UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

No. 06-4536

PAUL KAMIENSKI,

Appellant,

-v.-

ROY L. HENDRICKS, ADMINSTRATOR;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
OCEAN COUNTY PROSECUTOR'S OFFICE

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. NO. 02-CV-03091(SRC)

OPPOSITION BY APPELLANT PAUL KAMIENSKI TO APPELLEES' MOTION TO STAY MANDATE

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

COUNSEL FOR APPELLANT PAUL KAMIENSKI

Appellant Paul Kamienski opposes Appellees' Motion For Stay of Execution and Enforcement of Mandate Pending Filing of Petition for Writ of Certiorari in Supreme Court of the United States, dated July 21, 2009 ("Motion to Stay Mandate").[1]

A. <u>The Motion is Procedurally Defective</u>

1. The Motion to Stay Mandate is procedurally defective under Federal Rule of Appellate Procedure 41 to a fatal degree. It seeks to "stay" the mandate in this matter, when, in fact, the mandate was already issued on July 10, 2009. (No where in their motion do Appellees mention this important fact.) Thus, this Court lacks jurisdiction to even entertain the application *sub judice*. *See United States v. Holland*, 1 F.3d 454, 455 (7th Cir. 1993) (holding that party who seeks stay after mandate had issued first has to show that mandate ought to be recalled and then has to show that recalled mandate should be stayed).[2]

---

[1] Appellees' caption indicates that they are "Appellants," but that appears to be a typo, as does the accompanying Certification of Service Upon Counsel by Samuel Marzarella, which erroneously refers to the undersigned as "*pro hac vice* counsel," when, in fact he, is a member of the bar of this Court and counsel of record.

[2] Appellees' attempt to circumvent the specific requirements of Federal Rule of Appellate Procedure 41 by seeking to also rely on 28 U.S.C. § 2101(f) should be similarly denied. Under the current posture of this case, the general rule of Section 2101(f) must be construed to limit Appellees to making the instant motion to the Supreme Court. Otherwise, the specific terms of Rule 41 would have no meaning.

2. A correctly styled motion (which Appellees have not made) would be to move to "recall" the mandate and then seek to stay it. Assuming there is authority to grant a motion to recall an appellate court's mandate, the standard for granting it is quite high. *Calderon v. Thompson*, 523 U.S. 538, 550 (U.S. 1998) (Holding that in light of "the profound interests in repose" attaching to the mandate of a court of appeals, …the power can be exercised only in extraordinary circumstances….The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies.") (citations omitted); *see also United States v. Fraser*, 407 F.3d 9, 10 (1st Cir. 2005); *Faulkner v. Jones*, 66 F.3d 661, 662 (4th Cir. 1995); *Boston & Me. Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993). The Motion to Stay Mandate does not attempt to meet, nor does it inadvertently satisfy, the Supreme Court's "exceptional circumstances" and "unforeseen contingencies" standard.

3. The Motion to Stay Mandate is also procedurally defective since it is untimely. Federal Rule of Appellate Procedure 41(b) provides that:

> The court's mandate *must* issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a *timely* petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.

Fed.R.App.P. 41(b) (emphasis added.) Thus, by the express terms of Rule 41(b) an appellate court "must" issue a mandate unless there is a "timely" motion to stay it. Appellees fail to mention the fact that their motion is out of time since it was not filed within seven days after the Court denied (on July 2, 2009) their petitions for panel rehearing and rehearing en banc. And, they fail to offer any explanation for why their untimely motion should be considered by the Court. On this basis it should be summarily denied.

B. The Motion Does not Satisfy the Terms of Rule 41 or Meet The Four-Part *Doe v. Miller* Test

4. Even if one were to permit the instant motion despite its dispositive procedural flaws, Appellees still do not meet the test for staying the mandate under Rule 41(d)(2). That rule provides a motion to stay the mandate "must show that the certiorari petition would present a substantial question *and* that there is good cause for a stay." Fed.R.App.P. 41(d)(2) (emphasis added). In other words, according to the Rule, the State must show not only that its prospective certiorari petition raises important issues, but also that there is some good reason to stay the mandate until such issues are presented to the Supreme Court.

5. In determining a motion to stay the mandate under Rule 41(d)(2), at least one appellate court has ruled it must find the movant has

satisfied the following four factors: (1) there is reasonable probability that U.S. Supreme Court will grant certiorari; (2) there is fair prospect that the movant will prevail on merits; (3) the movant is likely to suffer irreparable harm in absence of the stay; and (4) the balance of equities, including public interest, favor its issuance. *Doe v Miller*, 418 F. 3d 950, 951) (8th Cir. 2005) (applying and finding movant failed to meet the four part test to stay the mandate).

Applying Doe v. Miller

6. Factor One (likelihood of certiorari). The Supreme Court apparently has never granted certiorari in a garden variety 28 U.S.C. § 2254 (AEDPA) habeas case where a state prisoner's petition for a writ was granted because of insufficient evidence case. *See e.g*., *Cain v. Perez* (No. 08-268) (5th Cir.) cert. denied, 11/03/08; *Juan H. v. Allen*, 408 F.3d 1262 (9th Cir. 2005), cert. denied, 546 U.S. 1137 (2006); *Chein v. Shumsky*, 373 F.3d 978, 993 (9th Cir.), cert. denied, by *Shumsky v. Chein*, 543 U.S. 956 (2004). While one can never predict any court's ruling with certainty, it is most likely the Supreme Court will do the same thing here.

7. Appellees' claim that the instant case is "identical" to *McDaniel v. Brown*, No. 08-559, where certiorari was granted, is incredibly wrong. That case (which is currently being briefed on the merits) addresses

primarily the issue of whether the AEDPA permits a federal habeas court to expand the record to consider evidence obtained after trial to determine the reliability of testimony and evidence given at trial. There, under highly unusual circumstances, the Ninth Circuit permitted a defendant to use DNA expert evidence obtained post-trial to show that the State of Utah's trial DNA expert's testimony was so glaringly erroneous that it had to be effectively deleted from the record when performing a sufficiency of evidence analysis. There is nothing close to those facts (or the larger policy issues it raises) here.

8. Certiorari is also extremely unlikely here given the unanimous decision by this Court, the designation of its ruling as "non-precedential," and, the peculiarly factual nature of the Court's ruling. When all is said and done, what the State actually disagrees with is the Court's failure to agree with it that there is something (what, we do not know) in the underlying trial record that supports Kamienski's murder convictions on an accomplice liability theory. This type of factual dispute is one that the Supreme Court ordinarily does not address.

9. Moreover, one can only imagine how unreceptive the Supreme Court will be to granting certiorari when it reads this Court's opinion and sees that it found the State had submitted an "unhelpful" and "misleading

brief" or when it reviews the transcript of the oral argument and sees that the State made false representations to the Court concerning what is contained in the underlying trial record.

10. Factor Two (likelihood of success on the merits). The State of New Jersey had ample opportunities to cite at least one fact from the underlying trial transcript which showed that Kamienski had foreknowledge of his co-defendants' plans to commit murder and that he did anything (knowingly or otherwise) to help plan or facilitate the murders or related drug robbery. Those opportunities included multiple briefs and oral argument on the appeal and an additional brief on the combined motions for panel and en banc rehearing. The State simply has been unable to identify one solid fact (whether direct or circumstantial) establishing Kamienski's guilt. Even in the instant application the State does not point to one simple fact establishing accomplice liability on Kamienski's part. No matter how it tries to slice and dice the law (saying there are six legal grounds on which this Court committed error), it has not overcome, and likely will not be able to surmount, this fundamental evidentiary shortcoming.

11. Factor Three (irreparable harm to the State). The State of New Jersey claims it will suffer some unspecified irreparable harm if Kamienski's mandate is not stayed and the Supreme Court reverses this Court. It made

the same argument in opposing Kamienski's release on bail under Fed.R.App.P. 23(c) when it said he should not be released on bail because it would suffer unspecified irreparable harm if this Court reconsidered its original judgment. The State was unable to persuade the Court before—and for good reason. It cannot show irreparable harm because there is none to be found. If by some remote chance the Supreme Court grants certiorari, and if by some even more remote chance it reverses this Court, then Kamienski's conviction can be simply reinstated and he can be easily reincarcerated.

12. Moreover, Appellees' contention that they will be unable to monitor or reincarcerate Kamienski if the stay is denied is unavailing. He is currently on bail (one million dollar personal recognizance) with conditions that include barring him from foreign travel or even obtaining a passport. Kamienski has other travel and reporting conditions, which he is currently seeking in the District Court to modify slightly, but not eliminate. Thus, Kamienski will continue to be under the careful watch of the State whether the stay is granted or denied. The State has never shown that Kamienski has the resources or connections to flee to another jurisdiction, where he could not be returned, nor has it shown any past history of failing to meet all court dates—including during the one year period after his indictment and before his trial, when he was permitted to live in Florida and travel to New Jersey.

13. Finally, the State has not shown that Kamienski is more likely to flee if the mandate is issued pending a petition for certiorari then he would be if the stay is granted. Nor could it. His opportunities and motives to flee are the same regardless of the status of the mandate pending possible Supreme Court review.

14. Factor Four (equity and public interest). Kamienski has been exonerated by this Court in a unanimous decision. The State's motion for rehearing has been summarily denied. This was without any panel member voting for rehearing, without a majority of the entire court seeking en banc rehearing, and without Kamienski being even asked to reply to the State's motion for reconsideration. Kamienski is now innocent of the murder charges against him in the eyes of the law and the public. Continuing his release on bail with a large bond and limited monitoring conditions to assure his appearance at future legal proceedings is adequate to meet the parties' competing interests and those of the public as well. It also bears emphasizing that the State has never claimed that Kamienski poses a threat to the safety of the public. In short, the State has not cited one good reason to tip the scales in favor of granting a stay of the mandate.

Conclusion

For all of the foregoing reasons, the Motion to Stay Mandate should be denied in all respects.

Dated: July 21, 2009

/S Timothy J. McInnis
Timothy J. McInnis, Esq.
Law Office of Timothy J. McInnis
521 Fifth Avenue, Suite 1700
New York, NY 10175-0038
(212) 292-4573

CERTIFICATION of service upon counsel
(motion by appellant Paul kamienski)

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

Service Upon Counsel
(Pursuant to Third Circuit Local Rule 32.1)

I served one copy of the accompanying Opposition to Appellees' Motion to Stay Mandate on Appellees by causing it to be sent by filing it via the Court's Electronic Case Filing system to Samuel J. Marzarella, Esq., Office of Ocean County Prosecutor, Ocean County, 119 Hooper Avenue, P.O. Box 2191, Toms River, NJ 08753 at smarzarella@co.ocean.nj.us.

Dated: New York, New York
July 21, 2009

/S

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