No. 09-395

In The
Supreme Court of the United States

MICHELLE R. RICCI, ASSOCIATE ADMINISTRATOR, NEW JERSEY STATE PRISON; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a state trial judge, acting as the fact finder, determined there was insufficient evidence to support a jury's criminal conviction, and a state intermediate appellate court reversed that decision upon being presented by the state with a misleading recitation of the trial record, was it error for the federal court of appeals to grant habeas corpus relief under §2254(d)(1) of the AEDPA after it independently and carefully reviewed the entire trial record and concluded that: (1) the conviction was based on legally insufficient evidence according to the standard set forth in *Jackson v. Virginia*; and (2) the state intermediate appellate court's erroneous conclusion to the contrary was objectively unreasonable?

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The petition for certiorari omits the unpublished opinion of the Superior Court of New Jersey, Law Division, Ocean County, 12/21/1988, partially granting Respondent's post-trial motion for a judgment of acquittal. Resp.App.1.

STATEMENT OF THE CASE

a. Procedural History Supports Denial of Petition

The State of New Jersey petitions for a writ of certiorari to reverse a unanimous, non-precedential[1] opinion of the United States Court of Appeals for the Third Circuit. Petitioner's Appendix ("App.") 1. The opinion was summarily upheld following an application for panel rehearing and en banc review without dissent or even a requested response from Respondent Kamienski. App.156.

After briefing, oral argument and de novo review of the trial record, the court of appeals granted Kamienski relief under §2254(d)(1) of the AEDPA

[1] The face of the opinion states: "**NOT PRECEDENTIAL**" [bold/uppercase in original]. Under the court of appeals' local rules, "not precedential" means at least a majority of the panel determined the opinion has value only to the trial court and parties. Internal Operating Procedures, §5.1 et seq. The rules further require the words "not precedential" appear on the face of the opinion. *Id.* The "not precedential" legend is missing on the opinion in Petitioner's Appendix. App.1.

because of insufficient evidence as to state murder convictions secured on an accomplice liability theory. In doing so, it reversed the United States District Court for the District of New Jersey's denial of Kamienski's habeas petition, and restored the case to its status 20 years earlier, when the state judge who oversaw Kamienski's jury trial set aside his murder convictions on that same ground. The trial court's ruling was reversed on direct appeal by a state intermediate appellate court.

The court of appeals decided for Kamienski after determining that the State had submitted to it a recitation of the trial record that was both "misleading" and "unhelpful," App.11, n.8 & n.9. It further opined during oral argument that the State had caused the state appellate court to reach an erroneous holding because it had filed the same misleading and unhelpful description of the trial record in the state appellate proceeding. Resp.App.22. ("And that's what caused the state to rule the way they did.").

According to the court of appeals, the State's misconduct included: drawing inferences from "selective reliance on testimony"; using the term "defendants" in a manner intended to include Kamienski, when the record showed the evidence to which the State was referring pertained only to Kamienski's codefendants; and, citing evidence that had been admitted at trial as to only Kamienski's codefendants. App.11, n.8 & n.9. The court of appeals made these observations in response to Kamienski's reply brief which outlined

106 instances in the State's opposition brief where the State made factual representations that were unsupported by, or contrary to, the trial record. In a highly unusual request, prior to oral argument the court of appeals asked the State to rebut just two such examples and gave it an opportunity to file a letter brief with supplemental exhibits to defend itself against Kamienski's charges of prosecutorial misconduct. Resp.App.18-19. The State never responded substantively to the court of appeal's two-example litmus test. At oral argument, the panel also noted the State had cited "stricken testimony" throughout its brief, and that doing so was "totally improper." Resp.App.21-22.

The court of appeals further determined that the State's submission to it was materially at odds with positions the State had taken at trial. App.12-14, 23-26, & n.15. It noted that, "Ironically, the prosecutor's closing argument to the jury and post trial representations to the court are the most accurate assessment of the evidence the government produced at trial." App.23. And, it characterized the State's stance on appeal as "a bit of a paradox," App.25, given that it was the polar opposite of its position at trial—potentially rising to the level of "judicial estoppel." App.15 n.15.

The "paradox" to which the court of appeals referred was the State's contradictory positions as to whether there was any evidence of Kamienski's antecedent knowledge of a scheme to rob and kill the two murder victims during a planned drug deal. At

the trial court, the State repeatedly conceded there was no such evidence. Resp.App.13-14 and 15-17. In contrast, on direct appeal, and in the federal habeas proceedings, the State contended there was highly attenuated circumstantial evidence from which one could infer antecedent knowledge and a shared intent to commit murder.

The court of appeals also actively responded to the State's attempt to fabricate proof of Kamienski's antecedent knowledge during oral argument. When asked to provide just one example of evidence showing Kamienski knew in advance of his codefendants' murderous intentions, the State was at first nonresponsive and ultimately apologetic. Resp.App.22-26. During that exchange, when pressed to cite any example, the State replied falsely that after a supposed meeting with the victims on the night before the murders, "*All* the parties on their way home were talking about how this was a bust," i.e., a phony drug deal that was really going to be a robbery and murder. Resp.App.23 (emphasis added). This statement was completely unsupported by the record and was revealed to be so when the court of appeals pointedly asked the State at least five times to justify its assertion that Kamienski participated in such a conversation, and the State would not, or could not, answer the court's question. Resp.App.23 (twice), 24,25,26.

Beyond the issue of the State's misconduct, the subject of the court of appeals' opinion leading to the grant of Kamienski's habeas petition under §2254(d)(1)

was a decision by the Superior Court of New Jersey, Appellate Division. App.100. That decision purported to apply the sufficiency of evidence standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), to the trial record. App.131-32. The state appellate court re-instated murder convictions against Kamienski which the judge who had presided over his jury trial at the Superior Court New Jersey, Law Division—Ocean County had dismissed on grounds of insufficient evidence following post-trial motions, briefing and oral argument. Resp.App.1. To obtain relief in the state appellate court, the State submitted a brief containing virtually the same misleading recitation of the trial record the court of appeals found to be improper below.

In deciding for Kamienski, the court of appeals agreed with the trial judge's original finding that the evidence as to Kamienski's murder convictions was legally insufficient under *Jackson*. Specifically, the court of appeals determined that the evidence adduced at trial, and all inferences reasonably drawn therefrom, did not satisfy the essential elements of New Jersey's aiding and abetting statute,[2] as applied to the substantive crimes of murder[3] or felony murder.[4] Rather, the court of appeals reasoned, one had to impermissibly resort to "rank speculation" to

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[2] N.J.S.A. 2C:2-6(b)(3) and (c)(1).

[3] N.J.S.A. 2C:11-3(a)(1).

[4] N.J.S.A. 2C:11-3(a)(3).

conclude otherwise. App.22-23. Accordingly, it held that the state appellate court's determination that the evidence met the *Jackson* standard was erroneous. The court of appeals further held that this error was objectively "unreasonable," as seen through the highly deferential lens of the AEDPA, because the state appellate court had "conflated" proof of Kamienski's role in the underlying drug deal with proof of murder. App.2,19-20,25-26,30-31.

The court of appeals also rejected the State's earlier attempt to deem murder a "continuing offense" in order to improperly expand the duration of the offense to include efforts to hinder detection of a murder after it had already been completed by another person. The court of appeals found that theory legally unsupportable and noted that the State did not press it on appeal. App.23 ("[T]he state's murder theory against Kamienski had been based on some abstract notion that the crime of murder is a continuing offense that includes attempts to dispose of the victim's body. That is a theory that is as unique as it is baseless and the state has not pursued it on appeal.").

The court of appeals' application of the standard of review under *Jackson*, which the State now challenges in the instant certiorari petition, was precisely the same standard it urged the court of appeals to apply. Resp.App.26. In addition, the State agreed at oral argument that the matter should be analyzed under §2254(d)(1), and, unlike in its certiorari petition, it said nothing below about dispensing with that

provision and addressing Kamienski's appeal under §§2254(d)(2) and (e)(1). Resp.App.26-27.

Having determined that Kamienski met the twin requirements of §2254(d)(1), the court of appeals instructed the district court to grant his habeas petition and to order his immediate release from prison. The court of appeals issued its mandate over the State's objection. The district court granted the habeas petition over the State's objection. And, the district court ordered Kamienski's release on bail after more than 20 years of incarceration, also over the State's objection.

b. State's Reliance on Misleading Factual Recitation

The factual statements in Kamienski's brief in opposition are drawn primarily from the court of appeals' opinion, App.1-31, unless indicated otherwise. In contrast, the State asks the Court to refer to the district court opinion, App.32-99, and state appellate court opinion, App.100-155, for the factual background. Petition for Writ of Certiorari ("Pet.") at 3. On key issues (for example, whether Kamienski met with the victims the night before their murders and helped "lure" them to a death-trap at an isolated location the next day) there is a sharp conflict between the court of appeals' view of the evidence in the trial record and the views of the district court and state appellate court.

As shown above, the court of appeals determined that the State had submitted a misleading brief to the state appellate court and that this brief improperly affected the state court's view of the record. The same is true of the State's submission to the district court. Both decisions repeat (and in some instances lift verbatim) parts of the State's misleading factual recitation. For example, the state appellate opinion says that "The bodies were tied with a hitch knot *peculiar* to . . . Kamienski," App.137 (emphasis added), when the record is to the opposite effect, *see infra* p.15. Likewise, the district court opinion states that "Kamienski . . . arranged the September 19, 1983 meeting" at which the victims were executed, App.67, when there is no support for this in the record, *see infra* pp.23-29. The court of appeals' opinion, as well as the panel's comments during oral argument, confirms the merits of Kamienski's charge that the State submitted misleading briefs on direct appeal and in the district court and thereby tainted those courts' opinions. Thus, one cannot rely on those courts' recitation of the facts, as the State urges here.

c. No Evidence of Kamienski's Involvement in the Murders

Kamienski was tried in Ocean County, New Jersey in 1988 on drug and homicide charges. The charges stemmed from a planned cocaine deal between four people (two buyers and two sellers) that Kamienski had socialized with separately and introduced to each other two weeks before the drug deal at the sellers' request. The two buyers, Anthony

Alongi and Joseph Marsieno, were middle-aged men from New Jersey whom Kamienski had met that summer at the Jersey Shore area. The two sellers, Henry "Nick" and Barbara DeTournay, were a married couple in their 30s from Florida whom Kamienski had met about a year earlier through boating. Kamienski, age 35 at the time, had previously purchased drugs from each party for his personal use (the record established he never dealt in drugs, SA2490)[5] and had used drugs with them. Kamienski, himself, was neither a buyer nor seller in the contemplated drug transaction, nor was he a commissioned broker in the sale. The trial record said nothing about Kamienski having any financial interest in the deal, and the State has never claimed otherwise.

When the certiorari petition first identifies the "buyers" in the drug deal, it correctly says they were Kamienski's codefendants. Pet.4. ("Kamienski brokered the sale of three kilos of cocaine between sellers Henry and Barbara DeTournay from Florida and *buyers Anthony Alongi and Joseph Marsieno* from New Jersey . . . ") (emphasis added). Later in the certiorari petition the State repeatedly uses the word "buyers" broadly to include Kamienski in attempting to show sufficient evidence against him. E.g., Pet.31-32. ("The state appellate court detailed the testimony

[5] "SA" refers to pages in the supplemental appendix Kamienski filed with the court of appeals.

demonstrating the involvement of Kamienski, Alongi and Marsieno in these murders. . . . The state court recognized *a "scheme" of the buyers* to lure the victims and their cocaine away from the public Holiday Inn to a more private place. . . . Thus, on September 18, [1983,] the first scheduled transaction at the Holiday Inn failed because Henry did not bring the drugs, so '*the buyers* informed Henry that they were having some difficulties getting the money together. At 6 p.m. that evening, Kamienski, Alongi and Marsieno met at the Holiday Inn.'") (emphasis added; record citations omitted). *See also* Pet.6,31-33.

Where the State suggests that Kamienski was one of the "buyers" of the cocaine, or that he met with the victims on September 18, 1983, or that he participated in "luring" the victims to their deaths, those assertions are not only unsupported by the record, but also completely contrary to it, as the court of appeals' opinion correctly notes. App.5 (Kamienski had no contact with the victims after he introduced them to the buyers except for a brief, inconsequential telephone call 10 days before the killings.). Additionally, by repeatedly using the term "buyers" in the certiorari petition to include Kamienski, the State is mirroring what it did below, where approximately 55 times it improperly used the word "defendants" in its briefs to erroneously include Kamienski, which is one of the specific ways that the court of appeals found the State's recitation of the trial record to be "misleading." App.11 n.9.

According to the testimony of Marsieno's then girlfriend, he confessed to her that on the day of the scheduled drugs-for-cash exchange he single-handedly shot and killed both DeTournays with a 9 mm pistol that was never recovered and stole their cocaine. Their bodies were discovered by local police a few days later in the Barnegat Bay near Toms River, New Jersey. Although there was no physical or eye witness evidence as to when and where the killings took place, the State surmised that it was in the early evening of September 19, 1983, at Alongi's Toms River residence, and prosecuted the case on that assumption.

The State tried Kamienski for murder and felony murder on conspiracy and accomplice liability theories. It claimed he was at (or near) the place where the murders occurred, and, that while he was surprised by the drug deal turning into a robbery and murder, and, in fact, did not want it to happen, he nevertheless helped conceal the bodies afterwards. This is reflected in the prosecutor's closing argument, which the court of appeals' opinion quotes extensively:

> *Am I going to say does Paul Kamienski know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. . . .*
>
> And you know what, Tony [Alongi] and Joe [Marsieno] . . . murdered them in cold blood. . . . And I submit to you that's what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in

> getting rid of the bodies. . . . *I'll say this, he never expected it to happen, he didn't expect them to be murdered. . . .*
>
> *. . . I've indicated to you that I don't think that Paul Kamienski—I don't think that [he] was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy to possess that cocaine with intent to distribute it*.

App.13-14 (italics and brackets in original). These statements by the prosecutor during summation are clearly at odds with the State's contention here that, "The State's theory at trial was that Kamienski's actions *before, during and after* the crimes proved his guilt as an accomplice to robbery and murder." Pet.5 (emphasis added).

Moreover, the prosecutor's statements in closing were not, as the certiorari petition claims, a brief "moment of unscripted candor" in a lengthy trial. Pet.4.[6] The prosecutor said the same thing many times at trial, Resp.App.13-14, and during his lengthy colloquy with the trial judge during post-trial motions. As an example of the latter, the court made the following observation and the prosecutor gave the following reply:

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[6] How, even if this were true, it would affect the legal significance of the prosecutor's statement is not clear. A brief moment of unscripted candor can be equally or even more telling than a long, rehearsed soliloquy.

> The Court: . . . 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. . . .
>
> [Prosecutor] Millard: I agree.

Resp. App.15-16 (emphasis added); *see also* App.14 (court of appeals noting the prosecutor agreed with the following statement by the trial judge during post-trial motions: "prior to the afternoon of the 19th there was nothing suggesting that [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder . . . [a]nd the jury so found.").

No one actually saw Kamienski at Alongi's house at the time of the killings or witnessed him physically assisting in disposing of the bodies afterwards. In fact, one of Alongi's neighbors, George Hunt, who was familiar with Kamienski's Avanti sports car and 36 foot power boat with a flying bridge, SA1803-04, was regularly observing Alongi's house throughout the afternoon and evening of the murders and he never testified that he saw Kamienski or his car or boat there at any time that day.

Rather, the State's conclusion as to Kamienski's presence at Alongi's house during the murders and the role he played in disposing of the bodies came exclusively from multiple chains of inferences it tried to draw from the uncorroborated testimony of Kamienski's ex-girlfriend, Donna Sue Duckworth. She had recently pleaded guilty in Ocean County to unrelated

drug charges and was awaiting sentencing at the time of Kamienski's trial, but testified she had not received any promises from the prosecutor's office in exchange for her testimony. SA2065-66.[7] Not only did Duckworth's trial testimony relate to events occurring five years earlier, but she admitted that during the relevant timeframe she was under the influence of drugs and alcohol on a near-constant basis. SA2096-05. There was also testimony from a non-party witness who said that around the time she started to cooperate with law enforcement authorities (circa September 1987), Duckworth had split up with Kamienski on bad terms and threatened that, "I'm going to cut his fucking balls off." SA3627.

It was in the foregoing context that Duckworth testified as the State's main witness against Kamienski. Among other things, she said he told her he could not control the events leading to the deaths of the DeTournays. She said he also told her that Henry had been killed first and Barbara did not suffer. She further said Kamienski warned her that if they both did not keep their mouths shut they both would end

[7] An issue Kamienski raised in state post-conviction proceedings and his federal habeas petition, and preserves here pursuant to Supreme Court Rule ("SCR") 15.2, was a possible violation of *Giglio v. United States*, 405 U.S. 150 (1972), since the post-trial record showed Duckworth was admitted into the state's pretrial intervention program upon the recommendation of the State (and her charges were ultimately dismissed), even though she had been rejected from that program prior to her testimony. This issue was not certified for appeal.

up like the DeTournays and he would be unable to prevent it. (The State mischaracterizes the latter as Kamienski "threatening" Duckworth. Pet.2,3, when the record shows only he cautioned her that, "if we didn't shut up that he wouldn't be able to save me or himself." SA2034.).

Additionally, Duckworth testified that a floral-pattern towel recovered with Henry DeTournay's body "looked like" a polishing rag Kamienski kept with similar rags in a box on his pier, although she could not say for sure because it lacked any unique identifying features. SA2507-08 ("It looked like a towel from [the rag box]. . . . It doesn't have our initials on it."). She also said two non-descript, earth-tone blankets found around each victim when their bodies were recovered from the Barnegat Bay "looked like" blankets Kamienski used and kept on his boat, although again she could not be certain. SA2510-11 ("I can't identify that blanket in particular as being on or off the boat. . . . No, I cannot state that in fact these two [blankets] came off the boat."). And finally, she said that a knot depicted in a crime scene photograph of a plastic-coated clothesline that was tied around Henry DeTournay's body and tethered to a cement cinderblock was the type of "hitch" knot Kamienski made when tying up his boat, although she acknowledged she had seen "other people" tie the same knot in "many circumstances." SA2514-18.

At trial, the State never explained logistically how Kamienski retrieved the blankets and towel, which were on his boat and pier at a marina in Lavallette,

New Jersey, several miles away from Alongi's house across the Barnegate Bay. Nor, did the State ever explain why Marsieno needed those items from Kamienski given that the murders purportedly took place at the Alongi residence (where Alongi had lived for two years with his then fiancée and his teenage son, SA3391-92, and which would have had towels and blankets), and also that the victims' car, which they had driven up from Florida and parked in Alongi's driveway just before the murders, was full of towels and blankets. S-27, S-49 and S-51.[8]

In the certiorari petition, the State claims for the first time that Kamienski knew about the murders in advance and, with premeditation, brought the blankets and towel with him to conceal the bodies afterwards:

> Kamienski's boat was docked several miles away from Alongi's house, yet Duckworth saw those items [the two blankets and floral towel][9] in Alongi's yard on September 19, giving rise to the inference that *Kamienski did not just happen to appear there after the murders, but had in fact participated in them by bringing supplies to dispose of the bodies. . . . Kamienski's . . . furnishing of materials provide strong proof of premeditation*

[8] "S-" refers to the State's physical evidence at the investigative and trial court level.

[9] Actually, Duckworth did not testify about seeing the towel at Alongi's house on the 19th.

> *on his part, sufficient to convict him as an accomplice to robbery and murder*.

Pet.35-36 (emphasis added). However, not only is the State's newly-crafted inference, appearing for the first time in the instant certiorari petition, contrary to the theory on which it prosecuted Kamienski (i.e., he did not know about the murders until events unfolded at Alongi's house), and not only is it also highly implausible under the circumstances of how and when and where the murders occurred, but it is also pure conjecture. There is no evidence in the record to support it.

Lastly, the State never explained at trial why Kamienski was linked to the blankets and towel, but not the other unusual items found with the DeTournays' bodies. Henry's body was placed in a blue sleeping bag before it was wrapped in the blanket, and tethered by the plastic-coated clothesline to the cement cinderblock. SA0627-31. The State never connected the sleeping bag, clothesline or cinderblock to Kamienski. Additionally, a colorful woman's blouse, blue jogging pants and a woman's hair brush were found inside the sleeping bag containing Henry's body. SA0630. The State never answered why these woman's articles came from some source other than Kamienski, but the floral towel found with them came from him.

Relatedly, the State never ruled out the most likely scenario: that all of the feminine objects found with Henry's body had come from the green nylon bag

in which the DeTournays had concealed the cocaine while transporting it and which Barbara brought to the drug exchange, and that Marsieno spilled these objects out and left them behind after he killed the DeTournays and made off with the cocaine in the very green bag Barbara had brought with her. Pet.7 ("At the Holiday Inn around that same time, Barbara DeTournay was in Sidney Jeffrey's room with the kilos of cocaine packed in a green nylon bag, waiting to be picked up after Henry was supposedly done counting the money."), and Pet.10 ("Later that night in Marsieno's condo, Yurcisin glimpsed three blocks of cocaine wrapped in plastic contained inside a green flight bag, with one bag opened and half empty."). All of these unexplained questions concerning the link vel non between the physical evidence at the crime scene and Kamienski bear on whether "any rational trier of fact could have found the essential elements of [accomplice liability to murder and felony murder as to him] beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Duckworth also testified Kamienski dropped her off at her friend's house in Sea Side Heights, New Jersey, a few miles away from Alongi's house, on what the State believed was the afternoon of the murders. Duckworth said this was unusual since she and Kamienski were always together during that period of time. Both Kamienski and Duckworth's friend, Janet O'Donnell, denied at trial that this event had occurred. SA3684 and SA3574, respectively. Since the jurors acquitted Kamienski on the murder conspiracy

charge, they either disbelieved Duckworth's testimony or did not attribute to it the significance the State tries to give it now, namely, that it was evidence of a premeditated plan on Kamienski's and his codefendants' part to eliminate an eye-witness to the DeTournays' murders.

Duckworth further said that around dusk that evening Kamienski picked her up at O'Donnell's house and brought her to Alongi's home, where, in defiance of Kamienski's instruction to stay inside, she went to the back yard where she saw Kamienski standing on land seemingly speaking to Alongi who was standing in a boat moored at his dock. Duckworth said that in the boat were shapes under some blankets and a sleeping bag that could have been bodies and that the surrounding area appeared to be wet, implying it may have been hosed down. After making these observations, Duckworth said Alongi made a menacing gesture towards her, but Kamienski calmed him down by assuring him she was all right.

The foregoing was all the evidence the State adduced with respect to what Kamienski did at Alongi's house around the time of the killings or shortly thereafter. And, to repeat, it all came from the uncorroborated testimony of Duckworth, whose testimony the court of appeals accepted as true.[10]

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[10] Kamienski concedes for purposes of the instant certiorari petition the State is entitled to the presumption her testimony was truthful and accurate. However, solely to preserve possible

(Continued on following page)

According to the certiorari petition, aside from Duckworth's testimony, the only other noteworthy State witnesses against Kamienski were Marsieno's girlfriend, Jean Yurcisin, and a mutual acquaintance of Kamienski and Alongi, Arthur "Buddy" Lehman. Yurcisin testified that after the killings she saw Marsieno give Kamienski cocaine for his use and did not charge him for this. Duckworth said the same thing. Both Yurcisin and Duckworth admitted that Marsieno had also given them free cocaine after the murders. SA2977-78 and SA2045-46, respectively. The State suggests that when Marsieno gave free cocaine to the two women it was to shut them up or calm them down, but when he gave it to Kamienski it was

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arguments in other proceedings, SCR 15.2, Kamienski notes that at both the court of appeals and district court he submitted proof that: (1) the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to turn over FBI hair and fiber lab notes showing Kamienski's hair was not found on the blankets which Duckworth said looked like ones he used and kept on his boat, and that the former supervisor of the FBI lab opined in an affidavit submitted to the district court that the arrays of hairs collected from the crime scene suggested that the blankets had come from the victims' own car; (2) defense counsel failed to use an FBI lab report showing that the towel Duckworth said looked like a rag Kamienski polished his boat with had no traces of polish on it; (3) the knot on the ligatures the State said was "peculiar" to Kamienski was, in fact, a common hitch knot that could not be linked to any one person, according to a forensic knot analyst; and (4) Duckworth's chronology of what she did on the day of the murders was contradicted by credit card records and eye-witness affidavits obtained post-trial and submitted to the district court. These issues were not certified for appeal.

to "reward" him for his "participation" in some unspecified aspect of the robbery, murders or disposal of the bodies. Pet.2,3. It is only the State's speculation as to Marsieno's motive in giving Kamienski free cocaine. There is no evidence implying it was a "reward" or if so what conduct was being rewarded. However, the jury's acquittal of Kamienski on the conspiracy to murder charge precludes a finding that it was a reward for acting in concert with Marsieno in planning and carrying out the murders.

Additionally, Yurcisin said she observed verbal disputes between Marsieno and Alongi after the murders where the latter demanded "his share" of the cocaine and Marsieno withheld some of it because Alongi (not Kamienski) had made a mistake in getting rid of the bodies. E.g., SA2976-77. (" . . . Mr. Alongi was saying he wanted his share. . . . Marzeno told him [Alongi] that he wouldn't be getting all of his share, because he [Alongi] hadn't done the job properly. He hadn't weighed the bodies down. They would have never come up if he had.") Neither Yurcisin nor Duckworth said the word "share" was used with respect to the cocaine Kamienski received from Marsieno, and neither testified that either Marsieno or Alongi said anything about Kamienski having any role in disposing of the bodies.

Yurcisin also testified about picking up Marsieno by himself at the Holiday Inn around 8 p.m. on September 18, 1983, as well as what Marsieno said to her and what she saw thereafter. SA2970-73. Yurcisin said Marsieno told her of a meeting at some

unspecified time and place with the victims and of his intent to rob and kill them. She also testified that when they were alone at his condominium later that evening Marsieno showed her the gun he intended to use. But, Yurcisin never said Marsieno told her anything about meeting with Kamienski along with the victims before she had picked him up that evening, or that Kamienski knew of Marsieno's robbery-murder plan, or even that Kamienski knew Marsieno had the gun which he had shown her.

Lehman was the other significant State witness against Kamienski, according to the certiorari petition. He testified Kamienski told him that "my friends" (plural) had been killed. Kamienski made this statement a few days after the murders at a time when the authorities had recovered only Henry DeTournay's body. They contacted Kamienski about Henry because they had found Kamienski's business card in his wallet. Thus, from Lehman's testimony one could infer only that Kamienski knew from some source other than the police that both victims had been killed days earlier. Lehman also testified that in conversations with him, Alongi referred to Marsieno as "my partner" and discussed their falling out after the DeTournays' bodies were discovered. SA2690, SA2696. Lehman never said anything similar about Kamienski being called the "partner" of either Alongi or Marsieno.

In short, even the certiorari petition concedes the homicide case against Kamienski was entirely circumstantial, Pet.22, with crucial evidentiary gaps that had to be filled in by inference or speculation. There

was no forensic or eyewitness evidence connecting Kamienski to the crime scene or the murders. And, there was no evidence as to precisely where Kamienski was and what he was doing at the time of the robbery and murders.

Further, there was no evidence Kamienski knew in advance of Marsieno's plan to rob and kill the DeTournays, that Marsieno possessed or intended to bring a firearm to the drug exchange, that Marsieno and Alongi did not have the wherewithal to pay for the cocaine, or even the approximate amount of cocaine at stake or its estimated value. The size of the deal was not set until the week after Kamienski introduced the DeTournays to Alongi and was much larger than the DeTournays had originally planned: escalating from "grams or ounces" to "pounds or kilos." SA1149-52. And, that change occurred at meeting in Toms River when Kamienski was many miles away in Garfield, New Jersey. SA2020-21.

Lastly, there was no evidence Kamienski had any motive for killing the DeTournays. They were friendly acquaintances of his and stood to be a regular source of cocaine for Kamienski, who, according to the State's witnesses, was a frequent user.

d. No Evidence of Kamienski's Involvement in "Luring" the Victims

Telephone records introduced by the State, S-7, failed to show Kamienski had any contact with the DeTournays after introducing them to Alongi two

weeks before the killings, aside from one brief telephone call with Henry 10 days before the murders, and in that call all Kamienski was overheard by Duckworth to say was, "no, [I don't] have a scale and get off the boat." SA2021. The lack of any evidence reflecting communication between Kamienski and the DeTournays for many days leading up to the drug exchange was particularly noteworthy and inconsistent with the State's theory of his role in it. While the State characterized Kamienski as a "broker" in the drug transaction, and the authorities found Kamienski's telephone and beeper numbers in Henry's wallet, there was no evidence of any telephonic or beeper communications between Kamienski and either victim other than the brief telephone call described above.

The court of appeals' opinion correctly notes that this inconsequential telephone call, which records showed took place on September 9, 1983, was the only evidence of any conversations between Kamienski and the DeTournays between the time he introduced them to Alongi at a Labor Day barbeque at Alongi's house (on September 5, 1983) and the date of the murders (on September 19, 1983). App.5.

In its certiorari petition, the State claims otherwise. It says the evidence shows Kamienski, Alongi and Marsieno, as well as Duckworth and Alongi's fiancée Jackie Sullivan, met with the DeTournays at the Toms River Holiday Inn on the evening of September 18, 1983. Pet.5-6,31-33. The State further says that at the meeting Kamienski helped "lure" the

victims to an isolated place the following day where they could be robbed and murdered without detection. *Id*. It claims that Kamienski did this by conveying (or helping to convey) a message to them that Alongi and Marsieno "were having trouble getting money together" and needed an additional day. *Id.*

The State's assertion that Kamienski met with the victims at any time on September 18, 1983 is completely unsupported by the record and is directly contrary to the all the evidence in the case, including, the testimony of Duckworth and that of the DeTournays' friend and drug courier, Sidney Jeffery, III.[11] Duckworth said she was with Kamienski all day on the 18th. The day began and ended with them alone on Kamienski's boat. SA2144-45, SA2179-80. The only time they were at any other location was for a short "happy hour" gathering at the Toms River Holiday Inn. SA2025. And, according to Duckworth, the only people she and Kamienski met with at the Holiday Inn that evening were Alongi and Sullivan, Marsieno, and briefly Lehman. SA2025-26. Moreover, she did not observe or recall anything memorable being discussed at that social gathering. SA2025. Parenthetically, in contradiction to Duckworth's testimony, fellow State witness Lehman denied he met with Kamienski and the others at Holiday Inn on the night of September 18, 1983. SA2688-89, SA2908.

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[11] The court of appeals misidentifies him as "Jeffrey Sidney." App.6.

According to courier Sidney Jeffrey, the DeTournays always contemplated in advance of it that the drug exchange would take place nearby, but not actually at, the Holiday Inn. He said Henry DeTournay gave him directions to the hotel and told him to hold the drugs there "because that was *close* to where the deal was going to take place." Resp.App.7 (emphasis added).

So the State's notion, which it articulated for the very first time in the state appellate court proceeding, having never once mentioned it during the opening or closing at trial, SA0498-19 and SA4267-48, respectively, that anyone, let alone Kamienski, had to "lure" the victims away from the hotel to an isolated location to complete the drug deal is contradicted by the unambiguous record. It is also contracted by the prosecutor's own words to the jury during closing, "We know when [Sidney Jeffrey] gets in, he gets in on the seventeenth, that's the day he checks in at the Holiday Inn, which is . . . *near to* where the deal is going down." Resp.App.13 (emphasis added).

In other words, the Holiday Inn was never the intended place for the deal. The exchange was always planned for someplace "close" or "near" to the hotel, such as Alongi's house, which was just a few minutes drive away. The Holiday Inn was located on Rt. 37 in Toms River, SA2725; Alongi's house was located on Baron Street, also in Toms River, SA3392, only a few miles away from the hotel.

Additionally, Jeffrey stated many times over that Henry DeTournay never came onto the Holiday Inn premises. Resp.App.7-9. He emphasized that Henry would not go "anywhere near" the hotel. Resp.App.10. This was because Henry (with long red hair and a long red beard) "looked like a hippie" and he did not want to focus attention on himself in a way that might cause law enforcement personnel to find the cocaine, which Jeffrey had stashed in his room at the Holiday Inn while awaiting delivery instructions from the DeTournays. Resp.App.10.

Remarkably, Jeffrey also said he was in the bar at the Holiday Inn at same time that Duckworth said she and Kamienski met the others there for happy hour. SA1578. When Jeffrey was asked who he recalled seeing there at that time, he said the only person he could recall was the bartender and no one else. Resp.App.9-10. Accepting Duckworth's testimony about the gathering as true, clearly, the DeTournays were not in the Holiday Inn bar when Jeffrey, and coincidently, Kamienski and the others were there for happy hour.

Jeffery further testified that on September 18, Henry told him of the conversation about postponing the drug exchange for one more day so the buyers could get the money together. Henry told Jeffrey about this conversation shortly after it had taken place at Alongi's house sometime between 10 a.m. and 11 a.m. on September 18, and not during happy hour later that evening. Resp.App.7-8. The record establishes that Kamienski was not at Alongi's house that

morning and the only people the DeTournays spoke to there were Alongi's fiancée, Sullivan and Alongi. SA3434-38.

The State actually agrees with the foregoing chronology in a brief it has filed in opposition to Alongi's pending appeal in the Third Circuit. In that brief the State says the record shows that:

> On September 18, 1983, when the deal was originally supposed to happen, *Nick [Henry DeTournay] went to [Alongi's] house without the cocaine, where he spoke with [Alongi]. Nick shortly thereafter saw Jeffrey and told him that "they were having trouble getting the money together" and that the deal would be postponed until September 19 at 3:00*.

Alongi v. Hendrix, No. 06-4419, United States Court of Appeals for the Third Circuit, document 00319795536, filed 09/02/2009, at p. 39 (emphasis added). Resp.App.28. In contrast, in its certiorari petition here the State claims the above-referenced conversation about getting the money together and postponing the deal until September 19 took place at the Holiday Inn in the early evening of September 18 with Kamienski present.

The State's claim in the certiorari petition that Kamienski met with the DeTournays for an aborted drug deal at the Holiday Inn on the 18th, and that during the meeting he actively "lured" them to their deaths is also contradicted by the trial prosecutor's summation, where he said:

> Donna Duckworth tells you that there's a meeting at the Holiday Inn later on that day [September 18, 1983], cocktail hour . . . she doesn't see *the DeTournays, they weren't there*.

Resp.App.13 (emphasis added).

One must presume the jury also found Kamienski did not attend any meeting with the victims the evening before the murders at which he helped lure them to their deaths 24 hours later. This is because it acquitted him of conspiracy to commit murder and to do so would be inconsistent with a factual finding that Kamienski not only knew of the killings in advance but acted in concert with his codefendants beforehand to facilitate them.

REASONS FOR DENYING THE CERTIORARI PETITION

a. The Nature of the Opinion Below Militates Against Review

The court of appeals' opinion is unanimous, "not precedential" and was summarily upheld on a petition for reconsideration and en banc review without dissent or a request for a response.

b. Petitioners Seek Mere Error Correction

Facially, the petition seeks to correct purported errors of the court of appeals. Pet.3 ("Petitioners . . . provide [a detailed factual statement]. . . . to demonstrate the errors of the Third Circuit. . . ."); and, Pet.28

("Point III. . . . The Third Circuit Performed [a De Novo Review of the Record] Improperly Under the *Jackson* Standard. . . ."). It thus runs afoul of SCR 10.

Additionally, resolution of this fact-bound issue requires review of the entire 5,000-page trial record. Doing so would not be a good use of the Court's resources. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

c. Petitioners Urged the Court Below to Apply the Standard of Review They Now Challenge

The State argues that certiorari should be granted because the court of appeals purportedly applied an erroneous standard of review in considering Kamienski's sufficiency of evidence challenge under *Jackson* and §2254(d)(1). First, it argues the court of appeals should not have conducted a de novo review of the trial record. Second, it argues the court of appeals should have reviewed the sufficiency of evidence claim under §§2254(d)(2) and (e) of the AEDPA and not §2254(d)(1). However, the State told the court of appeals below that its role was to perform a de novo review of the record and to analyze the sufficiency of evidence issue under §2254(d)(1). Resp.App.26-27.

d. Petitioners' Misconduct Makes this an Inappropriate Case for Granting Certiorari

The State's misconduct at the court of appeals and prior proceedings is detailed throughout the Statement of the Case, *supra*. The court of appeals found that not only did the State submit a "misleading," "unhelpful" and "totally improper" memorandum of law to it, but that the State submitted a similarly misleading brief to the state intermediate appellate court and thereby improperly "caused the state [court] to rule the way they did." Resp.App.22. During questioning at oral argument the court of appeals also exposed the State's attempt to establish a fundamental factual issue (namely, whether there was any evidence Kamienski knew in advance of his codefendant's intention to kill the victims and steal their cocaine) with purported evidence that did not exist anywhere in the record. Resp.App.22-26.

The State has continued the same pattern of misconduct in the instant certiorari petition, as also outlined in the Statement of the Case, *supra*. This includes: repeatedly using the word "buyers" to include Kamienski, Pet.6,31-33, when he was not one of the cocaine buyers; pressing factual and legal arguments that are diametrically opposed to ones the State had taken in earlier proceedings; asking this Court to draw an inference of premeditation that the State never presented to the jury, the trial court, the state appellate courts, the district court or the court of appeals (namely, the presence of the two blankets and towel recovered with the victims establishes

Kamienski brought these items to the crime scene with intent to conceal the bodies, Pet.35-36); urging the Court effectively to ignore the jury's acquittal of Kamienski on the murder conspiracy charge by arguing for inferences of his knowing participation in concerted actions with his codefendants prior to the murders; and misstating that the State's theory at trial "was that Kamienski's actions *before, during and after* the crimes proved his guilt as an accomplice to robbery and murder," Pet.5 (emphasis added), when, in fact, the prosecution repeatedly told the jury and trial judge that the State's theory of accomplice liability was based solely on "what happened *at the scene* . . . *after* he arrived there that evening." Resp.App.16-17 (emphasis added); *see also* Resp.App.13-14.

But, the most disturbing aspect of the State's ongoing misconduct is its continued misrepresentation that the trial record shows Kamienski met with the victims at the Holiday Inn on the evening before the murders and actively "lured" them to a death-trap the next day. On at least four occasions, the State lists this as the primary example of evidence that the state appellate court supposedly got right and the court of appeals supposedly got wrong:

> The [state appellate] court found that Kamienski . . . and his co-defendants had *lured* the victims to a private place so the crimes would not be detected. . . ."

Pet.2 (emphasis added); *see also* Pet.3,31,33.

However, the trial record establishes unequivocally Kamienski never met with the victims any time that day. *See* Statement of the Case, *supra* pp.23-29. Even the State's basic factual premise is wrong. It repeatedly says the drug "exchange originally was to occur [at the Holiday Inn]," Pet.2,3,6, when, in fact, the record conclusively establishes the victims always contemplated it would take place "near to," but not at, the hotel. Resp.App.7 and 13.

e. The Issue Petitioners Raise Occurs Rarely and Even More Rarely In the Context of this Case

"[T]he grant of habeas relief on a sufficiency-of-evidence claim is *extremely rare*." Pet.16 (emphasis added). Only a few federal appellate decisions have upheld habeas relief for state prisoners on this ground under the AEDPA. Because it is extremely rare, no pattern of confusion or lack of uniformity has emerged.

Such relief is even rarer in the context of the instant case. This is a purely circumstantial homicide case, premised on accomplice liability; where the prosecutor acknowledges there is no evidence the accomplice knew in advance of the plan to rob and kill the victims or that he had any role in the killings themselves; where the jury acquits him of conspiracy to commit murder, but convicts him of being an accomplice to murder based exclusively on his purported role in disposing of the bodies afterwards; where the trial judge sets aside the convictions after

a lengthy trial because of insufficient evidence; and finally, where the state seeks and obtains a reversal of the trial court's acquittal by submitting a misleading recitation of the trial record in its appellate brief. *See* Statement of the Case, *supra*.

f. The Court Has Denied Certiorari in Similar Cases

This Court denied certiorari in the most analogous reported case of which Kamienski is aware, *Juan H. v. Allen,* 408 F.3d 1262*, cert. denied*, 546 U.S. 1137 (2006) (insufficient evidence of aider and abettor's shared intent and concerted action in homicide case); *see also Chein v. Shumsky,* 373 F.3d 978, 993 (9thCir.2004)*, cert. denied*, *sub nom. Shumsky v. Chein*, 543 U.S. 956 (2004) (insufficient proof of the materiality of perjurious testimony); *Cain v. Perez,* No. 08-268 (5thCir.), *cert. denied,* 129 S.Ct. 496 (2008) (insufficient evidence to rebut of insanity defense). The Court also denied certiorari in nine of the 18 cases which the State claims evince a conflict among the circuits. App.162-63. For all its case citations, the State omits the cases' subsequent history.

g. There Is no Bona Fide Conflict Among the Circuits on the Issue Presented Here

The State's reliance on a claimed conflict between the unpublished court of appeals' opinion below and published opinions in other circuits is an attempt to involve the Court in resolving a fictitious conflict. A comparison of the opinion sub judice and the 18 other

court of appeals' opinions cited by the State (in the appendix, not body, of the certiorari petition, contrary to SCR 24.3) shows there is no conflict. All the courts apply essentially the same standard of review. Thus, there is no reason to think the result below would have been different if Kamienski's habeas petition had been adjudicated by any other court of appeals listed by the State.

Moreover, 15 of the 18 cases the State lists in the appendix involved appeals where state convictions were upheld upon federal habeas review, not reversed by the federal court, as here. Therefore, the states there never pursued a standard of review challenge because they had prevailed below. Additionally, most of the State's cited cases involve habeas challenges to criminal convictions primarily on some ground other than sufficiency of the evidence (most commonly ineffective assistance). Where these opinions address sufficiency of evidence at all, it is very much a peripheral issue that is dealt with summarily or in dicta.

h. The Instant Case Is Not Similar to *McDaniel v. Brown*

The State claims it seeks consideration of the same issue presented in *McDaniel v. Brown*, No. 08-559, *cert. pending*, 129 S.Ct. 1038 (2009). Pet.1 & n.1. *McDaniel*, however, is unique. It presents the question of whether a state prisoner can use post-trial scientific expert testimony in a federal habeas proceeding to negate in-trial testimony of a state's

scientific expert. Although scheduled for oral argument on October 13, 2009, *McDaniel* was removed from the calendar after the habeas petitioner there conceded in his reply brief that the case did not present a question of sufficiency of evidence, but rather, whether the state violated his due process rights by improperly using bad science testimony.

i. The Court of Appeals' Decision Was Correctly Decided

As shown in the Statement of the Case, *supra*, the court of appeals properly held that Kamienski was entitled to habeas corpus relief under §2254(d)(1) on grounds of insufficient evidence. It applied the limited standard of review set forth in *Jackson* to the trial record and correctly concluded the State had failed to satisfy the mens rea and actus reus elements for either the "planning" or "commission" prongs of New Jersey's accomplice liability statute. App.2,19-20,25-26,30-31. *Accord Piaskowski v. Bett*, 256 F.3d 687, 691-93 (7thCir.2001) (proof of presence at the murder scene and an earlier assault of the victim, could not overcome insufficient evidence of participation in the murder itself); *Brown v. Palmer*, 441 F.3d 347 (6thCir. 2006) (proof of presence at the scene of the crime and relationship with the gunman were insufficient to establish prisoner aided and abetted gunman).

The court of appeals also rightly concluded that the state appellate court's contrary ruling was an

"unreasonable application" of *Jackson* because it had improperly "conflated" proof of Kamienski's role in the drug deal with proof of his role in the murders. App.30-31.

The court of appeals' ruling effectively restores Kamienski's case to its status at the conclusion of post-trial motions 20 years ago, where the judge who oversaw the trial dismissed the jury's murder convictions against Kamienski because of insufficient evidence. Resp.App.1-6. It is also consistent with statements of the trial prosecutor, who repeatedly acknowledged in closing arguments and post-trial motions there was no evidence Kamienski had any foreknowledge of the robbery and murders or that Kamienski had participated in the actual killings in any way. Resp.App.13-14 and 15-17, respectively.

Finally, the court of appeals' opinion is consistent with the jury's verdict acquitting Kamienski of conspiring to commit robbery and murder. Although theoretically, if there had been some evidence he assisted Marsieno during the robbery and murders, then Kamienski could have been acquitted as a conspirator and convicted as an accomplice without it technically being an "inconsistent verdict." However, as the court of appeals concluded after what it said was a "careful review of the record" under the "very deferential standard" that limited its inquiry, App.2, there was no evidence that Kamienski did anything during the murders to lawfully convict him under New Jersey's accomplice liability statute.

j. The Result Would Be the Same Under §§2254(d)(1) and (e)(1)

There is no basis to carve out the sufficiency of evidence ground for habeas relief from §2254(d)(1) and permit it only under §§2254(d)(2) and (e)(1), as the State urges. But, even if one were to do this, the result would be the same here. As shown in the Statement of the Case, *supra*, even with a rebuttable presumption of correctness as to the State appellate court's factual determinations, and allowing one to overcome this presumption only with a showing of clear and convincing evidence, the state appellate court's holding could not stand. That court's view of the trial record was fundamentally flawed, owing to the State's submission of a materially misleading brief.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MCINNIS, ESQ.
Counsel of Record
LAW OFFICE OF TIMOTHY J. MCINNIS
521 Fifth Avenue, Suite 1700
New York, New York 10175
(212) 292-4573

Attorney for Respondent

OPINION OF STEVEN P. PERSKIE, P.J. CR.

NEW JERSEY SUPERIOR COURT,
LAW DIVISION, OCEAN COUNTY

December 21, 1988

MOTIONS FOR NEW TRIALS OR
JUDGMENTS OF ACQUITTAL

Defendant Marzeno moves for a new trial because the jury verdict was "against the weight of the evidence." R.3:20-1. The court may grant such relief only if clearly and convincingly satisfied that there has been a "manifest denial of justice under the law." The jury had the opportunity to "pass upon the credibility of the witnesses," and there was more than enough evidence to sustain the verdict as to defendant Marzeno on all counts of the indictment submitted to the jury. The motion must therefore be denied.

Defendants Alongi and Kamienski move for a new trial, R.3:20-1, or for the entry of judgment of acquittal, R.3:18-2. A new trial may be granted "if required in the interest of justice," while a judgment of acquittal may be entered only upon a finding that the evidence is insufficient to sustain a verdict of guilty.

Defendants Alongi and Kamienski were charged with murder and felony murder as accomplices or conspirators, or both. The jury was instructed that they could be found guilty as principals in the murders and felony murders for any conduct undertaken as an accomplice, defined as any act done before, during or after the crime with purpose to promote or

facilitate the commission of the crime. The instruction explained the difference between being an accomplice and a conspirator. An example was used to illustrate the applicable legal principles, involving a hypothetical bank robbery where the perpetrator, without prior arrangement, enlisted the knowing aid of a friend in driving him to the airport to effect his escape. The example was correct on *its* facts, but not on the facts of this case. In the example the theft, the unlawful taking or receiving, was still underway when the friend drove the perpetrator to the airport, and thus the actions of the friend were undertaken "during" the commission of the offense, and with the purpose of promoting or facilitating its completion. In this case the actions of defendants Alongi and Kamienski in disposing of the bodies were undertaken after the robbery and murders had already been completed. This conduct is consistent with a purpose to hinder apprehension rather than a purpose to promote or facilitate the commission of the robbery and murders. This is the old "accessory after the fact" theory that was codified as N.J.S.A. 2A:85-2 prior to the enactment of the Code of Criminal Justice, and is now embodied in N.J.S.A. 2C:29-3. *State v. Lynch*, 79 N.J. 327, 339 (1979).

The instruction was in error on the subject of accomplice liability, in that it permitted the jury to consider the actions of defendants Alongi and Kamienski in disposing of the bodies as a basis for accomplice status in and of themselves, rather than as merely evidence from which inferences could be drawn as to the purpose of the conduct by the two of

them before or during the robbery and murders. Given the verdict, which acquitted defendants Alongi and Kamienski of conspiracy to rob or to murder, the jury unquestionably determined them guilty of the murders and the felony murders as accomplices. This mandates the conclusion that the error in the instruction had the capacity to affect the jury's verdict. It is therefore necessary to set aside the jury verdicts on the murder and felony murder charges against defendants Alongi and Kamienski.

The next question is whether to order new trials on those charges or, in the alternative, to enter judgments of acquittal. R.3:20-1; R.3:18-2. The verdict acquitting defendants Alongi and Kamienski of the conspiracy to rob or to murder would preclude a retrial on the theory that they were chargable as principals for the murders or felony murders by reason of their *conspiracy* status. This would leave for retrial only the charge that these defendants were guilty of the murders and felony murders as *accomplices*. There is not sufficient evidence to support such a verdict. While it can be argued that all of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable. If defendants Alongi and Kamienski did not conspire to commit these crimes, they could be charged therewith in a new trial only as accomplices and only on the basis of their actions

during the commission of the crimes. There was no evidence of their conduct during the commission of the crimes except, inferentially, their presence at the scene, which would not by itself suffice to sustain a verdict. The State relies upon this inference to sustain the further inference that defendants Alongi and Kamienski assented to the robbery and murders, lent to the crimes their countenance and approval, and thereby are chargable therewith as accomplices. This latter inference, however, rests not upon any *evidence* of their presence at the scene of the crimes but upon the *inference* of their presence. Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder, as opposed to the crime of possession of controlled dangerous substance with intent to distribute, in the conduct of defendants Alongi and Kamienski prior to or during the meeting on the afternoon of the 19th.

In substance, the jury found that the State had not proved beyond a reasonable doubt that defendants Alongi and Kamienski knew of and agreed to aid in the robbery and murders before they were committed, even though the jury obviously believed the testimony of Donna Duckworth as to her observations at the Alongi house on the night of the 19th. Given that there was no evidence of the actions of defendants Alongi and Kamienski during the commission of the crimes, as opposed to afterwards, the jury's verdict would logically also have been "not guilty" on the accomplice theory if the instruction on

that subject had been correct. The appropriate remedy, then, for the error in the instruction is to enter judgments of acquittal on the murder and felony murder charges as to defendants Alongi and Kamienski. R.3:18-2.

"What, then of the remaining verdicts against defendants Alongi and Kamienski, and the verdicts against defendants Marzeno? The first question is whether the error in the instruction had any capacity to affect the verdicts in question. With respect to the remaining charges against defendants Alongi and Kamienski, and all the charges against defendant Marzeno, the law of accomplice liability was not involved. Each of the defendants was charged as a principal in the crimes in question. The error in the instruction had no capacity to affect the verdicts on those charges. Furthermore, there was ample evidence before the jury to sustain each of the verdicts. Accordingly, the remaining verdicts are not subject to any remedial action by the court and must stand as returned.

Lastly, defendants suggest relief is in order for the failure of the court, on its own motion, to instruct the jury on the charge of hindering, N.J.S.A. 2C:29-3. While it is true, as asserted by defendants, that the court has an affirmative obligation to search the record and to instruct the jury as to any included offenses that the evidence would sustain; and while it is also true that the evidence in this case would justify a charge of hindering ("suppress[ing], by way of concealment . . . any evidence of the crime"), the

court's authority and responsibility in presenting included offenses to the jury extend only to those charges that are "included" within the scope of the charges returned in the indictment. N.J.S.A. 2C:1-8(d). Hindering, as defined in N.J.S.A. 2C:29-3, is not an offense included within the elements of murder or felony murder, and accordingly could not have been presented to the jury with or without a request by defendants. There is therefore no basis for relief from the jury verdicts on these grounds.

In conclusion, judgments of acquittal will be entered on the first, second and fifth counts of the indictment in favor of defendants Alongi and Kamienski. The remaining motions are denied. Sentence will be imposed on defendants Marzeno on the first, second, fifth, sixth and seventh counts, and on defendants Alongi and Kamienski on the sixth and seventh counts.

Steven P. Perskie, P.J.Cr.
December 21, 1988

Excerpts from Direct Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 10/28/1988.

* * *

[135] Q. Now, what did you do at this point in time when they talked to you about a three kilo – three kilos to bring up?

A. Well, I told them that I would, you know, look into it in Florida.

People that I knew there and Nick told me when I got it together, to come up to the Holiday Inn in Toms River.

He told me where it was, and the reason he wanted to do that was because that was close to where the deal was going to take place.

* * *

[138] Q. When is the next time that you saw him?

A. The next time I saw him was at the next day at 11:30 in the morning.

He drove by and asked me to come out to the car because he didn't want to come into the hotel.

* * *

Q. All right. Now, how did you know to wait for Nick DeTournay outside the Holiday Inn at 11:00 or 11:30 on the 18th?

A. Well, he called and told me that he would be by to pick me up.

Q. Okay. What did he tell you when you got in the car?

A. When I got into the car with him, he told me that the people still weren't ready and they were getting their money together and –

Q. Did he indicate where he had just come from?

A. They had just come from the people that were getting the money together.

Q. Okay. Did he indicate to you when the deal was going to be now?

MR. CAMMARATA: Judge, I would object to the leading nature of that question.

MR. MILLARD: Judge, with all due respect, I am asking –

THE COURT: No, I will permit it.

A. It was supposed to take place the next day at three o'clock.

* * *

Excerpts from Cross Examination of Sidney Jeffrey, III, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/1/1988.

* * *

[14] Q Okay. So there was no problem for Nick to come to the Holiday Inn on the 18th –

A He didn't come into the Holiday Inn, sir.

Q Let me finish my question.

There's no problem for him to come and park outside of the Holiday Inn on the 18th and pick you up in the morning. Is that right?

A No, it's not, sir. He never came into the grounds of the Holiday Inn.

* * *

[26] Q Okay. So at around six o'clock on the 18th, you're in the bar at the Holiday Inn, in Toms River, right?

A Yes, sir.

Q Okay. Remember who was there?

A Beg your pardon?

Q Do you remember any of the people that were there?

A No, sir. I remember a bartender.

Q A bartender?

A Yes, sir.

Q So there's nobody now that you recollect being in the Holiday Inn on the 18th around six o'clock, nobody specifically?

A No, sir.

* * *

[29] Q No. No. You're not listening to me. When he drops her off, he wasn't going to come anywhere near the Holiday Inn, right? 'Cause he looked too much like a hippie?

A Right.

* * *

Excerpts from Direct Examination of Donna Sue Duckworth, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/2/1988.

* * *

[37] Q I'm sorry. Sunday, September 18th.

A Um-hum.

Q Do you have a – do you have a recollection of being at the Holiday Inn on that day?

A Yeah. As to my best memory, we were there [38] around six o'clock, around that time. I don't know if it's five or six. Happy hours we went there.

Q Happy hour is the reason you went there?

A Yeah. Cocktails.

THE COURT: Is that in the afternoon or the morning?

THE WITNESS: No. Five o'clock, like dinner time.

Q And who else was there? Did you meet anybody else there?

A Joe Marzeno, Tony Alongi, Jackie, myself, Paul.

Q Were you talking to Paul and Joe and –

A Not really. I was just – I remember talking to Jackie. I wasn't really talking to them.

Q Do you know what they talked about on that day?

A I really wasn't listening.

[39] Q Did anybody else show up?

A As I recall, Buddy stopped in, but it's not –my – the way I saw it, it's not like he stopped in to meet anyone. I think he was there on his own.

* * *

Excerpts from Transcript of Proceedings, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 11/16/1988 (Closing Argument of Assistant Ocean County Prosecutor E. David Millard).

* * *

[262] We know when he gets in, he gets in on the seventeenth, that's the day he checks in at the Holiday Inn, which is where he's told on the check-in on the Holiday Inn in Toms River, that's near to where the deal is going down.

* * *

[266] Donna Duckworth tells you that there's a meeting at the Holiday Inn later on that day, cocktail hour, and she testifies that she's there, Marzeno's there, Alongi, Kamienski, Jackie Sullivan, and she's very honest, she does not recollect any conversation of what took place. She says the men were sort of together, she was just BS'ing with Jackie Sullivan, but she recollects being there. And she also indicated to you that it wasn't that unusual. She also tells you that she doesn't see the DeTournays, they weren't there, ...

* * *

[276] And I'm going to say does Paul Kamienski necessarily know that they're going to get killed? I don't think so. Not from the evidence and the testimony that I've heard. Paul Kamienski is there because

he is part and parcel, he put this drug deal together, he made it work, he was there.

And you know what, Tony and Joe, they didn't have any money, but you know what they had, they had a gun and they [277] killed the DeTournays. They murdered them. They murdered them in cold blood. And Kamienski was there and that didn't end the murder, a bullet through the chest or through the head did not end a murder, a murder is finished and the murder ended when that body is disposed of. And I submit to you that what occurred at that point in time was that Paul Kamienski assisted Marzeno and Alongi in getting rid of the bodies. That he assisted, he helped, he rendered his countenance to that in getting rid of the bodies. He was there. He never – I'll say this, he never expected it to happen, he didn't expect them to be murdered. He said that to Donna as soon as they got outside, I couldn't control the situation, but it happened. And he was there and he helped dispose of the bodies.

* * *

[296] And I've indicated to you that I don't think that Paul Kamienski – I don't think that the was a part of a conspiracy to murder those people, I think he very clearly was a part of the conspiracy, that second conspiracy, also to possess that cocaine with intent to distribute it.

* * *

Excerpt from Transcript of Motions and Sentence, State of New Jersey v. Marzeno, et al, Ind. No. 692-10-87, Superior Court of New Jersey, Law Division, Ocean County, 12/21/1988 (Oral Argument of Assistant Ocean County Prosecutor E. David Millard).

* * *

[63] And Mr. Cammarata said that I argue in my brief here that now that Mr. Kamienski was part of this plan, the murder, well, he obviously misread the brief because that's not what I said.

In fact, I say that it is not necessary that there was a plan known to Kamienski in advance of his arrival at the house on that occasion for him to still be guilty as an accomplice to murder, and that certainly is the state of the law.

* * *

THE COURT: Let me ask you this: Let's take that apart. I gather you are acknowledging, because you acknowledged to the jury, and I think you would have had a tough time here of saying otherwise, that there is no way in which Kamienski could be accountable, and I am going to use Kamienski as shorthand, I suggest to you that the jury's verdict suggest that Alongi and Kamienski are in the same posture.

But let's leave that for the moment. There is [64] 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.

Are you with me there?

MR. MILLARD: As to Kamienski?

THE COURT: All right.

MR. MILLARD: As to Alongi, I disagree with you.

THE COURT: Let's pass the question of Alongi for the moment.

I think you are in some difficulty in trying to make a distinction between the two of them.

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 knew of and agreed to assist in or conspired to commit a robbery or a murder.

MR. MILLARD: I agree.

THE COURT: And the jury so found.

MR. MILLARD: I agree with you.

THE COURT: All right. Starting from that, in order to have him be guilty as an accomplice and not as a conspirator, that would have to be based on what happened at the scene. Would it not?

MR. MILLARD: I agree.

* * *

[71] Mr. Millard:

* * *

Even if he doesn't know, and let's assume, and that's certainly what I argued to the jury, that when he arrived there on that evening, he was not aware of any plan to murder these individuals. It becomes apparent to him during the course of conduct, the course of events that take place there at the scene, he is an accomplice. . . .

* * *

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April 3, 2009

Via Facsimile
and Electronic Mail

Samuel J. Marzarella Esq.

RE: Kamienski v. Hendricks, et al
Case Number: 06-4536
District Case Number: 02-cv-03091
Listed: for Oral Argument on Thursday, April 16, 2009

Dear Counsel:

At the direction of the Court, "On Page 52 of the Brief for Appellees, Counsel for Appellees states: "Defendants never intended for the drug deal to have occurred. Defendants duped the DeTournays into thinking it would occur by lying about having trouble getting the nonexistent money. This is shown by the fact that there was never any money intended to be paid to the DeTounays." On Page 52, of the brief Counsel states: "Between September 10th and September 15th, . . . Defendants assured Buddy

Lehman . . . ". **Counsel is hereby directed to submit a letter to the Court no later than Wednesday, April 8**, stating whether "Defendants" as used in those paragraphs includes Appellant Kamienski, and if so, where in the Appendix the Court can find testimony to support this claim. If the testimony is not in the Appendix, but in the trial transcript, copies of the relevant pages of the transcript are to be included with the letter; the Court will accept those copies as a Supplemental Appendix, and Counsel should therefore comply with the requirements for submitting an Appendix (number of copies) when submitting the supplemental materials.

Please file the Letter using the "response event" under the argument notices and acknowledgment category in CM/ECF.

Finally, the Brief submitted by Counsel for Appellees refers only to portions of the trial transcript rather than to the Appendix that was submitted. It is therefore virtually useless insofar as it purports to support the representations made in the brief. Counsel is to submit a revised brief that replaces all citations to the trial transcript with citations to the Appendix. If counsel has cited portions of the trial transcript that are not included in the Appendix, **Counsel is hereby directed to provide those additional portions to the court in the form of a supplemental appendix no later than close of business on Friday, April 10th.**

Very truly yours,

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

By: Tiffany Washington
Tiffany Washington, Calendar Clerk
267-299-4905

cc: Timothy J. McInnis Esq.

Excerpts from Transcript of Oral Argument Kamienski v. Hendrix, no. 06-4536, U.S. Court of Appeals for the Third Circuit, 4/16/2009.

* * *

[4] THE COURT: Is sufficiency of evidence a question of law under (d)(1) or a fact under (d)(2)?

MR. McINNIS: Yes, that's correct.

THE COURT: Which?

MR. McINNIS: It's both.

THE COURT: Okay.

MR. McINNIS: Oh, I'm sorry. Sufficiency of the evidence is under (d)(1) where we say that the state appellate court made an unreasonable application of the Jackson standard. And the argument under (d)(2) and (e) is that the various fact finding it made were clearly erroneous.

THE COURT: Go ahead. I just wanted to get your view.

* * *

[20] THE COURT: Maybe you can start by helping me out with the problem I had as I read your brief and became almost apoplectic. Why would you put in your brief evidence against Kamienski and then put in parentheses admitted only insofar as Maiano, or whatever his name, Marzeno was concerned?

And even in your response you've got at one point evidence that you put in here and then there's a footnote: "The parties discussed a cocaine deal" – this is on page two of your response in response to his affidavits. "The parties discussed a cocaine deal. This was stricken from the record."

If it's stricken from the record why in the world would you put that in your brief and argue it? And you do that repeatedly throughout your brief. You'll say that the evidence is such and such and then you'll put in parentheses admitted only as to codefendant.

MR. MARZARELLA: Well, I think it's important –

[21] THE COURT: It's improper, that's what it is, it's totally improper.

MR. MARZARELLA: I apologize to the court if that's improper, Judge. That was what was done at the state level.

THE COURT: That's his point.

MR. MARZARELLA: Yes, and –

THE COURT: And that's what caused the state to rule the way they did.

* * *

[31] THE COURT: Forget what you know for sure. What does the evidence show? What does the [32] record show about where he was?

MR. MARZARELLA: Well, the record shows that he was at the Holiday Inn, that he was speaking with the three – the two other defendants, and that Duckworth was not privy to their conversation. He was there at 6 o'clock, and at 8 o'clock a lot of things happened. All the parties on their way home were talking about how this was a bust.

THE COURT: Wait, wait, wait a minute. Where is there evidence that Kamienski was involved in a conversation that this was a bust?

MR. MARZARELLA: Well, what we're, what I'm trying –

THE COURT: Didn't you just say that, all the parties were talking about on the way home this was a bust? That's what you just said.

MR. MARZARELLA: I don't think that we need to show –

THE COURT: Isn't that what you just said?

MR. MARZARELLA: Yes. Yes.

THE COURT: All the parties.

MR. MARZARELLA: Yes.

[33] THE COURT: Where's the evidence to support that, or an inference to that effect?

MR. MARZARELLA: The inference goes as follows, Judge. Kamienski left at 8 o'clock, or was, at least we can say he was at his boat between 8 and 9

o'clock, along with everyone else who left. Eight o'clock was the time when everybody pretty much scattered. And in Henry DeTournay's, the victim's words, when he called Sid Jeffrey he called him at 8 o'clock and said, No, we're going to do it on the 19th, the next day.

Buddy Lehman said that Marzeno had previously promised to him to be at his residence between six and –

THE COURT: If Nick DeTournay made that call then, the only thing that you could infer from that is that whatever happened inside the Holiday Inn room did not suggest anybody who didn't otherwise know that the DeTournays were going to get ripped off.

He's still thinking that they're having trouble getting the money together.

MR. MARZARELLA: That's true.

THE COURT: He didn't see a gun, I [34] would assume. Was there anything to suggest that he did?

MR. MARZARELLA: No, he didn't. No, he didn't.

THE COURT: So help me again, where – you said a few minutes ago that all of them were talking about this was going to be a bust. How do you get there?

MR. MARZARELLA: Well, the concerted action, Judge, everyone left at a specific time, only two hours after Duckworth placed all the defendants in each other's company. And so we can infer, I think it's a reasonable inference, that there was a meeting at the Holiday Inn. And by the way, as I said at the outset –

THE COURT: But finish that train of thought, we can infer that there was a meeting that – go ahead.

MR. MARZARELLA: At the Holiday Inn with respect to this drug deal that was supposed to have occurred. Now, we can also infer that it was a robbery from the get-go because there was never any money and that's all throughout the record.

THE COURT: That doesn't – we're [35] going around in one huge circle here. Where is the evidence from which a jury could infer that Kamienski knew there wasn't going to be any money? That was the question Judge Van Antwerpen started –

MR. MARZARELLA: I'm sorry, your Honors, I'm doing the best that I can to answer your question.

THE COURT: That may not be any fault of yours. It may simply be a fault of the record.

THE COURT: Maybe the evidence isn't there. Yes, maybe the evidence isn't there.

* * *

[37] THE COURT: . . . . Marzeno was planning to rip these folks off, says he'll kill them before he gets any money.

If you can point me to somewhere in the record where Kamienski heard that that would be incredibly helpful. But I haven't heard that yet.

And we're still trying to find out what in the record suggests Kamienski knew this was going to be a robbery, which would then get you felony robbery, I think, or felony murder?

I'm still looking for that.

* * *

THE COURT: Under 28 – 2254(d)(1) do you agree that the sufficiency of evidence is a question of law under (d)(1)? Defense counsel said it was.

MR. MARZARELLA: It's a question of a due process question. Certainly that, the constitutional question of law, yes, but I think that that's a little bit different from being the, acting as the trier of fact at the inception.

I mean you, you respectfully, I think your role is to find whether evidence is sufficient, whether there's anything in the record that, reasonable that the jury could –

THE COURT: There's a standard of deference – yes or no, are we under 2254(d)(1) or (d)(2)? Which standard applies?

MR. MARZARELLA: I think it's (d)(1), your Honor.

THE COURT: Okay.

* * *

Excerpt from Ocean County Prosecutor's Office Memorandum of Law in Opposition to Appeal by Anthony Alongi, no. 06-4419, U.S. Court of Appeals for the Third Circuit, filed 9/2/2009.

* * *

[39] On September 18, 1983, when the deal was originally supposed to happen, Nick went to the appellant's house without the cocaine, where he spoke with the appellant. Nick shortly thereafter saw Jeffrey and told him that "they were having trouble getting the money together" and that the deal would be postponed until September 19 at 3:00. (Ra127-128, 101-103)

* * *