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September 30, 2008

Submission of Supplemental Authority Pursuant to Fed.R.App.P. 28(i)

Clerk of the Court, USCA Third Circuit
Thurgood Marshall United States Courthouse
Attn: Tina Koperna, Case Mgr, 21400
601 Market Street
Philadelphia, PA 19106-1790

Re: Kamienski v. Hendricks
No. 06-4536

Dear Court Clerk:

The New Jersey Appellate Division's recent opinion in *State v. Whitaker*, _ A2d_, 2008 WL 4239216 (App. Div. Sept. 18, 2008) is pertinent and significant to the above appeal, which is fully briefed and awaiting possible oral argument.

The facts in *Whitaker* are materially identical to those in *Kamienski*. Both involved accomplice liability for felony murder under N.J.S.A. 2C:11-3a(3) predicated on robbery. In each, the prosecution proceeded on the theory that an accomplice who, during the "immediate flight" from a robbery, assists a principal by concealing evidence of the crime is liable for a murder occurring during the course of the robbery. In *Whitaker* it was helping to conceal the gun; in *Kamienski* it was helping to dispose of the bodies.

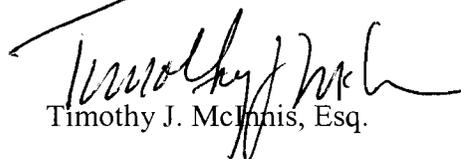
Whitaker flatly rejects this theory of accomplice liability, and in doing so expressly disagrees with *State v. Williams*, 232 N.J. Super. 432 (App. Div. 1989). *Id.* at *18. *Williams* is the principal authority the State relies on in its Opposition Brief to uphold *Kamienski*'s felony murder conviction. *See* Opp. Br. at pp. 78-81.

Actually, *Whitaker* stands for three distinct legal propositions that support *Kamienski*'s appeal. First, it restates the rule, set out in *Kamienski*'s Reply Brief at pages 20 and 25, that an accomplice's liability requires proof he shared precisely the same criminal intent as his principal. *Whitaker* at *11. Second, of greatest significance to this submission, it clarifies that the only conduct allowed to broaden (i.e., temporally expand) the crime of robbery pursuant to the "immediate flight" provisions of New Jersey's

robbery statute, N.J.S.A. 2C:15-1a, is that which involves physical violence or the threat of it, as set out in subsecs. (1)-(3), not attempts at concealment. *Id.* at ** 13-18. A point alluded to in Kamienski's Reply Brief at page 29.¹ And, third it confirms the fundamental proposition stated in Kamienski's Reply Brief at pages 29 through 30 that a person cannot be liable as an accomplice based solely on conduct occurring after the substantive offense has been completed. *Id.* at * 18.

In short *Whitaker* requires that Kamienski's conviction be vacated.

Respectfully submitted,



Timothy J. McInnis, Esq.

cc: Samuel J. Marzarella, Esq., OCPO

¹ This point is moot, of course, if the Court agrees the record does not warrant treating this as an "immediate flight" case. *See* Reply Br. at 4-5.