UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 06-4536

_____

x_____x

PAUL KAMIENSKI, :

Appellee, :

v. :

ROY L. HENDRICKS, et al. :

Appellants. :

x_____x

Motion For Stay of Execution and Enforcement of Mandate Pending Filing of Petition for Writ of Certiorari in the Supreme Court of the United States

PURSUANT to the provisions of 28 U.S.C. § 2101(f) and FRAP Rule 41(d)(2), Appellants respectfully move the Court to enter an order staying the execution and enforcement of the mandate in the above-entitled matter.

The reason for this motion is that it is the bona fide intent of the above-named Appellants to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.

The petition for a writ of certiorari will be substantially based on the following grounds:

1. *What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?*

This issue is ripe for resolution by the United States Supreme Court and in fact is already pending there by virtue of its grant of certiorari in *McDaniel v. Brown, No. 08-559*.

2. *May a federal habeas court determine that a jury's assessment was partly correct and partly incorrect when it disbelieved a defendant's specific denials of involvement in all of the crimes of which he was convicted, based on the court's own analysis of the facts?*

While the jury in this case disbelieved all of Appellee's denials of criminal involvement in the drug transaction, the robbery and the murder, this Court disbelieved only his denials of involvement in the drug transaction, finding the evidence against him in that regard "overwhelming." However, as to the robbery and murder, this Court made a finding of fact – notwithstanding the jury's assessment of Appellee's testimony – that there was insufficient evidence, thus granting the writ of habeas corpus. This ruling is in direct contravention of U.S. Supreme Court precedent as in, for example, Wright v. West, 505 U.S. 277, 296-97; 112 S.Ct. 2482 (1992).

3. *What is the meaning and proper effect of the "unreasonable application" prong of the AEDPA in a circumstantial sufficiency of evidence case?*

This Court failed to follow U.S. Supreme Court precedent and properly analyze the state court's decision under the standards outlined in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), Yarborough v. Alvarado, 541 U.S. 652, 124

S.Ct. 2140 (2004) and Williams v. Taylor, 529 U.S. 362 (2000) and substituted its own judgment to determine, without providing support for its view beyond the conclusion, that the state appellate court took the "ample" proofs against Appellee regarding the drug transaction that he denied, and "conflated that proof into its inquiry into evidence of murder and felony murder."

4. *May a federal habeas court apply the law of statutory presumptions rather than the law of inferences in its analysis of the "unreasonable application" language of the AEDPA?*

In discussing the state appellate court's application of the standard governing inferences, this Court articulated it as requiring that the inference be "more likely than not to flow" from the facts, citing Leary v. United States, 395 U.S. 6, 36 (1969). The Leary case, however, was all about statutory presumptions, not inferences. The "more likely than not" standard has not been established in the federal courts for treatment of inferences in a habeas case, and is therefore ripe for review by the U.S. Supreme Court, as are the other issues herein presented.

5. *May a federal habeas court apply a balancing test to the inferences that could be drawn from the evidence in the record, or must it give all favorable inferences to the State in its analysis under the AEDPA?*

This Court adopted an inapplicable balancing test when it opined that, ". . .if the evidence tends to give nearly equal

circumstantial support to guilt and to innocence. . . reversal is required." Such an approach is again contrary to the dictates of Jackson v. Virginia, *supra*, wherein the Court held that a habeas court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. at 319, 326.

6. *May a federal habeas court ignore or disregard a state appellate court's recognition of significant evidence tending to prove guilt that could give rise to other reasonable inferences and still render an even-handed decision without consideration of such evidence?*

In this case, the state appellate court recognized several pieces of noteworthy evidence that allowed reasonable inferences to be drawn regarding Appellee's role in a scheme to isolate a witness and lure the victims so that the robbery and murders could be accomplished without detection.

This Court virtually ignored the state appellate court's discussion of the evidence, instead quoting several times – while disclaiming its relevance – the prosecutor's summation where he said he did not think Appellee had been part of the *conspiracy*, leaving open the question whether Appellee was part of the robbery and murders as an accomplice.

This Court mischaracterized the prosecutor's remarks in summation by saying he had "candidly conceded that the state had not proven either the murder or felony murder charge against

Kamienski." Combined with its disregard of the state appellate court's analysis of the evidence, this court's mischaracterization of the prosecutor's remarks and reliance thereon were inappropriate and again were in contravention of the standards governing habeas review as established by the U.S. Supreme Court.

Appellants submit they have substantial questions and good cause for a stay based upon the following grounds:

(A) A reasonable probability exists that the Supreme Court will grant certiorari because an identical issue to #1 above is now pending before it, captioned *E.K. McDaniel, Warden, et al., v. Troy Brown, No. 08-559.* See, Yasa v. Esperdy, 80 S. Ct. 1366, 4 L. Ed. 2d 1717 (U.S. 1960); Chestnut v. People of State of New York, 86 S. Ct. 940, 15 L. Ed. 2d 842 (U.S. 1966).

(B) There is conflict among the circuits regarding what constitutes an "unreasonable application" of the law under the AEDPA in a sufficiency-of-evidence case, which necessarily involves analysis of the facts tempered with the deference required under the Jackson v. Virginia standards. *See, e.g.*, Foxworth v. St.Amand, ___F.3d___, 2009 WL 1844276 (C.A.1), Hurtado v. Tucker, 245 F.3d 7 (2001), compared with this case.

(C) A reasonable possibility exists that at least five Justices would vote to reverse the judgment of the Court of Appeals, rooted in appellants' good-faith examination of said judgment and its determination that the Court erred based on the issues raised in numbers one through six above. The Court's

analysis under Jackson v. Virginia and the AEDPA was flawed, was contrary to its own and other circuits' decisions in similar cases, and may be reversed because it applied an incorrect standard of review for a habeas petition based on a claim of insufficiency of evidence. If the possibility of Appellants' success is at least "fair" and the other factors are present, a stay should be granted. *See*, Rostker v. Goldberg, 448 U.S. 1306, 1309; 101 S. Ct. 1, 65 L. Ed.2d 1098 (1980)(Brennan, J., in chambers).

(D) Irreparable injury will be inflicted upon Appellants if the mandate is executed and enforced to compel issuance of the writ. Should that occur, the State will lose its ability to monitor Appellee via the recognizance bond and probationary terms he voluntarily entered into approximately three weeks ago. If he were to leave the jurisdiction, or simply go into hiding, the State could not re-incarcerate him to finish his sentence if the matter is reversed by the U.S. Supreme Court. Because more than ten years remain on Appellee's sentence, his incentive to flee will be strong in that instance, and the State will be without recourse.

(E) The interests of the parties and the public on balance favor a stay because the issues sought to be presented to the US Supreme Court are of constitutional dimension. Appellant is released on a personal recognizance bond that by its explicit terms allows him to remain free contingent upon certain conditions ordered by the District Court and agreed upon by the

parties. The relative harm to him should a stay be issued is minimal when balanced against the potential harm to the Appellants discussed in (D) above, and the relative harm to the public at large, which could be significant and irreparable in light of the serious nature of the charges. Appellants respectfully submit that on balance, the equities favor them and should cause a stay to issue forthwith.

Appellants move for this stay under FRAP 41(d)(2)(A)&(B), *Pending Petition for Certiorari*. Appellants have until September 30, 2009, to file their petition but intend to try to file it sooner. Appellants seek a stay for 90 days from the date of this panel's denial of the petition for rehearing, which was issued on July 2, 2009. Said stay will only be continued at that point if Appellants have in fact filed a petition for the writ, and will continue only until the Supreme Court's final disposition.

Appellants note that the filing of a petition for writ of certiorari has been contemplated since June 12, 2009, when this Court's order for release and remand was filed. At the bail hearing in the district court, language regarding the filing of a writ of certiorari was included, indicating that the bond would remain in effect if the State petitioned for a writ of certiorari. The State in fact represented to the district court in a recent opposition to Appellee's motion to modify bail that it would be filing a petition for a writ of certiorari in

September 2009. Nothing has changed in that regard, and a stay until that is accomplished would not unduly burden the Appellee.

Wherefore, the above-named Appellants respectfully move the Court for an order staying the execution and enforcement of the mandate pending the filing by Appellants of a petition for writ of certiorari in the Supreme Court of the United States, and until final disposition of the above-entitled appeal.

CERTIFICATION

As counsel for the above-named Appellants, I certify that the foregoing motion to stay execution and enforcement of the mandate is, and application to the Supreme Court of the United States for a writ of certiorari will be, presented in good faith. Such application will not be frivolous nor filed merely for delay.

MARLENE LYNCH FORD, PROSECUTOR
OCEAN COUNTY, NEW JERSEY
119 HOOPER AVE.
TOMS RIVER, N.J. 08754
(732) 929-2027
ATTORNEYS FOR APPELLANTS
BY: SAMUEL MARZARELLA
Supervising Assistant Prosecutor

/s Samuel Marzarella
Samuel Marzarella

July 21, 2009

CERTIFICATION OF SERVICE UPON COUNSEL
(Motion to Stay Mandate by Appellants)

I, Samuel Marzarella, counsel for Appellants, certify that:

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

I served one copy of the accompanying Motion to Stay Mandate and Certification of Samuel Marzarella, Esq., dated July 21, 2009, on Appellee by causing it to be sent by filing it via

the Court's Electronic Case Filing system to pro hac vice counsel Timothy J. McInnis, Esq., 521 Fifth Avenue, Suite 1700, New York, NY 10175, at mcinnisesq@aol.com.

Date: July 21, 2009

/s *Samuel Marzarella*
Samuel Marzarella
Office of the Ocean County Prosecutor
Attorneys for Appellants