

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

x_____x
PAUL KAMIENSKI, :
Appellant, :
v. :
ROY L. HENDRICKS, et al. :
Appellees. :
x_____x

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

**OPPOSITION TO MOTION BY APPELLANT KAMIENSKI FOR RELEASE
ON BAIL UNDER RULE 23(C) OR ALTERNATIVELY TO SHORTEN
THE PERIOD FOR A MANDATE TO ISSUE UNDER RULE 41(B)**

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

x_____x

PAUL KAMIENSKI, :

Appellant, :

CIVIL NO. 06-4536

v. :

ROY L. HENDRICKS, et al. :

Appellees. :

x_____x

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 this Court's judgment dated May 28, 2009, reversing the District Court's denial of his habeas corpus petition.

3. Appellant initially made this motion in the District Court, where it was denied for lack of jurisdiction. Appellees submitted a response to the motion in that court, and herewith incorporate and adopt said opposition for this Court's consideration. The State's opposition was attached to

appellant's submission to this Court as "Exhibit #3, Appellees' Affirmation." On the issue of release on bond, the State adds only that appellant's reply to our opposition contained quoted excerpts that cannot be found in our pleadings. See, e.g., parg. 10, p.5; parg. 15, p.7. Also not to be found in our pleadings is appellant's claim that the State sought to shift the burden to him and applied a heightened standard of review to the issue of whether he should be released on bail pending our imminent filing of a petition for rehearing.

4. Because appellant has submitted additional arguments now on the issue of the mandate, appellees respond herewith to those new or additional points.

5. Appellant now asks this Court to shorten the time for issuance of its mandate, notwithstanding the clear wording of the rule that applies in cases such as this, even where, as here, the writ has been granted:

Rule 41(b) 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. The court may shorten or extend the time.

Appellees' petition is due on June 11, 2009, thus requiring this court to wait until June 18, 2009, or until 7 calendar days after such petition is denied.

Appellees anticipate filing their petition by June 11, 2009, and therefore this Court's "mandate must issue 7 calendar days" later. While the rule does allow for the Court to shorten

or lengthen the time, appellant has not proffered a reason for this Court to depart from its rule except to say that "he has been unlawfully incarcerated since this Court's ruling on May 28, 2009." (Affirmation of Timothy J. McInnis, parg. 2, p.2)

6. The early issuance of the mandate sought by appellant would frustrate the intent of the rule, which is to "key[] the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition." (Advisory Committee Notes, FRAP Rule 41, Subdivision (a)¹)

7. Appellees note also that even if their petition for rehearing is denied, the rule provides that the Court still wait 7 calendar days to issue the mandate. Its issuance before the expiration of the State's time to petition for rehearing would defy the logic of the Advisory Committee's determination that the rule should not "cause the mandate to issue while the government is still considering requesting a hearing." Ibid.

8. In this case, the State has represented that it will file a petition; thus, adherence to the rule is of paramount importance because under Rule 41(d)(1), "The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, **stays the mandate** until disposition of the petition or motion, unless the court orders otherwise." (Emphasis added.)

¹ FRAP 41(a) referred to in Advisory Notes is now after amendment 41(b) under which appellant moves for an expedited mandate.

9. If the mandate issues prior to Appellees' filing of the petition for rehearing, this Court will lack the authority to consider the petition unless a recall is ordered, which should only be exercised sparingly and upon a showing of exceptional circumstances. Boston and Maine Corp. v. Town of Hampton, 7 F.3d 281 (1st Cir. 1993). A mandate is effective when a court issues it; thus, this Court's judgment or order is not yet final and review of its actions has not commenced.

10. Appellant has offered nothing to this Court to justify his requested departure from the rules, except to rehash arguments he made at oral argument that do not bear upon application of these particular rules at this stage of the proceedings.

11. In light of the one day remaining for Appellees to file their petition for rehearing, in light of appellant's failure to show exceptional circumstances not contemplated in the time frame provided in the rule for the issuance of a mandate, this Court should deny his application and allow the matter to proceed in the usual course.

CONCLUSION

For the above reasons, Kamienski's motion to be released on bail or for an expedited issuance of a mandate should be denied.

Date: June 10, 2009

/s Samuel Marzarella
Samuel Marzarella
Supervising Assistant Prosecutor
smarzarella@co.ocean.nj.us

CERTIFICATION OF SERVICE UPON COUNSEL
(Opposition to Motion by Appellant Kamienski)

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 10, 2009

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