IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4536

PAUL KAMIENSKI,
Appellant

v.

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

PETITION FOR REHEARING

Appeal from the Final Order of the U.S. District Court for the District of New Jersey, Entered July 27, 2006, docket no. 2:02-cv-03091, Denying the Appellant's Petition for Writ of *Habeas Corpus*

MARLENE LYNCH FORD
Ocean County Prosecutor

SAMUEL MARZARELLA
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Dated: June 11, 2009

Appellees, the custodial respondent in this *habeas corpus* action brought by a New Jersey prisoner pursuant to 42 U.S.C. § 2254, hereby respectfully move the court, pursuant to F.R.A.P. 35 and F.R.A.P. 40, for rehearing in this matter. As explained more fully, *infra,* in rendering its decision filed on May 28, 2009, (copy attached as Exhibit A), a Panel of this Court incorrectly stated the applicable law and relied on this mistaken law, departed from the correct standards of appellate review in the context of a habeas corpus proceeding, specifically the "unreasonable application" standard of the AEDPA, and in contravention of those standards, deprived the State of its most potent inferences while at the same time drawing alternative inferences favorable to Appellant Kamienski.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this court, *i.e*., the panel's decision is contrary to the decisions of the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979) and *Williams v. Taylor*, 529 U.S. 362 (2000).

s/ Samuel Marzarella

SAMUEL MARZARELLA
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STATEMENT OF THE CASE

On May 28, 2009, a Panel of this Court reversed the opinion of the district court denying a writ of *habeas corpus* on a sufficiency of evidence claim in a prosecution arising in the courts of New Jersey and decided by the State's intermediate appellate court, (hereafter "Appellate Division"). The Appellate Division published a comprehensive precedential opinion on the sufficiency of evidence question. See *State v. Kamienski,* 254 *N.J. Super* 75, 603 *A.2d* 78 (N.J. Super. Ct. App. Div. 1992), *certification denied* 130 *N.J.* 18 (N.J. 1992). The District Court's July 26, 2006 opinion upheld the Appellate Division's decision. Both decisions relied on *Jackson v. Virginia,* 443 *U.S.* 307, 99 *S.Ct.*2781, 61 *L.Ed. 2d* 560 *(1979)*.

This is a circumstantial evidence case. Essentially the Panel reversed the state and district court decisions because it found insufficient evidence to support the intent element for the convictions based on an accomplice theory.

This Circuit has never spoken on the meaning of the "unreasonable application" standard in a sufficiency of evidence claim under *Jackson v. Virginia*. The U.S. Supreme Court has opined that the unreasonable application standard will vary depending on the underlying constitutional right asserted, i.e., general standards that require substantial judgment will differ from specific standards, and bear upon the question of unreasonableness. The standard may also vary as a collateral attack on the

state conviction, having already survived direct review, and with principles of comity and federalism of concern.

Yet the Panel did try to give the unreasonable application standard meaning. Unfortunately, it applied the *law of statutory presumptions* as the test for when inferences may be properly relied upon when considering the question of unreasonableness. Further, it failed to give meaning and proper effect to the unreasonable application standard in an evidential sufficiency challenge in a circumstantial case.

Aside from errors regarding the unreasonable application standard, the Panel created a balancing test for inferences in a sufficiency claim (thereby failing to view the evidence in the light most favorable to the state), conducted a de novo review of the evidence, failed to accept the state court's view of state law on the required proofs of intent in a circumstantial case under an accomplice theory, and failed to consider as affirmative evidence of guilt Petitioner's claim of innocence at trial.

Additionally, the Panel drew its own inferences in the light most favorable to Petitioner, thereby contravening *Jackson,* which requires that all favorable inferences be given to the prosecution. Despite these errors, the facts accepted and the inferences permitted by the Panel were sufficient to conclude that the state court decision was not unreasonable.

Finally, due to space constraints, we merely note here that the Panel is mistaken as to the record about the trial judge's findings on sufficiency of the evidence, quoted at length by the Appellate Division. *Kamienski,* at 254 *N.J. Super.* 97, 603 *A.2d* 90-91.

REASONS FOR GRANTING REHEARING

POINT I. The panel decided the question of unreasonableness under the articulated wrong standard in a sufficiency case.

A. In an attempt to give meaning to the "unreasonable application" language of the AEDPA, the panel explicitly applied the law of statutory presumptions to the inferences at issue in this case.

B. The panel failed to properly address the meaning and give proper effect to the "unreasonable application" prong of the AEDPA in a circumstantial sufficiency of evidence case.

This Circuit has not yet spoken on the "unreasonable application" standard of review in a sufficiency of evidence case under the AEDPA. The Panel concluded that there was insufficient evidence on the intent element to support the convictions of as an accomplice to felony murder during a robbery and murder. It decided that the Appellate Division incorrectly applied *Jackson,* therefore it "unreasonably" applied *Jackson* under the AEDPA. (Ex. A – page 26)

The Supreme Court has made clear, however, that:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes *in its independent judgment* that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.[*Williams v. Taylor*, 529 U.S. 362, 411 (2000)] (emphasis added)

The panel no doubt had difficulty giving meaning to the AEDPA "unreasonable"

standard, and made two errors of law, each considered separately here.

A. The panel applied the law of statutory presumptions to the inferences at issue in this case to find the Appellate Division opinion unreasonable.

The Panel stated that the Appellate Division erred because it "unreasonably applied the standard governing when inferences may be relied upon . . . ." The Panel stated, "[t]hat standard requires that the inference in question must be more likely than not to flow from the facts already established." (Ex. A, p. 27) The Panel further stated, "[t]he 'more likely than not standard' is well established." It cites *Leary v. United States*, 395 U.S. 6, 36 (1969) as establishing this standard. Yet, the *Leary* case involves a question of whether a statutory presumption is constitutional, and has nothing to do with inferences--which are not presumed but are to be found by the trier of fact. The cited case and its principle of law have nothing whatsoever to do with habeas review or any of the issues at hand and, respectfully, the application of that case in an attempt to give meaning to the unreasonable application standard is error. See *Leary v. United States*, 395 *U.S.* 6, 36 (1969)

The Panel's application of the so-called "well established" standard regarding the treatment of inferences in a habeas case is in fact not established in the federal courts and its application led to the Panel's conclusion that the Appellate Division's decision was "unreasonable" under the AEDPA. But whatever else "unreasonable" means, it is not given meaning via application of this law.

B. The panel failed to properly address the meaning and give proper effect to the "unreasonable application" prong of the AEDPA in a circumstantial sufficiency of evidence case.

The Panel found the Appellate Division's analysis unreasonable based on its assessment that "the Appellate Division conflated [proof of Kamienski's role in brokering a drug transaction] into its inquiry into evidence of murder and felony murder." (Ex. A, p.27)

As this Court knows, two standards are in issue. The habeas question is whether the state court decision is "objectively unreasonable." The underlying standard depends on the constitutional right asserted. In our case, *Jackson* governs that right via its test of, "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 *U.S.* at 319 (emphasis in original).

In 2004, the U.S. Supreme Court in *Yarborough v. Alvarado*, 541 *U.S.* 652, 124 *S.Ct.* 2140 (2004) ruled that the state court did not unreasonably apply clearly established federal law by finding non-custodial status on a Miranda issue given its factual debatability. Significantly the court observed, "the range of reasonable judgment" can depend on the nature of the underlying rule.

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.* [541 *U.S.* at 664, 124 *S.Ct.* at 2149] (emphasis added)

Under the principles above, sufficiency challenges merit the highest degree of AEDPA deference because "sufficiency of a jury verdict is both general and deferential." The deference "may well be at its highest when a habeas petitioner challenges a state court determination that *the record evidence was sufficient to satisfy the state's own definition of a state law crime.*" *Policano v. Herbert*, 453 *F.3d* 79, 92 (2006) (emphasis added) (dissenting opinion of 5 judges in a denial of a rehearing en banc on a sufficiency challenge). Appellees wish to rely upon the dissenting opinion in this case in support of our request for rehearing, especially the discussion at parts B. 1. and 2 of the opinion found at 453 *F.3d* 91-92.

In a circumstantial evidence case, the principle of debatability is most acute. The U.S. Supreme Court teaches that

> [C]ircumstantial evidence may in some circumstances point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. *Holland v. United States,* 348 *U.S.* 121, 140 75 *S.Ct*. 127, 137-138 (1955).

Further overlayed upon this principle is the Panel's failure to consider as affirmative evidence of guilt the fact that Kamienski claimed complete innocence at trial, even as to involvement in the drug deal, his prearranged isolation of a witness

from the scene, and his disposal of the bodies and cover up of the crimes which the Panel accepted as fact. While the Panel acknowleged that some of the evidence against him was "overwhelming," (conceding by implication that he lied to the jury), the Panel did not properly consider his denials as "affirmative evidence of guilt" if it concluded that he lied. *Wright v. West*, 505 U.S. 277, 296 (1992); *Caminitti v. United States*, 272 *U.S.* 470, 494 (1917).

Indeed, "upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution" *Jackson, supra,* at 319, including this affirmative evidence of guilt.

With respect to the record evidence being sufficient to satisfy state law, while the Panel decided the intent element was insufficient here, it cited no New Jersey law in effect at the time of this conviction regarding the specific requirements of how to establish intent under an accomplice theory in a circumstantial evidence case. The main circumstantial evidence cases are cited by the Appellate Division, *State v. Gelb*, 212 *N.J. Super* 582, 515 *A. 2d* 1246 (N.J. Super. App. Div. 1986), and *State v, Newell*, 152 *N.J. Super* 460, 378 *A.2d* 47 (N.J. Super. App.Div. 1977) upon which Appellees also rely. One of the errors of the Panel is its apparent rejection of the analyses of these cases as well as the Appellate Division's discussion of the law in this context in *State v. Kamienski,* 254 *N.J. Super* at 96-97, 603 *A.2d* 89.

The First Circuit has addressed the meaning of the "objectively unreasonable" standard in a circumstantial case on collateral review where a sufficiency claim was made and the intent element was at issue. In *Hurtado v. Tucker*, 245 *F.3d* 7 (1st.Cir. 2001) the lower federal court held there was insufficient evidence to establish Hurtato's intent to exercise dominion and control over certain drugs, i.e., the state court "overstated the evidence" and that the evidence "did not exist".[1] The federal appeals court then gave meaning to the "unreasonable application" and observed that despite the factual overstatement or imprecision, "there is room for mistakes under § 2254(d)(1)." The court found that the state court addressed the constitutional claim—the sufficiency issue—surveyed the entire record, did not ignore evidence or arguments, and articulated reasons for the conclusions it reached. Critically, the court noted that, "the jurors saw Hurtado testify" and evaluated his credibility. It cautioned that in a sufficiency of evidence case on collateral review, federal courts should be cautious on the objective unreasonableness prong:

> where there has been a verdict of guilt by a jury of a defendant's peers, where the defendant's credibility was evaluated by the jury hearing his testimony, where that verdict has been affirmed on appeal in the state system, and where there is no claim of constitutional error in the conduct of the trial. Even on direct appeal, claims that the evidence was insufficient to support the verdict are "often made but rarely successful." *United States v. Moran*, 984 F2d 1299, 1300 (1st Cir. 1993) [Id 245 *F.3d* 19-20]

[1] Recall the Panel's statement that the Appellate Division "conflated" the proof of the drug deal into evidence of murder and felony murder.

All of the conditions prevailing in *Hurtado* prevail here, yet a different result was reached. The *Hurtado* Court's determination was consistent with the concerns over principles of comity and federalism in the context of habeas review which are not present in a direct review, as discussed at length in *Brecht v. Abrahamson*, 507 *U.S.* 619, 633-635, 113 *S.Ct.* 1710, 1719-1721, 123 *L.Ed. 2d* 353 (1993). The Panel's analysis and decision here resembled direct review.

POINT II. Adoption of a "balancing test" concerning inferences in a habeas case.

Rather than according the familiar deference in a habeas case to the inferences the jury must have made, the panel adopted a balancing test: ". . .if the evidence tends to give nearly equal circumstantial support to guilt and to innocence . . . reversal is required." This is directly contrary to the standards of *Jackson v. Virginia,* which held that where there are conflicting inferences, 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."* [*Jackson,* 443 *U.S.* 307, 319, and 326 (emphasis added)]

POINT III. The panel departed from its required function to decide simply whether any fact finder could have found guilt beyond a reasonable doubt.

The Panel stated: "[W]e must view each strand [of evidence] as it is connected to the whole and determine if the totality of the evidence, viewed in the light most

favorable to the government, *establishes guilt beyond a reasonable doubt.* (Ex. A, p. 25-26;emphasis added)) Again, this is contrary to *Jackson* which specifically stated, "[The] inquiry does not require a court to "ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson,* 443 *U.S.* 307, 319 (1979)(emphasis in original)

POINT IV. The inferences permitted by the Panel are alone enough to support the convictions even where the most potent of the State's inferences were rejected by the Panel.

Significantly, the inferences accepted by the panel were enough, under New Jersey law on accomplice liability, to find evidential sufficiency or, alternatively, that the Appellate Division did not objectively unreasonably apply the *Jackson* standard on the murder and felony murder convictions.

The following two inferences rejected by the Panel are also potent evidence of Kamienski's intent either alone or in combination.

POINT V. The Panel completely omitted the Appellate Division's recognition of a "scheme" to lure the victims together with the cocaine away from the Holiday Inn, which was "rather public," to an isolated spot where the robbery/murders could be completed.

The Appellate Division recognized a "scheme" to lure the victims together away from the public Holiday Inn with the cocaine. Its main feature was the nonexistence of any money to pay for the cocaine. On September 18th 1983 at the first scheduled pick up and delivery of the cocaine at the Holiday Inn, the transaction failed because "the

buyers informed Henry that they were having some difficulties getting the money together." *Kamienski,* 254 *N.J. Super* at 101-102, 603 *A.2d* at 92.

The deal was postponed to 6:00 p.m. that evening at the Holiday Inn. At the meeting all defendants including Kamienski were present and it was at that meeting,

> Marzeno said the *sellers wanted to see the money first* but he had no intention of turning over any money to them and that he would kill them before they got any of his money. A reasonable inference can be drawn that Marzeno had planned to rob and maybe kill the DeTournays to obtain the cocaine on the 18th because he had only a gun in the briefcase and because he had promised to obtain the cocaine on the 18th and to sell some to Lehman on the same day. *Kamienski,* 254 N.J. Super. at 102, 603 A.2d 92. But the Holiday Inn was a rather public place and Henry did not bring the drugs so a *scheme was devised to get Henry and Barbara to Alongi's home which was more isolated.*" (emphasis added) [*Kamienski,* 254 *N.J. Super*. at 102, 603 *A.2d* at 92.]

The scheme was necessary due to the care of the suppliers in their dealings with the Defendants. "Henry said he would be *counting the money before producing the drugs.* While the money was *supposedly* being counted, Barbara was waiting in Jeffrey's Holiday Inn room to be picked up with the cocaine." *Kamienski,* 254 *N.J. Super* 102, 603 *A.2d* 92. (emphasis added)

Hence, "the date for the transfer of the drugs changed from the 18th to the 19th and the place was changed from the Holiday Inn to Alongi's home." *Kamienski,* 254 *N.J. Super* 105-106, 603 *A.2d* 94. The time was set for 3:00 o'clock but postponed to 6:00 o'clock. The Court described the new plan in which Alongi escorted Henry to the

scene of the robbery and murders "*under the pretext of counting the money* before the cocaine was to arrive." (emphasis added) *Kamienski,* 254 N.J. Super at 106, 603 A.2d at 94.

The Panel impermissibly drew an inference in favor of Kamienski on this point. The Panel notes that the victims told the courier that the originally scheduled drug deal was delayed because the buyers were,

> . . .still getting their money together. To the extent Kamienski was involved in the actual exchange, the evidence only allows an inference that Kamienski believed, like the DeTournays, that Marsieno intended to pay for the cocaine he was to buy the next day. [Exhibit A, at 25]

While the Panel found overwhelming evidence that Kamienski was involved in the drug transaction, (someone who would have known about the status of any money), and while the Panel believed the promised payment was a lie, the Panel took a lie that was told to the murder victims as part of the set-up and decided that the only inference that could be drawn as to Kamienski is that he too believed that lie. The Panel's opinion is inherently contradictory because it recognized Kamienski testified at trial and denied everything. He certainly never testified to believing there was to be payment because, according to him, he was not involved in the drug deal or any of the crimes. This inference was impermissibly drawn in Kamienski's favor and not based on any evidence while the jury's and Appellate Division's inference was proper.

B. The Panel rejected the inference that Kamienski sequestered by "prearrangement" a potential witness to the robbery and murders.

The Appellate Division found Kamienski dropped Duckworth off at a friend's house "only 30 minutes before the drug deal was to be finalized. Duckworth regarded this conduct to be unusual because she and Kamienski were rarely apart and he *never drove a car*. His license was suspended." (emphasis added) *Kamienski,* 254 *N.J. Super*. at 102-103, 603 *A. 2d* at 92. After the murders, Kamienski picked Duckworth up and drove to Alongi's house where Duckworth wondered down to the dock and saw the bodies. "A reasonable inference can be drawn that because *Duckworth had been present when Kamienski bought drugs in the past,* Kamienski did not want Duckworth present this time because *he was participating in much more than a drug sale and he did not want her to be an eye witness.*" *Id*. at 103 (emphasis mine) The court found she was previously present when he "bought drugs," not as the panel stated when he "used drugs."

The Court recognized that Kamienski,

> . . . needed to be free of [Duckworth] as a potential witness to what was to transpire when the drug deal was finalized. . . . *The jury could have inferred that by prearrangement,* Kamienski took steps to remove a potential eye witness from the scene of a robbery and murder and that his conduct constituted facilitating the commission of the crimes with the required shared intent or purpose." [*State v. Kamienski*, 603 *A.2d* at 93] (emphasis added)

The Panel rejected this inference by creating its own inference as to what the evidence *could* mean, that he was "reluctant" to have Duckworth witness "a substantial

cocaine deal." (Ex. A, p.23). Yet, the Panel implicitly acknowledges that Kamienski's prearranged isolation of the witness was because he knew a significant event was about to occur only a short time later. This event in fact resulted in a robbery and murders—and none of this is speculation. It was only *the purpose* of the isolation of that witness that the Panel imagined could be different from what actually occurred, and to the extent reasonable minds may differ about that purpose, the courts have created deferential review standards. Certainly inferring the prearranged sequestration of the witness was due to the size of this particular drug deal when she was present for other deals is more speculative than inferring it was because of the crimes that actually happened. Essentially, by molding this inference in favor of Kamienski, the Panel necessarily did *not* view the evidence in the light most favorable to the prosecution.

CONCLUSION

For the foregoing reasons, the Court should grant the appellant's petition for rehearing.

Respectfully submitted,

MARLENE LYNCH FORD,
Ocean County Prosecutor

By; /s/ Samuel Marzarella
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Date: June 11, 2009

CERTIFICATION OF BAR MEMBERSHIP

I, **Samuel J.Marzarella, Supervising Assistant Prosecutor,** do hereby certify that I am a member of the Bar of this Court.

/s/ Samuel Marzarella
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CERTIFICATION OF ELECTRONIC FILING

I, **Samuel Marzarella, Supervising Assistant Prosecutor** do hereby certify that the text of the electronic petition is identical to the text in the paper copies. I also certify that the following virus detection program – Barracuda antivirus software-- was run on the file and no virus was detected.

June 11, 2009

By: /s/Samuel Marzarella
Supervising Assistant Prosecutor
Counsel for Appellees

CERTIFICATION OF SERVICE UPON COUNSEL

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

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

I served one copy of the accompanying Opposition to Appellant's Motion for Bail or Expedited Issuance of Mandate/Affirmance of Samuel Marzarella, Esq., dated June 10, 2009, on Appellant by causing it to be sent by filing it via the Court's Electronic Case Filing system to Timothy J. McInnis, Esq., 521 Fifth Avenue, Suite 1700, New York, NY 10175, at mcinnisesq@aol.com.

Date: June 11, 2009

/s *Samuel Marzarella*
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