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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL 02-3091

PAUL KAMIENSKI, :
Appellant, :
v. : OPPOSITION TO APPELLANT'S
ROY L. HENDRICKS, et al. : MOTION FOR RELEASE
Appellees. :

AFFIRMATION OF SAMUEL J. MARZARELLA

I, *Samuel J. Marzarella, Esq.*, affirm under penalty of perjury as follows:

1. I am an attorney in good standing in the State of New Jersey, and I am attorney of record in this court and on the related appeal in the Third Circuit.

2. This affirmation is submitted in opposition to appellant's motion for an order releasing him on a personal recognizance bond from the custody of the New Jersey Department of Corrections, as the result of the Third Circuit's judgment dated May 28, 2009, reversing this Court's denial of his habeas corpus petition.

3. The Third Circuit's opinion disagreed with the state and federal courts that reviewed the evidence before it did, starting with the twelve original jurors who watched and

listened to Paul Kamienski testify, working through the appellate division's decision and ending with this Court's denial of relief. According to the Third Circuit, all were incorrect and unreasonable in their assessment of the evidence against appellant.

4. The Office of the Ocean County Prosecutor (OCPO) intends to seek review of the Third Circuit's judgment. The OCPO has until June 11, 2009, to file its petition.

5. The OCPO contests appellant's assertion that the Third Circuit opinion "does not . . . draw any inferences from evidence in favor of Kamienski and against the State." For example, in discussing a potential inference from Kamienski's sequestering of his girlfriend Donna Duckworth right before the robbery and murders - a highly unusual action on his part, and one which the State contends was designed to isolate her from the robbery or the killings that he knew were about to happen - the Third Circuit speculated as to a different inference that could be drawn which was admittedly not based on any evidence in the record and was impermissibly drawn against the State, i.e., that Kamienski isolated Duckworth because he was reluctant "to have her witness the only major cocaine transaction he was involved in during their relationship (at least there was no evidence of any other large cocaine transaction)." (Opinion, p.23)

That and other errors by the Third Circuit bolster the chances of the OCPO obtaining a rehearing or hearing en banc.

6. The OCPO also intends to challenge the Third Circuit's reliance on the trial court's entry of judgment n.o.v. (later reversed by the appellate division) and the trial prosecutor's alleged concession that "there was no evidence adduced at trial showing that Kamienski knew of the robbery or murders of the victims until after they had occurred." (Affirmation of Timothy McInnis, p.4-5) The Third Circuit's analysis is again based on selective excerpts from the record and likely will not survive close scrutiny upon review.

7. Although the State responds to the assertions in appellant's motion regarding the history of this case, it notes that they do not properly belong in an application for bail pending review and suggests they were included to try to skew this Court's perception from the objective to the subjective.

8. A proper analysis by this Court of whether appellant should be released even before the State petitions for review is based upon *Fed.R.App.P. 23(c)*, which contains a rebuttable presumption of release, and general standards governing stays of civil judgments. Hilton v. Braunskill, 481 U.S. 770 (1987). Appellant has not addressed those standards in his motion.

9. Factors to be considered under Braunskill include (a) the prisoner's risk of flight, (b) the prisoner's danger to the community, (c) the State's interest in continuing custody and rehabilitation pending final determination on appeal, and (d) the prisoner's interest in release pending appeal. Id. at 775-76.

These factors are derived from those generally employed to determine if a stay of civil proceedings is appropriate, i.e., a showing by the applicant of a likelihood of success, irreparable injury absent a stay, substantial injury to other interested parties upon issuance of a stay, and the general public interest. *Id.* at 776. The factors contemplate individualized judgments in each case:

(a) & (b) *The prisoner's risk of flight and/or danger to the community.* Appellant claims that he should be released on bond because during his time in custody, "he has done nothing there to indicate that he would be a risk of flight or pose a danger to the community." (Affirmation of Timothy McInnis, p.6) This is an irrelevant and baseless assertion made by counsel, not the appellant himself, which is unsupported by prison records or any other proof that would indicate how Kamienski's behavior while incarcerated demonstrates that he would not flee or pose any sort of danger to the public if released.

As to appellant's observation that his pretrial bail was never revoked, the Braunskill Court, in reliance on its decision in United States v. Salerno, 481 U.S. 739 (1987) said, "[A] successful habeas petitioner is in a considerably less favorable position than a pretrial arrestee. . . to challenge his continued detention pending appeal. Unlike a pretrial arrestee, a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State."

Braunskill, *supra*, at 779.

Kamienski's actions in 1987 while awaiting trial and his behavior while in the custody of the Commissioner of Corrections can give this Court no assurances of what he will do if after release he contemplates the unappealing prospect of losing to the State's appeal and returning to state prison at age 60.

(c) *The State's interest in continuing custody and rehabilitation pending final determination on appeal.* The length of time remaining to be served on the prisoner's sentence is of paramount importance in weighing this factor. Appellant has almost a decade left on his original sentence before he would be eligible for parole. In such a case, the State's interest is "strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." Braunskill, *supra*, at 777. This factor highlights Kamienski's compelling motivation to run if he loses the appeal and he is already free. Thus, the State's interest here is vital and powerfully outweighs appellant's glib statement that it "can always re-incarcerate Kamienski" if the Third Circuit's judgment is reversed. (Affirmation of Timothy McInnis, p.6)

(d) *The prisoner's interest in release pending appeal.* The State readily admits that the prisoner has a substantial interest in being released. However, the inquiry does not end with that admission, as his interest must be weighed against the other factors and will be strongest only where the other factors

are weakest. If the State demonstrates that it has a strong likelihood of success on appeal or a substantial case on the merits, "continued custody is permissible" if irreparable injury will occur absent a stay and if the public interest compels such a result. Braunskill, *supra*, at 776.

The State's petition for rehearing or hearing en banc is being drafted simultaneously with this opposition and therefore cannot be submitted for this Court's review to determine its chance of success. However, the State can advise the Court at this time that it will proffer substantial meritorious arguments that the Third Circuit's decision is reversible because it modified the standard of review under the AEDPA, and it failed to abide by the rule of Jackson v. Virginia, 443 U.S. 307 (1979) in that it gave petitioner the benefit of certain inferences earlier given to the State by the state courts.

10. The State respectfully reminds this Court that the Third Circuit opinion is contrary to numerous decisions over the past 20 years regarding the sufficiency of the evidence against appellant, from the original jurors up through the state system and ending with this Court's denial of relief. The remarks of the trial prosecutor in summation and the findings of the trial court in granting judgment n.o.v. were selectively and incompletely cited in the opinion granting the writ.

For these and the reasons argued above, the State respectfully submits that an abundance of caution should preclude the prisoner's release on bail unless and until the

State's petition for rehearing is either denied or resolved in his favor.

Respectfully submitted,

s/ Samuel Marzarella
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