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April 22, 2009

Clerk's Office
U.S. Court of Appeals
21400 US Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Kamienski v. Hendricks
No. 06-4536

Dear Sir/Madam:

We represent Appellees in the referenced case. Please accept this as a formal response to Appellant's motion to strike dated April 16, 2009.

Contrary to the assertions in Appellant's motion the Court did not strike or instruct the jury on the threat testimony presented in our briefs. The threat testimony presented in our briefs remained undisturbed. The Judge did, however, instruct the jury on one particular threat by Kamienski towards Duckworth, which was not presented in our briefs. The particular threat that caused the jury instruction involved Kamienski coming after Duckworth with a knife which occurred in Atlantic City.

As this Court knows, the threat evidence is important in this circumstantial evidence case because the threats, along with other evidence, show a common purpose or motive

among the defendants—each of whom made threats toward Duckworth as recounted in our main brief and supplemental brief. The threat evidence is also legally significant according to U.S. Supreme Court and New Jersey case law, as will be discussed below.

As for the particular threat now at issue, which is not cited in our briefs, when asked on cross-examination "when did this alleged hurting occur before this" she responded: "I can name an instant in Atlantic City where he hurt me and came after me with a knife in a casino." (SA 2257) An objection was made. (SA 2258)

The next day the judge told the attorneys he was going to instruct the jury specifically on the "incident that occurred in a casino in Atlantic City." (SA 2262)(emphasis mine)

The Judge then stated, "I refer specifically to the last one or two or three questions that were asked of Miss Duckworth, and in which she indicated in response to one question something about an incident that happened in a casino in Atlantic City involving-or possibly involving her and Mr. Kamienski." (SA 2265) The judge told the jury that while the jury "heard that reference," the jury was not to consider it. (SA 2266)(emphasis mine)

Hence, the remaining ample evidence of Kamienski's (and the others') threats towards Duckworth, as cited in our supplemental and main briefs, is entirely undisturbed, and the inferences the jury could have drawn from them are potent indeed.

The threat evidence is of great legal significance, and even more so when considered in conjunction with Kamienski's denials at trial. Because Kamienski testified in his defense, he had the opportunity to present an

explanation to the jury regarding those threats. He chose not to do so. His attorney never asked him to offer any explanation of the threats, although he denied all the other persuasive evidence presented against him such as being involved in a drug deal with the other defendants, (SA 3668) purchasing or sharing in the DeTournay cocaine, (SA 3718, 3710, 3834) making the statements attributed to him, "Nick went first, Barbara didn't suffer. . . .", (SA 3815), isolating Duckworth at the O'Donnell residence shortly before the robbery/murders on September 19th, (SA 3684, 3686, 3808), being at Alongi's house on September 19th, (SA 3808) tying the knots on the bodies or using the blankets from his boat, (SA 3687-3688) owning the distinctive towel from the teak box that was recovered with the bodies, (SA 3707), and other significant denials too numerous to mention here.

Where a defendant takes the stand, "comparatively slight evidence on the part of the prosecution will be accepted because of the readiness with which the defendant(s) could supply the exculpatory evidence, if it exists." State v. Muniz, 150 N.J. Super. 436, 445 (App. Div. 1977)

The United States Supreme Court has held specifically, ". . . where the accused takes the stand in his own behalf and voluntarily testifies for himself, he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." Caminitti v. United States, 272 U.S. 470, 494 (1917). (emphasis mine)

Kamienski failed to explain away much of the evidence against him, including the threat evidence now at issue. Given his blanket denials at trial, the jury certainly could have found him not credible, which makes the defendant's heavy burden before this Court even heavier. Muniz, supra at 445.

Therefore, we ask that this court deny the relief Appellant requests.

Respectfully submitted,

s/Samuel Marzarella

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cc: Timothy J. McInnis, Esq.