

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL KAMIENSKI,)	
)	
Plaintiff,)	
v.)	Civil 02-3091 (SRC)
)	
ROY HENDRICKS, etc.)	
)	
Defendant.)	

AFFIRMATION OF TIMOTHY J. MCINNIS

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

1. I am an attorney in good standing in the State of New York and am admitted *pro hac vice* counsel to petitioner Paul Kamienski in this Court and am also his attorney of record in the related appeal at the Third Circuit.

2. This affirmation is submitted in support of Kamienski's motion pursuant to Fed.R.App.P. 23(c) for an order releasing him on a personal recognizance bond from the custody of the New Jersey Department of Corrections. He is currently incarcerated at the South Woods State Prison in Bridgeton, New Jersey.

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

4. The opinion accompanying the Third Circuit's judgment forcefully states that, after carefully reviewing the underlying trial transcript under Black Letter Law standards of review, it found there is absolutely no evidence to support Kamienski's

convictions as an accomplice to first degree and felony murder under New Jersey State law. The opinion is unanimous.

5. Based on the Third Circuit's ruling as to insufficient evidence Kamienski cannot be retried for those offenses. *See Coss v. Lackawanna County Dist. Atty.*, 204 F.3d 453, 466 (3d Cir. 2000), *rev'd on other grounds*, 532 U.S. 354 (2001) (citing *Burks v. United States*, 437 U.S. 1, 11 (1978) (Double Jeopardy Clause forbids a second trial where first failed for lack of sufficient evidence)).

6. Since counsel is aware of no ground on which the State of New Jersey is currently holding Kamienski --other than the murder convictions underlying his *habeas* petition-- he is now being unlawfully incarcerated.

7. According to statements reported in the media in the wake of the Third Circuit's ruling, the Office of the Ocean County Prosecutor is considering whether to seek review of the Third Circuit's decision. As of the date of this affirmation, no motions or petitions have yet been served on counsel for Kamienski.

8. Given the Third Circuit's ruling, Federal Rule of Appellate Procedure 23(c) mandates that Kamienski be released on bail. That rule provides:

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

Fed.R.App.P. 23(c). Accordingly, on the basis of the Court's ruling and this rule alone Kamienski should be released from the custody of the State of New Jersey for the homicide offenses underlying his current term of incarceration forthwith.

9. Kamienski's release should not be delayed while the State considers its litigation options. The foremost reason for not delaying further is that the State's likelihood of prevailing on a motion for reconsideration or *en banc* review at the Third Circuit (or in obtaining a grant of *certiorari* and prevailing at the United States Supreme Court) is extremely remote:

a. The opinion accompanying the Third Circuit's judgment has been designated as an unpublished opinion without precedential value. It announces no new principle of federal law. Nor does it attempt to construe any unsettled question of state law.

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

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

c. In reaching the above conclusion, the opinion does not make any credibility determinations of witnesses or draw any inferences from evidence in favor of Kamienski and against the State.

d. In its opinion, the Third Circuit repeatedly faults the Ocean County Prosecutor's Office for attempting to mislead that Court and for having misled courts in earlier proceedings which addressed the sufficiency of evidence issue. For example, the Court points out the State's reliance on a lay witness' purported forensic knot

identification testimony was “selective” and “misleading.” It likewise deemed the State’s repeated misuse of the word “defendants” to include Kamienski as “misleading” and called the State to task for improperly citing evidence that was ruled inadmissible to him:

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

e. Additionally, the Third Circuit harshly criticizes the Ocean County Prosecutor’s Office throughout its opinion for having relied on what it calls “rank speculation.” It also faults that Office for failing to provide simple and direct answers to fundamental questions about what evidence was adduced or not adduced at trial as to Kamienski:

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

f. The Third Circuit’s opinion emphasizes that the prosecutor trying the case back in 1988 repeatedly conceded there was no evidence adduced at trial showing that Kamienski knew of the robbery or murders of the victims until after they had

occurred. In other words, at one time the State itself admitted that Kamienski could not be found guilty as an accomplice for assisting in “planning” the robbery or murders before they took place.

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

h. As the Third Circuit opinion explains the State adduced only the faintest, indirect evidence that Kamienski was even present at the time of the homicides and corresponding drug robbery. Moreover, it had no evidence of any purported role by him in the crimes themselves.

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

j. Nor, according to the Third Circuit, could the State sustain Kamienski’s guilt for supposedly helping to dispose of the victims’ bodies in the aftermath of the murders, as the State argued at trial. The Third Circuit characterizes the State’s closing argument that murder is an on-going crime which does not end with the fatal bullet but continues through to the disposal of the body as “some abstract notion that the crime of murder is a continuing offense” which is “as unique as it is baseless.” The Court further noted that the State did not even bother to pursue this theory on appeal.

k. Should the State seek and ultimately succeed in getting the Third Circuit's judgment reversed it can always re-incarcerate Kamienski for the remainder of any unserved term of imprisonment

10. As further support for this application, Kamienski should be released on bond because the normal conditions of bail are readily satisfied. He has been in the custody of the State of New Jersey's Department of Corrections since November 1988. During that time he has done nothing there to indicate that he would be a risk of flight or pose a danger to the community.

11. Moreover, prior to his incarceration, Kamienski was found by the New Jersey State trial court to be an appropriate candidate for pretrial release and he was out on bail from the time of his arrest in the fall of 1987 until his conviction on the underlying charges in November of 1988. While he was on pretrial release Kamienski never did anything that caused his bail to be reconsidered or revoked.

12. Justice cries out for Kamienski to be immediately released. There is no justification for delaying this relief.

13. For the foregoing reasons, Kamienski's request to be released on bail should be granted forthwith.

Dated: June 1, 2009

/S Timothy J. McInnis
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