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

RESPONDENT'S SUPPLEMENTAL BRIEF PURSUANT TO RULES 15(2) AND 15(8)

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Respondent Kamienski submits this supplemental brief pursuant to Rules of the Supreme Court of the United States ("SCR") 15(2)[1] and 15(8)[2] to advise the Court of a material misstatement of the record in Petitioners' reply brief, dated November 13, 2009 ("Rply.Br.").[3] This misstatement concerns the trial court's findings with respect to sufficiency of evidence.

ARGUMENT

The trial court unequivocally found there *was not* sufficient evidence of antecedent conduct to support Kamienski's murder convictions under an accomplice liability theory. Surprisingly, in their reply brief Petitioners claim for the first time that the trial court "found" there *was* such evidence. To support this contention, they purport to quote a sentence from the trial court's written opinion. But, a review of the

[1] "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." SCR 15(2).

[2] "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing." SCR 15(8).

[3] Kamienski also briefly addresses Petitioners' reliance on *Wood v. Allen*, No. 08-9156 (submitted after oral argument on November 4, 2009). Rply.Br.2. Not only is that case's question limited to the construction of §§ 2254(d)(2) and (e)(1), but it also concerns ineffective assistance of counsel. The instant matter concerns the application of § 2254(d)(1) to a claim of insufficient evidence.

actual written opinion reveals that Petitioners selectively quote from only part of the sentence at issue, thereby reversing its intended meaning. Petitioners also mischaracterize the nature of the trial judge's action as well, transforming the trial court's paraphrasing of the prosecution's "theory" – which it renders "untenable" – into a supposed factual "finding." In short, Petitioners completely distort the trial court's record concerning what they concede is a central issue for the Court's consideration.

Specifically, in their reply brief, Petitioners make the following assertion:

> The trial court's ruling was fully discussed and then reversed by the appellate division, which noted that, notwithstanding its granting of judgment n.o.v., *the trial court had found that, "[a]ll 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*." (Resp.App.3)

Rply.Br.4 (emphasis added; citation in original).

The above quotation purports to be from the following sentence in the trial court's written opinion dated December 21, 1988, see Resp.App.1-5:

> *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*.

Resp.App.3 (emphasis added).[4]

When one compares the Petitioners' quotation with the actual opinion, it becomes clear that Petitioners deliberately omitted the beginning and ending parts of the trial court's sentence, which are needed to give it its intended meaning. First, the trial court began by stating, "While it can be argued," thereby, indicating it was restating the prosecution's theory, not finding a fact. Second, the trial court finished the sentence by concluding that the record "renders this theory untenable." Neither the "While it can be argued" nor "renders this theory untenable" phrases (or their substance) appear anywhere in Petitioners' quotation or elsewhere in the reply brief, and their absence causes Petitioners' purported statement of the record to be misleading.

Petitioners compound this mischaracterization by saying that "the [state] appellate division . . . noted" the trial court's supposed *finding* of sufficient antecedent evidence in reversing the judgment n.o.v. Rply.Br.4. Petitioners fail to cite where in the state

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[4] Petitioners did not include the trial court opinion in their appendix, even though they were required to do so under SCR 14(i)(i). And, they did not proffer their interpretation of that opinion, which Kamienski challenges here, until they filed their reply brief.

appellate division opinion that court supposedly made the claimed observation. There is good reason for this because the state appellate court merely quoted the entire sentence from the trial court opinion verbatim, as Kamienski sets out above; it made no attempt to turn the trial court's dismissal of the prosecution's theory into a finding of sufficient evidence. App.129.

Petitioners' purported quote from the trial court's written opinion is also misleading because it conflicts with the plain words the trial court used throughout the opinion, as well as, its express findings from the bench during oral argument on post-trial motions. For example, having noted in the written opinion that the jury acquitted Kamienski on the conspiracy to commit murder charge and having further concluded that it gave an erroneous jury instruction on accomplice liability, the trial court made the following factual findings with respect to insufficient evidence in the trial record:

> 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*. . . .[5]

[5] In their reply brief, Petitioners also claim for the first time that the trial court did not dismiss the murder charges against Kamienski because of insufficient evidence. Rply.Br.4 ("The trial court [did not] enter[ ] judgments of acquittal on the robbery and murder convictions . . . because it found the evidence under

(Continued on following page)

> *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*. . . .
>
> *Thus there does not appear to be sufficient evidence to establish the requisite purpose to promote or facilitate the crimes of robbery or murder* . . . in the conduct of defendant[ ] . . . 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 defendant[ ] . . . Kamienski knew of and agreed to aid in the robbery and murders before they were committed*. . . . *Given that there was no evidence of the actions of defendant[ ] . . . Kamienski during the commission of the crimes* . . . the jury's verdict would logically also have been "not guilty" on the accomplice theory if the instruction on that subject had been correct.

Resp.App.3-5 (emphasis added).

Additionally, at least twice during oral argument on post-trial motions, the trial court indicated it found that there was insufficient evidence of Kamienski's antecedent conduct to support his murder convictions

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an accomplice theory was insufficient to sustain them."). This is clearly wrong as the cited portion of written opinion shows.

as an accomplice. The trial court noted:

> *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. . . .
>
> You [Prosecutor Millard] indicated to the jury, and I think you had to, and I think you were correct that *there is nothing that suggests by the requisite standard that prior to the afternoon of the 19th he [Kamienski] knew of and agreed to assist in or conspired to commit a robbery or a murder*.

Resp.App.15-17 (emphasis added). The prosecutor agreed with both of the above statements by the trial court. Id.[6]

Thus, the court of appeals' unanimous decision, which was highly critical of the Petitioners' misleading

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[6] Accordingly, Petitioners are also wrong when they say Kamienski misconstrued the prosecutor's statement at the trial court proceedings as an admission there was insufficient evidence of antecedent conduct to sustain Kamienski's accomplice liability-based murder convictions. Rply.Br.4 ("The trial prosecutor's comment in summation that there was insufficient evidence to support a conviction on the conspiracy charges has been misconstrued by Respondent as pertaining to the evidence of his guilt under an accomplice theory."). As can be seen in the quoted colloquy, the trial court and prosecutor were discussing that lack of antecedent evidence for both "assisting in" and "conspiring to" commit robbery or murder, and they did not limit their comments to just "conspiracy," as Petitioners now claim.

briefs and oral argument,[7] is entirely consistent with the trial court's factual findings as to insufficient evidence, as Kamienski showed in his opposition brief, and is not inconsistent with the trial court's supposed finding of sufficient evidence, as Petitioners mistakenly argue for the first time in their reply brief.

CONCLUSION

That Petitioners misstate the record with respect to the "only" factual issue in Kamienski's opposition brief which they say they need to rebut, Rply.Br.4, underscores this is not an appropriate case to broadly construe various subsections of § 2254 with respect to all habeas petitions, regardless of the grounds on which they seek relief, as Petitioners urge. For this and the other reasons set out in his opposition brief, certiorari should be denied.

Respectfully submitted,

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[7] The court of appeals further determined that Petitioners' misleading brief "caused" the state appellate court to rule erroneously. Resp.App.22. This determination is not just something Kamienski "assumed as a fact," as Petitioners claim. Rply.Br.3.