of guilt, suggesting Kamienski hauled the boat to avoid detection. SA4327-4328. However, the judge sustained an objection to these remarks and ordered the jury to disregard them because "there is no testimony about any of that." SA4328. Even though there is "no testimony about any of that," the State continues to invoke the same false innuendos 20 years later.

7. Wrongful Accusation Kamienski Threatened Duckworth's Life (3)

The State claims Kamienski, acting in concert with Alongi, threatened Duckworth to keep her quiet. *See e.g.*, S. Br. at 34 ("Between September 19, 1983 and September 24, 1983, both Alongi and Kamienski threatened Duckworth's life.") *See also* S. Br. at 62-63, 65.

This assertion is false in two respects. First, there is no evidence in the record of Kamienski acting in concert with Alongi to silence Duckworth. Second,

there is no evidence that Kamienski acting on his own ever threatened her to be quiet about the murders. In fact, Duckworth testified that, on the night of the killings, Kamienski told her if they *both* did not keep their mouths shut they *both* would be harmed and he would be helpless to stop it. SA2034. This was the only time she and Kamienski ever discussed the murders. SA2485. Duckworth further testified Kamienski never threatened her or tried influence her statements to the authorities. *Id*. Prosecutor Millard even acknowledged in closing Kamienski never threatened Duckworth. SA4340:25-4341:3. The State is clearly wrong when it says now that Kamienski threatened Duckworth repeatedly "[b]etween September 19, 1983 and September 24, 1983."

8. False Suggestions Kamienski Participated in Conversations (4)

The State implies Kamienski participated in significant conversations about the murders. *See e.g.,* S. Br. at 33-34 ("Around October 1, 1983, there was a meeting at [which], Kamienski, Alongi and Sullivan, Duckworth and Jeannie Yurcisin, Defendant Marsieno's[2] companion, were present….There was a conversation at the table in which Marsieno said that the bodies were found.

[2] The correct spelling is Marzeno. SA1188-1189.

Duckworth heard Marsieno state, 'They were like scared puppies. . .it was easy.' Duckworth left the table with Yurcisin to ingest cocaine on Marsieno's instructions because Duckworth was 'getting nervous.' When she returned Marsieno asked her whether the cocaine was good enough for her. She told him not at the price it cost. Marsieno said 'they were nobodies, and they weren't really my [Duckworth's] friends.' Marsieno said that 'I should straighten up or I could end up like them. . . .' He then grabbed her jaw saying she should wise up. He told her he thought she was a stronger kid than that.") *See also* S. Br. at 30 (regarding an imminent coke deal), 36-37 (regarding an argument between Alongi and Marzeno over withholding Alongi's share because he had screwed up in getting rid of the bodies), 62 (same).

However, an examination of the record fails to show Kamienski participated in any of these conversations, was within earshot of them when they occurred, or was ever made aware of their substance by any other person. Indeed, at least once the record affirmatively establishes Kamienski was not present when the key conversation took place. *See* SA2045:18-2046:25 (Duckworth testified Kamienski was "in the bathroom" during the reported conversation with Marzeno.)

9. Mischaracterizing Kamienski as the Deal "Broker" (3)

The State calls Kamienski was the "broker" of the drug deal between the DeTournays and his codefendants. *See e.g.*, S. Br. at 65 ("As for Kamienski, he brokered this 'deal' which was never a deal at all. He conceived of the deal among the parties. He introduced the parties and vouched for the parties.") *See also* S. Br. at 73, 76.

According to the record, Kamienski did not initiate anything. Nick DeTournay approached Kamienski on September 3, 1983 and asked if he knew anyone who might be interested in buying unspecified quantities of cocaine. SA2004-2007, 2120-2121, and 2125-2126. As a result of DeTournay's inquiry Kamienski introduced him to Alongi on September 5, 1983 at a Labor Day barbecue and, at that time, "vouched" for each side. SA2010-2014. That was the full scope of Kamienski's involvement in the deal, according to all the evidence at trial.

Additionally, there is no evidence that Kamienski was a "broker" in the commonly understood sense that he was to receive any money from the deal. All the evidence at trial was to the effect that Kamienski was only a recreational user of drugs and not a dealer. SA2490-2491.

Lastly, there is no evidence Kamienski ever knew the scope of the deal, that is, the amount of cocaine or money involved. The record reflects that the deal was conceived during late afternoon on September 9, 1983, at a meeting between Kamienski's codefendants and the DeTournays in Toms River. SA2018-2019. At that meeting the DeTournays learned *for the first time* they would be dealing in kilo quantities and not mere ounces. They called this newly discovered information, the "joke of the day." See SA1070-1076; and 1145-1146, 1149-1152. All this happened while Kamienski was miles away in Garfield.

The record also reflects a telephone conversation between Kamienski and Nick DeTournay on September 9, 1983 around 2 p.m. in which Kamienski denies having a drug scale and angrily tells DeTournay to stay away from his boat. SA2020-2921. This shows the lack of Kamienski's role in the drug conspiracy.

Additionally, according to the record Kamienski had a beeper and Nick DeTournay had the number for it in his wallet. S*ee* S. Br. at 12-13. However, the State's telephone record evidence for the relevant period (S-7) showed no instances when DeTournay beeped Kamienski. S*ee* S. Br. at 10-11. The lack of such contact undercuts the State's characterization of Kamienski as the essential broker in this drug deal. The evidence at trial showed Kamienski had no involvement in the drug deal except at its vague inception.

10. Miscellaneous Record Errors and Omissions (8)

The State repeatedly distorts miscellaneous parts of the record to misleadingly suggest a nexus between Kamienski and the murders where there is none. Examples are briefly detailed below, with regular text showing what the State claims the record says and italicized text showing what it actually says.

a. …Thompson described the body of Henry DeTournay as being wrapped in a blue sleeping bag…. When the blue sleeping bag was removed, a rust colored blanket with a satin border or trim was next encountered and removed. S. Br. at 3.

The sleeping bag was wrapped inside blanket; not other way around. SA0631. This difference relates to Kamienski's Brady claim because undisclosed lab notes revealed one of Nick DeTournay's pubic hairs on the blanket, which indicated that the blanket most likely was his and not Kamienski's since Nick was fully clothed and sealed inside a mummy style sleeping bag.

b. The blankets …., with their specific patterns, were identified at trial as similar to those kept on Kamienski's boat, S. Br. at 4 n.1.

No witness described any "specific patterns" on the victim blankets; they were simply described as "rust colored" and so non-descript their manufacturer could not even be identified. SA0627, 6330, 0741-0742. Even Duckworth said she was unsure if they were Kamienski's. SA2058-2059, 2509-2510. She could only say was the blankets used on Kamienski's boat were brown and had satin trim borders. SA2057.

c. [9mm parabellum] semi-automatics…may also be used with silencers. S. Br. at 9.

The testimony was a silencer had not been used. SA1023-1024. The State cannot explain why no one heard 10 gun shots at 6 p.m. on a Monday night in late September in a fairly dense residential neighborhood

d. Kamienski used blankets and towels which were similar to those used on his boat. S. Br. at 52.

There was only one towel with the bodies, not multiple ones. SA0630. If there had been multiple towels from Kamienski's boat Duckworth testimony would have been more credible.

e. [Duckworth] was whisked away to the mall by … Sullivan when she inadvertently discovered the bodies. S. Br. at 57.

Duckworth testified they went to the mall after deciding to buy an engagement gift for a friend. SA2031.

f. [S-7, a the chart of phone activity]…permitted the following inference[]….On September 9, 1983, Kamienski called the DeTournays at the Boutsikaris residence about their meeting in Toms River. The DeTournays met with Kamienski in Toms River because [Nick] DeTournay was actually on Kamienski's boat later that day. S. Br. at 60.

According to the record, there was a one minute call from Kamienski's Garfield apartment to Barbara's parent's house in Newark around 10:30 p.m. SA1212. Barbara's sister Christine Longo says Nick and Barbara were not there at that time, having left for Toms River during the day of September 9 and not returning to Newark for two or three days. SA0887. No inference can be drawn as to the substance of this call.

There also is no evidence Kamienski met with the DeTournays in Toms River during the day of September 9, 1983. The testimony of Fred and Katherine Adams (who recalled the DeTournays talking about meeting some friends of Barbara's ex-husband that afternoon, SA1072, 1152), as well as that of Duckworth (who said she and Kamienski were at a funeral in Garfield during the day and evening of September 9, 1983, SA2018-2021) establish there was no meeting between Kamienski and the DeTournays in Toms River on that date.

g. Kamienski, like Alongi, shared in the cocaine getting ounces at a time in which no money was exchanged. S. Br. at 65.

This omits there was also testimony that Duckworth and Yurcisin got free

cocaine from Marzeno after the murders. E.g., SA2045-2046, 2977-2978. Moreover, the State's implication ignores all testimony to the effect that Marzeno and Alongi had a two person partnership; that they were the sole claimants to shares of the cocaine; and that their partnership soured after Marzeno withheld part of Alongi's share because Marzeno said Alongi had made a mistake in not properly weighing the bodies down. See SA2690-2696; SA2976-2977.

h. Kamienski....participated in the commission of the robbery. S. Br. at 75.

The State proffers no record citation for this assertion. Indeed, there is none to be had. Kamienski's only alleged role was in trying to conceal the bodies. See SA4326:7-13. (Prosecutor's closing: "And I submit to you that what occurred [was]… Kamienski assisted Marzeno and Alongi in getting rid of the bodies.").

11. Repeated Misuse of "Defendants" (55)

The State repeatedly prefaces its record citations with the word "defendants" (or "they" or "their") without specifying which defendant or defendants it means to include. *See* S. Br. at 8-9 n. 2, 17 n. 5, 20-21, 21, 50, 52, 53, 54, 55, 55-56, 57, 57-58, 59, 60, 61, 62, 64-65, 71, 74, 76, 77 (some pages have multiple "defendants" references).

In failing to distinguish among the defendants, the State violates a fundamental precept of American criminal jurisprudence: namely, that guilt is individual, not collective. *See U.S. v. DiLapi*, 651 F.2d 140, 146 (2d Cir. 1981)("[T]he fundamental precept that guilt is individual must be observed in the deliberative process. For this reason, juries in multi-defendant trials are

instructed…to give separate and individual consideration to the case against each defendant.").

Moreover, in each of the 55 instances cited above, the State implicitly includes Kamienski with the "defendants," when, in fact, the record shows he should be excluded. By way of illustration, the State says, "Defendants assured … Lehman that he could have 'kilo quality coke' for $1,000 less per ounce than he was presently paying on credit." S. Br. at 53. However, there is nothing in the record about Kamienski participating in any such conversation with Lehman. As another example, the State says, "This was probably because Defendants were friends with Barbara's ex-husband, Bill Rispoli." S. Br. at 55. The record is replete with references to the DeTournays describing their counterparts on the drug deal as being "friends with Barbara's ex-husband." This was important identification testimony since the DeTournays never used their actual names. But, "friends with Barbara's ex-husband" refers only to Alongi and possibly Marzeno (going back to their hoodlum days in Newark)--not Kamienski. There is absolutely no evidence Kamienski had ever met Bill Rispoli.

Likewise, the State's Brief says, "The [murder] site was no doubt suggested by defendants." S. Br. at 56. But, the evidence established Kamienski had had no contact with the DeTournays for more than nine days before their deaths, and the

selection of the murder site occurred well after his last communication with them. *See also* S. Br. at 58 ("Thus, given the care of the DeTournays to isolate the Defendants from the cocaine, defendants, as part of their plan, lured the DeTournays to an isolated place where the DeTournays had to bring the cocaine with them.) (same). The foregoing are just a few of the many instances where the State erroneously lumps Kamienski in with his codefendants.

In sum, the State's reliance on a falsely portrayed record underscores a larger point: if there were sufficient evidence to sustain Kamienski's conviction, there would be no need for fabrication. The foregoing citations of 106 misleading trial record references belie the fact there was insufficient proof of Kamienski's guilt. The trial judge had it right when he entered a judgment of acquittal in favor of Kamienski on the murder charges and dismissed them on this ground.

POINT TWO

THE JURY AND STATE APPELLATE COURT COULD NOT HAVE LAWFULLY FOUND THE EVIDENCE AGAINST KAMIENSKI WAS SUFFICIENT

To be liable as an "accomplice," a person must perform some act with the requisite state of mind sometime prior to or during the commission of the offense. See N.J.S.A. 2C:2-6(3)(c)(1)(b) (Accomplice liability, as relevant here, applies if, "[w]ith the purpose of promoting or facilitating the commission of the offense;

[the defendant]...[a]ids ... [an]other person in planning or committing it." Thus, by its express terms the accomplice liability statute is limited to conduct occurring either “in planning” or “in committing” the offense; not “after” the offense has been committed.

See also 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. Ingram*, 2007 WL 2188699, 8 (App. Div., Aug. 1, 2007) (“[t]o render both defendants [the principal and the accomplice] guilty it is essential that they shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act.”); *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). *See also* Appendix Vol. I, tab Q, App. Op. at 86-87 (state appellate court approved such a charge here).

In the instant case, the State cannot show Kamienski aided Marzeno during either the “planning” or “execution” phases --let alone that he performed any act with the shared purpose of promoting or facilitating the commission of first degree murder, felony murder or robbery.

First, the State is precluded from relying on evidence of pre-offense conduct because of the jury's acquittal on the murder conspiracy charge and because of the State's repeated concessions at trial that there was no such evidence. Additionally, the only pre-murder act the State cites (dropping off Duckworth at her friend's house) was both inherently innocent and vigorously contested. It is too innocuous and ambiguous, by itself, to allow the inference it was done while sharing Marzeno's intent to commit first degree murder.

Second, there is no evidence suggesting Kamienski had any hand in the actual execution of the murders and robbery. And, there is no basis for extending the duration of these crimes under the "immediate flight" doctrine.

Third, any acts committed by Kamienski after the full completion of the murders and robbery, by themselves, give rise at most only to "hindering" liability, not accomplice liability. Nearly all of the evidence on which the State relies falls into this post-offense category.

A. The State is precluded from relying on pre-offense conduct; and even if it were not, the only event left after a fair reading of the record is inherently innocent.

While ordinarily a fact finder can consider pre-offense conduct in assessing accomplice liability, there are two reasons the State cannot rely on such evidence here. First, the jury acquitted Kamienski of the murder conspiracy charge,

meaning they found insufficient evidence he had knowingly agreed with his codefendants to participate in, or further, the murders and robbery.

One cannot reconcile the verdict of not guilty on the conspiracy charge with a finding of pre-offense conduct and scienter sufficient to sustain a guilty verdict for accomplice liability. The State conceded this during argument on post-trial motions. *See* SA4611:16-4612:18 (prosecution agreeing: "There is no way that Kamienski could be responsible for the murder on the basis of anything that happened before they all got to the Alongi house on the afternoon of the 19th.") From this premise, the State further agreed the only way Kamienski could be found liable as an accomplice was based on evidence of "what happened at the scene." SA4612:21-25.

In addition to the jury's acquittal on the conspiracy charge, the State repeatedly acknowledged during trial and post-trial motions that there was no evidence Kamienski had any foreknowledge of his codefendants' plan to kill the DeTournays and steal their cocaine. Under the principle of judicial estoppel, the State is therefore precluded from arguing in this forum the opposite of what it had argued during closing and at the post-trial motion hearing. *See New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) (a party is not allowed to gain an advantage by proceeding on one theory and then seek an inconsistent advantage by pursuing

an incompatible theory); *United States v. Lehman*, 756 F.2d 725, 728 (9th Cir.), cert. denied, 474 U.S. 994 (1985). The State is simply and impermissibly "play[ing] fast and loose with the courts." *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). This is not an instance of a difference in emphasis or focus. At trial the State acknowledged it lacked evidence of premeditation. Here, the State tries to manufacture evidence of it.

Further, even though the prosecution's remarks during closing argument were not evidence per se, it would have been objectively unreasonable and irrational for a juror to ignore them when deliberating as to Kamienski's guilt as an accomplice. *Cf. State v. Harrington,* 310 N.J.Super. 272, 284 (App. Div. 1998) (Defense counsel's concession during closing argument that evidence showed his client was guilty of the underlying robbery "destroyed any lingering possibility that the jury would acquit" him on a felony murder charge.)

Finally, even without the jury's acquittal and the State's repeated acknowledgement of the lack of evidence of advanced knowledge, planning and conduct, the lone event that survives a proper review of the record can hardly be deemed sufficient to uphold Kamienski's murder convictions. The State argues that Duckworth's testimony that Kamienski dropped her off at O'Donnell's house hours before the killings allows the inference he did so with foreknowledge of the

murders and with the specific intent of aiding Marzeno in them. But, this event is so inherently ambiguous that any inference as to the *mens rea element* for first degree murder is too speculative. 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). It is like a navigator trying to establish location with only one point of reference. It cannot be done. He needs at least two points of reference to "triangulate" and thereby fix his position.

The appellate court's conclusion about this event speaks volumes. It found the testimony Kamienski dropped Duckworth off at O'Donnell's permitted the reasonable inference "Kamienski did not want Duckworth present this time because *he was participating in much more than a drug sale* and he did not want her to be an eye witness." *See* Appendix Vol. I, tab Q, App. Op. at 92 (emphasis added). This conclusion was based on a faulty factual comparison: namely, that Kamienski had let Duckworth be present at other drug transactions in the past. While that may have been true, according to the record those other transactions involved purchases of personal use quantities, not large size quantities, such as the three kilogram deal here. *See e.g.*, SA1999:11-2008:1. So the comparison is not

apt.

Even if it were, the appellate court did not make a finding there was sufficient evidence of shared purpose to commit murder. "Much more" than a drug deal could refer to something "much less" than first degree murder (simple theft, for example). The court was required to find evidence that Kamienski contemporaneously shared Marzeno's intention to commit first degree murder. Any lesser degree of scienter --even second degree murder-- would absolve him of the murder charge here. (No lesser included offense instruction was requested or given.) *See State v. Ingram*, 2007 WL 2188699, 10 (NJ law recognizes that two or more persons may participate in the commission of an offense but each may participate therein with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent on his/her own state of mind and not on anyone else's.); *State v. Harrington*, 310 N.J.Super. 272 (App. Div. 1998); *State v. Franklin*, 377 N.J.Super. 48, 54 (App. Div. 2005); *State v. Jackmon*, 305 N.J.Super. 274, 286-87 (App. Div. 1997); *State v. Bielkiewicz*, 267 N.J.Super. at 533; *State v. Cook*, 300 N.J.Super. at 486, 693; *State v. Bridges*, 254 N.J.Super. 541, 566 (App. Div. 1992), aff'd in part, rev'd in part on other grounds, 133 N.J. 447 (1993); *see also State v. Fair*, 45 N.J. 77, 95 (1965).

Dropping off Duckworth at her friend's house without "another point of

reference" cannot satisfy the requisite *mens rea* element without undue speculation as to state of mind. This event, which other witnesses denied and the jury may well have disbelieved, *see* Point One, subsec. 1, *supra*, without more does not warrant such a leap.

The "something more" that is missing here is proof Kamienski knew in advance Marzeno was bringing a gun and a brief case with no money in it to the drug exchange. Perhaps if there were such evidence a juror could reasonably infer Kamienski dropped off Duckworth hours before the handoff because he knew or suspected there was going to be an armed robbery and twin-killing. But, there is no such evidence. According to the record the only people who knew in advance about the gun and empty brief case (as well as Marzeno's intention to kill the DeTournays) were Marzeno and his girlfriend Yurcisin. See SA2971:2-14, SA3083:7-14, SA3226, SA3228.

B. There was no evidence that Kamienski assisted Marzeno in the course of the murders and robbery and there is no legal basis to expand the duration of the offenses beyond the moment of the killings and theft of the cocaine.

Murder itself is not a continuing offense.[3] The statutory elements for the

[3] While conspiracy to commit murder might be regard as a continuing crime under appropriate facts, here Kamienski was acquitted of that charge.

offense of first degree murder are set out in N.J.S.A. 2C:11-3.a(1). It has two elements: possessing the requisite degree of scienter and causing death. When those elements are satisfied the crime is complete. *Cf. U.S. v. Local 807 of International Broth. of Teamsters,* 315 U.S. 521, 541 (1942) ("under [a 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, the DeTournays' murders were completed at the moment of their deaths. The only evidence as to what happened during the killings came from Marzeno's mouth via his girlfriend Yurcisin's testimony, which recalled his confession to her. Marzeno described how, with premeditation and purposeful intent, he *single-handedly* choked and shot Nick to death and then shot and killed Barbara as she was attempting to flee the room. *See* SA2971:2-14, SA3083:7-14, SA3226, SA3228. There is no evidence that anyone else was even in the same room when Marzeno committed these acts, let alone did anything to aid him.

The duration of felony murder can, under certain circumstances, be expanded beyond the moment of the completion of an underlying robbery pursuant to the "immediate flight" doctrine. *See* N.J.S.A. 2C:11-3.a(3). ("[Felony murder] is committed when [among other things] the actor, acting either alone or with one

or more other persons, is engaged in the ... flight after committing or attempting to commit robbery... and in the course of such ... immediate flight therefrom, any person causes the death of a person other than one of the participants...."). The robbery statute has an analogous provision which covers bodily injuries that occur during flight following a theft. N.J.S.A. 2C:15-1 ("An act shall be deemed to be included in the phrase 'in the course of committing a theft' if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.") A*ccord U.S. v. Barlow*, 470 F.2d 1245, 1252 (D.C. Cir. 1972) (The aiding and abetting statute includes criminal conduct done both before and during the commission of the crime --including during the asportation of stolen property).

Thus, by operation of N.J.S.A. 2C:2-6(3)(c)(1)(b) (accomplice liability) and 2C:11-3.a(3) (felony murder) and/or N.J.S.A. 2C:15-1 (robbery), an accomplice who knowingly and with shared intent assists the principal in the planning stage, during the execution of the robbery or homicide, or during the "immediate flight" from the theft could be liable for a death caused either during the robbery itself or in the "immediate flight" phase.

The immediate flight doctrine does not apply in this case, however, because no one fled the murder-robbery scene and no one sought to temporarily hide the stolen cocaine at some other location. *See* Point One, subsec. 4, *supra*. According

to the record, Marzeno, Alongi and Kamienski stayed at Alongi's house for many hours after Marzeno had killed the DeTournays and taken their cocaine. *Id*. Additionally, the conduct the State claims Kamienski engaged in after the killings had nothing to do with assisting anyone in fleeing from the scene or asportating the stolen cocaine. It involved exclusively concealing and disposing of the bodies (or otherwise trying to cover up the murders). *See* Point One, subsecs. 3 and 4, *supra*. Thus, the immediate flight doctrine is inapposite here.

C. Kamienski's murder convictions and their subsequent reinstatement were based on evidence of post-offense conduct and this was insufficient as a matter of law.

While evidence of post-offense conduct (and mental state) may be considered in the mix of proof going to an alleged accomplice's guilt, it cannot, by itself, establish such guilt. There must be some proof that the accomplice did something in preparation for, or during the execution of, the offense and that he performed such an act with the same degree of scienter as the principal. *See State v. Roldan*, 314 N.J.Super. 173, 189-190 (App. Div. 1998) (accomplice liability conviction vacated were the State failed to present evidence of any conduct by defendant prior to or during drug offense and all of the defendant's activities in furtherance of the drug conspiracy occurred after the principal's criminal possession of the cocaine had ended) *(citing United States v. Camargo-Vergara*, 57

F.3d 993, 1001 (11th Cir.1995) ("A person cannot aid and abet a crime that has already been completed.")).

Nearly everything the State points to here as evidence of Kamienski's guilt occurred after the murders and robbery had been completed: supplying some of the materials used to conceal the bodies; tying up and disposing of the victims; threatening Duckworth; hauling his boat out of the bay; telling a witness (Lehman) before the news was public that not just one but both DeTournays had been killed; lying to the authorities about his involvement in drug activities; receiving free cocaine from Marzeno; telephoning Alongi and meeting with his codefendants at restaurants.

But these acts, by themselves, are at most evidence of "hindrance" under New Jersey's criminal code. See N.J.S.A. 2C:29-3. To rely solely on post-offense conduct, as the State must here because it is precluded from drawing on the planning stage and there is no *actus reus* in the execution phase, nullifies the hindrance statute, which New Jersey expressly enacted to avoid precisely this result. *See State v. Williams*, 232 N.J.Super. 432, 436 (App. Div. 1989) (Intended to break from the common law notion that a person who helps an offender avoid justice becomes an accomplice to the original crime, the hindering offense rests on a theory of obstructing justice. Thus, hindering is viably distinct from accomplice

accountability which imposes criminal liability for aiding in the commission of the original crime.) (citing II *Final Report of the New Jersey Criminal Law Revision Commission, Commentary* (1977) at 283).

In sum, even if one were to ignore Kamienski's showing of how the State proffered a false and misleading record (Point One, *supra*,) and accepted the State's rendition, Kamienski's murder convictions would still have to be vacated because there is no evidence he aided Marzeno during the course of the twin-killings and cocaine robbery. And, under the facts of this case, that is the only relevant time frame as a matter of law.

CONCLUSION

The denial of Kamienski's *habeas* petition should be reversed and his state murder convictions should be vacated.

Dated: New York, New York
August 17, 2008

/S

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

COMBINED CERTIFICATIONS

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

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

Appellant's Revised Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains no more than 7,000, words, 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 further

Appellant's Reply 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 Revised Reply Brief for Appellant Paul Kamienski (gray 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 on August 18, 2008, 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 Revised Reply Brief for Appellant Paul Kamienski, by causing them to be deposited on August 18, 2008, 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 Revised Reply 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 August 18, 2008.

Identical Compliance Brief
(Pursuant to Third Circuit Local Rule)

I submitted an identical PDF version of the Revised Reply Brief for Appellant Paul Kamienski as an attachment to an e-mail addressed and transmitted to <electronic_briefs@ca3.uscourts.gov> on August 18, 2008.

Virus Check
(Pursuant to Third Circuit Local Rule)

I have scanned for viruses the PDF version of Appellant's Revised Reply 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
August 18, 2008

/S

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TIMOTHY J. MCINNIS, Esq.
Attorney for Appellant Paul Kamienski