

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 06-4536

PAUL KAMIENSKI,

APPELLANT,

VS.

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

APPELLEES.

*On appeal from the order of the U.S. District Court for the District of New Jersey D.C.NO. 02-
cv-03091(SRC)*

**APPELLEE'S RESPONSE TO SUPPLEMENTAL BRIEF
OF APPELLANT, EXHIBITS A-F, FOR ORAL
ARGUMENT**

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This is a response to defendant's supplemental brief filed on April 6, 2009 in support of oral argument in this matter. This response is filed in accordance with this court's letter dated April 3, 2009, and its notice to the parties of an extended deadline for response of April 13, 2009.

Counsel's arguments are easily negated by the record.¹ However, a brief discussion of the facts contained in almost 5,000 pages of the record is necessary to give contextual support and citations to the this response in what is a circumstantial case. The factual statement alone goes far in answering Appellant's supplemental brief. Each of the responses to the arguments in Appellant's supplemental brief are set out under Appellant's exhibit designations.

¹ The State takes exception to counsel's characterization of its briefs as "fraudulent" and that this writer should be "taken to task." From the outset counsel has been flouting the rules of ethics resulting in the then Ocean County Prosecutor Thomas Kelaher, as well as the Attorney General of New Jersey becoming involved as reflected in the attached correspondence. The Ocean County Prosecutor referenced Mr. McInnis' "continued and repeated misrepresentations in this matter" in his letter to the Attorney General. See A1 through A7 attached hereto. Further, counsel has repeatedly contacted the First Assistant Prosecutor, Ronald DeLigney as well as his predecessor John Mercun informing him of this writers "fraud". The most recent of these contacts was on April 3, 2009 the date of this court's order, in which he claimed to Mr. DeLigney this writer is an example of a "prosecutor gone wild" and that this court's order supports that position.

Finally, we believe this brief, as well as our main brief, answers the Court's letter dated April 3, 2009 about our use of the word "defendants". "Defendants" as used in the legal argument in our main brief includes Kamienski, reflecting a shared intent. In our factual statement in that brief, each party's statements are properly limited.

Factual Statement

The crimes in this case occurred on September 19, 1983.

On September 3, 1983, Henry DeTourney asked Paul Kamienski if he knew anyone who wished to buy a large quantity of cocaine. Kamienski said he knew of someone who would buy a large quantity. (SA 2004-2007)

On September 5, 1983, Kamienski, Duckworth, and the DeTournays took Kamienski's boat to Alongi's house.² (SA 2016-2017)

Kamienski testified in his defense at trial. He confirmed that after arriving at Alongi's house by boat, they met Alongi. (SA 3664) But Kamienski denied discussing the sale of cocaine or introducing Alongi to the DeTournays

² There the parties discussed a cocaine deal. This was stricken from the record. (SA 2013-2014)

for the purpose of completing a sale of cocaine. (SA 3668). Kamienski admitted he knew the DeTournays were looking to sell cocaine just before their deaths. (SA 3832)

Donna Duckworth testified that at the September 5 introductions Henry DeTournay wanted to know if Kamienski would vouch for Alongi, and Alongi wanted to know whether Kamienski would vouch for the DeTournays. (SA 2016) Kamienski vouched for the parties, and Joe Marsieno arrived at Alongi's house later. (SA 2016-2017)

Kamienski admitted he took the DeTournays to Alongi's house on his boat. (SA 3660) Kamienski claimed at trial that he had only met Alongi one month earlier. (SA 3660). Kamienski claimed he became "good buddies" with Alongi after he refused to buy a condo Alongi was selling. (SA 3762) He admitted he saw Alongi frequently after meeting him—3 times a week. (SA 3762) Kamienski claimed he met Marsieno in late August or early September 1983. (SA 3762).

Kamienski testified that at the September 5th introductions Barbara DeTournay and Alongi discussed the fact that they had "mutual acquaintances" and Kamienski said Barbara's ex-husband was mentioned as one of them. (SA 3785) Also Barbara's sister, Christine Longo, had known Jackie [Sullivan] Alongi. (SA 3785)

Around September 7th or 8th, according to Barbara's sister Christine Longo, the DeTournays left Barbara's parents house, the Boutsikaris residence in Newark where they were staying, and were going to the Jersey Shore to a "funeral director's boat" whose name was "Paul". (SA 0885-0886) (Longo was unsure of the exact date they left, and ultimately settled on the 9th but nevertheless she stated their purpose; "I know they left to go down to Paul's boat". (SA 0887) She asked Barbara who Paul was, and Barbara replied, "It's our friend, a funeral director." (SA 0886) They returned to Newark two or three days later. (SA 0887) When they returned from Paul's boat, Barbara told Christine she was "going to make a big drug deal". (SA 0887-0888) Barbara was "ecstatically happy" about the deal. (SA 0888)

But Christine tried to talk Barbara out of making the deal stating, "please, do you know the people you are dealing with or what you are doing?" Barbara replied, "I know these people from my former husband and I trust them." Christine stated they were "friends of her former husband." (SA 0889)

On September 9th according to toll records, Kamienski placed a call to the Boutsikaris residence. He admitted he placed it but could not remember who he talked to or what

was talked about. (SA 3798-3799)

On September 10th, according to Jackie Sullivan-Alongi, Kamienski and Duckworth along with the DeTournays arrived by boat at the Alongi residence. She was introduced to the DeTournays at that time. (SA 3394-3396)

On September 11, 1983, by prearrangement, Sid Jeffrey met the DeTournays in a hotel parking lot. Nick told him, "Barbara had contacted some people that she had known up in New Jersey, and they wanted three kilos of cocaine." Barbara told him, "she had known them for a long time when she was living with her ex husband." (SA 1465) She used the plural "people" when referring to the buyers. (SA 1466)

On September 16th 1983 toll records revealed a call was placed from Alongi's house at 11:38 pm to a high school friend of Kamienski's, Carmine Mattarazzo. At trial, Kamienski, however, could not recall being at Alongi's house that night, and could therefore not recall what was discussed. (SA 3806)

On September 17, 1983, Donna Duckworth and Kamienski attended a party at Alongi's house, according to Duckworth, at which there was talk at that party of a "good deal coming down" and "good coke coming into town". It was Alongi and Marsieno who spoke of the "good deal". (SA 2023-

2024)

Jean Yurcisin testified she was at the same party and had a conversation with Marsieno. Marsieno told her he was expecting to get a great deal of cocaine and that it was good quality, "supposed to burn at 88 to 92%, and it was **coming up from Florida from friends of Paul and Donna's.**"

(SA 2966-2969) (emphasis mine)

At trial Kamienski admitted he was at Alongi's party on September 17th. Kamienski denied hearing anyone speaking about drugs. (SA 3805)

On September 17, 1983, Sid Jeffrey checked into the Holiday Inn in Toms River on previous instructions from Henry DeTournay. He had obtained three kilos of cocaine in Florida, and checked into the Holiday in at 6:25 pm because Henry had told him that was "close to where the deal was going to take place." (SA 1467-1469)

Once checked-in, Jeffrey called the Boutsikaris residence in Newark where the DeTournays were staying. He spoke with Henry who called him back from a pay phone immediately. Henry told Jeffrey he would meet him the next day. (SA 1469-1470)

At the Boutsikaris residence, Christine Longo observed Henry receive the call, at which time he went to a phone

booth to return it. When he came back he said "Come on, pack. We're leaving for the Shore." They waited for another call which came approximately nine o'clock that night, and Henry said "Come on Barb, this is it. We are leaving." (Sa 0891-0894) Christine's husband Leonard Longo also witnessed Henry receive the phone call. Just before receiving it he told Leonard, "I got something big. I got something real big going." (SA 1053-1054)

On September 17th Henry told Jeffrey the deal was set for the 18th. (SA 1572) He stated the deal was "originally" set for "that afternoon" on the 18th. (SA 1568) The deal was set for 3 o'clock on the 18th, but pushed back to 6 o'clock. (SA 1569)³

On September 17, 1983, a waitress at the Holiday Inn saw both Henry and Barbara DeTournay at the Holiday Inn late in the evening. She was shown a picture of the couple, S-31, and Kaminski's attorney stated "for the record, that's a photograph of the DeTournays." (SA 3619-3622)

On Sunday morning September 18th 1983, according to Jackie Alongi, the DeTournays appeared at the Alongi residence "looking for Paul and Donna." (SA 3397-3398) She revealed that they had arrived in the morning between ten

³ Jeffrey became confused on cross examination as to the dates and times. More about this will be said later in this brief.

or eleven o'clock. Defendant Alongi was not at home but he arrived as the DeTournays were leaving. (SA 3435) There was a conversation in the driveway that Jackie was not privy to. However, Jackie Alongi testified the DeTournays were looking specifically for "Paul Kamienski" and "they wanted to know **if we heard from him.**" (SA 3436-3437) (emphasis mine)

Just after that meeting at the Alongi residence, -- at 11:00 or 11:30 in the morning -- Sid Jeffrey said Henry DeTournay called him at the Holiday Inn and told him he would be by to pick him up. Once in Henry's car, Henry told Jeffrey, "they had just come from **the people** that were getting the money together." He indicated "**the people** still weren't ready and they were getting their money together. . . ." (SA 1471)⁴ (SA 1568) (emphasis mine) When Jeffrey met with Henry that morning, he was with Barbara. (SA 1567) Henry told Jeffrey "he was going to get back in touch with me." (SA 1646)

With the cocaine in Jeffrey's hands at the Holiday Inn, the deal was set for 6pm on the 18th of September. Jeffrey indicated the deal was set for 3:00 o'clock on September

⁴ At trial Kamienski denied meeting the DeTournays at the Alongi residence on September 18th. (SA 3680)

18th, but pushed back to 6:00 o'clock on September 18th. (SA 1472, 1569)⁵ Duckworth testified that on September 18th 1983 she, Kamienski, Alongi and Marsieno met at the Holiday Inn at 6 o'clock. She was not privy to the conversation among the defendants, but spoke with Jackie Alongi instead. (SA 2024-2026)

On September 18, Jean Yurcisin, Marsieno's companion and driver, received a phone call from Marsieno earlier in the day telling her to be ready later in the day to drive

⁵ Jeffrey said the deal was scheduled for 6pm on the 18th. Jeffrey got confused on cross examination with his dates and times. Aside from Jeffrey's testimony, we set forth in this factual statement immediately following this footnote, with accompanying cites to the record, the facts supporting a 6pm meeting at the Holiday Inn. Duckworth puts all the defendant's in each other's company at 6 o'clock on September 18th at the Holiday Inn. Marsieno's evening meeting at the Holiday Inn ending at 8pm to which he brought a gun and no money and about which he told his driver that the suppliers—who were the DeTournays—wanted to see the money, puts Marsieno in their presence. While Marsieno's conversation with Yurcisin puts the DeTournays in his presence, Duckworth put Kamienski and Alongi in Marsieno's presence. Buddy Lehman's claim that Marsieno promised him some of the South Florida rock cocaine on the evening of the 18th indicated Jeffrey's recollection on direct examination was accurate—that the deal on the 18th was set for 6 o'clock. That is the precise time Duckworth testified Kamienski was meeting with Alongi and Marsieno at the Holiday Inn, and it was consistent with Lehman's direction from Marsieno that he meet him at his condo between 6 and 8 pm that night to buy some of that cocaine, and it is consistent with Marsieno's direction to his driver that she pick him up at the Holiday Inn at 8pm and not to be late because he would be "carrying". It is also consistent with Henry DeTournay's call to Jeffrey around 8pm that night to meet him at Denny's at which time he told Jeffrey the deal was reset for the next day. Thus, by 8 o'clock on the evening of the 18th the deal had failed and new plans were in the making. On the other hand, the jury could have simply chosen to believe Jeffrey's testimony that the deal was set for 6pm on the 18th, especially after the DeTournays has gone looking for Kamienski that morning, and Jeffrey reported Henry had just come from the buyers and they were having trouble getting their money together. Finally, in testimony limited to Marsieno, he confirms a "first meeting" at which he didn't intend to pay the suppliers any money, and a second meeting at which he choked and shot Henry. (SA 3029)

him. At 4:00 o'clock she received a call from him, "and he told me to pick me up at the Holiday Inn on Route 37. He said specifically to be there at 8:00 o'clock, not to be a minute late because **he would be carrying.**" (SA 2970) (emphasis mine)

Yurcisin picked Marsieno up at 8pm. When Marsieno got in her car she testified he stated to her; "those lousy m.f'rs. . . .**they wanted to see the money first, and that he-he had no intention of paying them any money, that he would kill them before they got any of his money.**" (SA 2971) (emphasis mine) Marsieno was carrying a briefcase with him. Later, back at his condo, Marsieno opened the briefcase and Yurcisin saw a gun inside but no money. The gun was described as flat without "a round bullet thing on it" or without a "tumbler." (SA 2971-2972)

On Sunday evening, September 18, Buddy Lehman visited Marsieno's house on previous instructions for the purpose of buying cocaine. Marsieno could not comply with his instructions to Lehman because he did not have to cocaine on the 18th. But he assured Lehman he would, "have it in a few days for you." (SA 2689) Lehman was at Marsieno's house between 6 and 8 pm. He was specifically there to buy drugs from him. He thought someone was in the house with Marsieno

at that time, possibly Jean Yurcisin. (SA 2870-2871)

Also on the 18th, also at approximately 8pm, Henry called Jeffrey back and asked to meet him at Denny's restaurant. (SA 1646) Jeffrey said "that's where he told me that the deal was going to be the following day at 3 o'clock. Henry told Jeffrey that the plan was "that he would be dropping Barbara off to pick up the merchandise [at the Holiday Inn], and then he would pick her up."

Following the meeting of September 18, Duckworth indicated that her and Kamienski arrived back home at his boat by 8 or 9 o'clock that night. (SA 2193)

With the deal scheduled for 3 o'clock on the 19th, Kamienski dropped Donna Duckworth off at her friend Janet O'Donnell's house at approximately 1:30 or 2:00 o'clock in the afternoon. (Sa 2195) Duckworth said this was unusual. Kamienski "never let me out of his sight" and they were always together. (SA 2028) Further, Kaminski's license had been suspended so Duckworth always drove. However, on this particular day, Kamienski drove Duckworth to her girlfriend's house. (SA 2184-2185) Although his license was suspended in a matter arising in Toms River, and he never drove, Kamienski drove his Avanti Automobile which was an unusual and rare collector's car with a special license

plate, 1 PMK. (SA 2392-2393) Duckworth was not told when Kamienski would be back to pick her up. (SA 2203) Duckworth was not told where Kamienski was going or what he was doing, (SA 2469), and in fact did not know what Kamienski did between the time he dropped her off and the time he picked her up. (SA 2476) ⁶

Kamienski picked her up around dusk and they drove to Alongi's house. It only takes 5 minutes to get from O'Donnell's house to Alongi's house. (SA 2474) When Kamienski picked her up they did not stay at the O'Donnell residence for a few minutes but rather left "immediately". (SA 2472-2473)

When they entered Alongi's house, Kamienski directed her to "wait here", but when she wandered into the backyard dock area she testified;

I saw Tony in the boat and I saw what appeared to me to be a body shape in the sleeping bag and [Alongi] started lunging out of the boat and . . . I turned around and started going back into the house real fast. (SA 2029-2030)

Duckworth said "everything appeared wet" and that Kamienski assured Alongi, "she's alright." (SA 2030-2031)

⁶ Hence Kamienski isolated the witness consistent with the parties' change in plans which in effect lured the DeTournays from the Holiday Inn with the cocaine to Alongi's house. The plans had to be changed because as Marsieno said on the 18th, the sellers wanted to see the money—and there was no money.

Later Alongi took Duckworth into his bedroom and pointed to a phone which said "hit man" on it saying "if I didn't be quiet, I'd end up like my friends." Alongi said "Paul wouldn't be able to save me if I opened my mouth. . . ." (SA 2031-2033)

After the Alongi threat, Duckworth had a conversation with Marsieno in which he said to her that "only the strong survive. . . ." (Sa 2035)

When Duckworth and Kamienski left Alongi's house that night, Duckworth questioned Kamienski about what she had seen. Kamienski said "that he couldn't control what happened. . . ." Kamienski also stated, "Nick went first, Barbara didn't suffer. . . ." Finally, Kamienski said, "If we didn't shut up that he wouldn't be able to save me or himself." (SA 2034) Duckworth was screaming at him and was hysterical. (SA 2253)

Duckworth and Kamienski returned to the Ocean Beach Marina to Kamienski's boat, which she noticed was more difficult to board. She explained that a teak box was kept on the catwalk to the boat in which cleaning rags and other supplies were kept. It was used as a step. On this night, the teak box was missing and the boat had been moved forward. (SA 2035-2036)

Also on September 19, Henry called Jeffrey and told him the deal was postponed from 3 o'clock to 6 o'clock that day. Barbara arrived at 5 o'clock at Jeffrey's room in the Holiday Inn. It was she that told Jeffrey there was yet another change in plans. This time Henry would not be picking her up because he would be busy counting money. (Sa 1484) She told her a "very distinguished man" would be picking her up instead. (SA 1476)

From Jeffrey's third floor room at the Holiday Inn he would see a car arrive which Barbara indicated was the car. She went down to meet it, (SA 1477-1478), and the car pulled out of the lot and drove east toward Alongi's house. (Toward the black "X" on S-4) He described the type and paint of the car and other details including the fact that it had a large dent on the rear quarter panel. He was shown S-69 through S-75 in evidence and identified the car as the car that picked Barbara up. (SA 1605-1612 and 1763). (See these exhibits attached hereto at 8 to A14) Barbara was picked up between 6 and 6:15pm. (SA 1598)

George Hunt, Alongi's neighbor across the street testified that on September 19, 1983 he saw a man with a red beard and hair at Alongi's house arrive in a white Toyota with Florida plates. Alongi greeted him and they

disappeared around the back of the house together. (SA 1795-1798) The time was between 3:00 pm and 6:00pm on September 19, 1983 (SA 1794-1795) He never saw the man again until he noticed his picture in the newspaper at which time he contacted authorities. He identified the individual via S-31 in evidence as Henry DeTournay. (SA 1796-1797) Hunt also identified Alongi's car via S69-75 in evidence (attached at a8 through 14) as the vehicle that was parked at his house on the 19th. (SA 1798-1800)

Jeffrey described the packaging of the three kilos of cocaine--each block was the size of a football--and the green nylon bag in which it was contained. The type of cocaine was "called rock" and consisted of "mostly little hard pieces." (SA 1478-1479) He was to receive \$50,000.00 per kilo from the DeTournays, and was to bring 3 kilos a month into New Jersey but he never saw the DeTournays again. (SA 1483) The cocaine was obtained from certain Colombians. (SA 1543)

On Monday, September 19, 1983, about 10:30 PM, Yurcisin received a phone call from Marsieno who told her that "the deal went down" and that he would be leaving town because things were "going to be getting pretty hot." (SA

2973) (15T345-5 to 345-20)

Jean Yurcisin stated that after September 19, Marsieno possessed "three blocks" of cocaine contained in a green nylon bag. (SA 2980) From this supply, Marsieno provided ounces of cocaine at a time to Kamienski and Alongi without receiving money in return. (SA 2981-2984)

On Monday September 19, 1983 Buddy Lehman tried to contact Marsieno to no avail, and tried thereafter. He contacted Alongi later in the week who stated he "had the product" and they arranged to meet. (SA 2690)

On September 24, after Henry's body was recovered but before Barbara's body was recovered, Alongi contacted Lehman and instructed him to meet Kamienski at the Holiday Inn to find out what was going on. Kamienski stated; "my **friends** from Florida have been murdered. The Prosecutor's Office is questioning me in regards to the murders." (SA 2691-2692) (emphasis of the plural mine) Lehman reported the killings to Alongi later who said "nobody's going to care if they're dead." (SA 2693)

Around October 1st Lehman received "kilo quality rock coke" and he observed Jackie Sullivan Alongi with a coat lined with 10 to 12 ounce bags of cocaine which were

offered to Lehman on credit. (SA 2693-2695) During the same week Alongi told Lehman he and Marsieno had a falling out, Alongi claiming Marsieno owed him 25-30 thousand dollars. (SA 2696)

On September 24, 1983, the day Henry's body was found, Duckworth and Kamienski, while dining at the Top O' the Mast restaurant in Seaside Park, were informed that the police were there for Kamienski. Just before Kamienski left the table, he had a conversation with Duckworth which caused her to call Defendant Alongi who arrived within ten minutes. Duckworth told Alongi that the police were there because they had found a body and that Paul's phone numbers were found with it. Alongi instructed Duckworth to drive Kamienski to the police station. (SA 2038-2041)

On September 24, 1983, Yurcisin was working as a waitress at the Top O' the Mast restaurant. Kamienski, Duckworth and later Alongi were present. Alongi asked Yurcisin where Marsieno was. Alongi said that a body was found and it was very important that he reach Marsieno. (SA 2973-2974) (15T345-18 to 346-22) This was the same night police questioned Kamienski at the Top O' the Mast. (SA 2038-2041) (11T51 to 54-5)

Some time around September 29, 1983, on a Saturday

night, [Duckworth says around October 1st (SA 2044)] Marsieno, Alongi, Kamienski, Jackie Sullivan and Donna Duckworth were at the Top O' the Mast. Yurcisin overheard part of their conversation. Defendant Alongi stated that "he wanted his share"; Alongi was angry with Marsieno. Marsieno said Alongi "wouldn't be getting all of his share, because he hadn't done the job properly. He hadn't weighed the bodies down. They would have never come up if he had." (SA 2975-2977; 3031) (also SA 3031)

According to Duckworth, around October 1, 1983, there was a meeting at the Top O' the Mast. Marsieno, Kamienski, Alongi and Sullivan, Duckworth and Jeannie Yurcisin, were present. Yurcisin was waitressing that night. There was a conversation at the table in which Marsieno said that the bodies were found. Duckworth heard Marsieno state, "They were like scared puppies. . .it was easy." (SA 2044-2045) Duckworth left the table with Yurcisin to ingest cocaine on Marsieno's instructions because Duckworth was "getting nervous." (SA 2978)

When she returned Marsieno asked her whether the cocaine was good enough for her. She told him not at the price it cost. Marsieno said "they were nobodies, and they weren't really my [Duckworth's] friends." Marsieno

threatened Duckworth saying, "I should straighten up or I could end up like them. . . ." He then grabbed her jaw saying she should wise up. He told her he thought she was a stronger kid than that. (SA 2045-2046)

Between September 19, 1983 and September 24, 1983, both Alongi and Kamienski threatened Duckworth's life. (SA 2400) Duckworth said that in the aftermath of the event, she was "afraid he [Paul] was going to get me. . . .I didn't want to get hurt. I didn't want to get killed. (SA 2257)

Also between September 19 and September 24, there was a drastic change in the supply of cocaine. Duckworth stated, "It went from like none to a lot. I don't know how much, but a lot." She was obtaining her Cocaine from Kamienski. (SA 2047) The cocaine available was unusual in that; "It was stronger. It was rock form. It was just not what you would find around here." (SA 2048) During this time, Kamienski was looking for a cocaine grinder used to grind up rock cocaine so that it would become a powder. (SA 2049)

Duckworth identified S-34 in evidence as the sleeping bag seen on the boat at Defendant Alongi's house on

September 19th. (See A15 attached hereto)

S-34 in evidence depicted a blanket with some rope wrapped around it. Duckworth saw that blanket that night over the side of the boat with something underneath. (SA 2049-2051)

S-37 in evidence (see A18 attached hereto) depicted a towel recovered with the bodies - one she had seen before in the teak box on Kamienski's boat where rags were kept for the boat. She saw that same towel in the teak box. Also, the blankets recovered with the bodies were similar to those on Kamienski's boat. (SA 2056-2059) (See A16, 17, 19, 20 attached)

Duckworth had been boating since age five and was familiar with how to secure boats and the knots boaters used to secure them. Kamienski used a peculiar "hitch" knot to secure a boat, rather than that taught to Duckworth. S-35 in evidence depicted the bodies wrapped and secured by rope in hitch knots, the same knots that Kamienski tied. (SA 2054-2055) (See A16 attached hereto) (For another view of the knots, see A20 attached hereto which was designated S 45 in evidence) (SA 0685)

In early November 1983, Yurcisin was present at Alongi's house when Defendants Alongi and Marsieno began

arguing about Alongi's proper share of the cocaine. Marsieno once again told Alongi "he had not done the job properly, he had not weighed the two bodies down or it would never come up like this." (SA 3026) [The trial judge limited application of this testimony to Defendants Alongi and Marsieno. (SA 3027-3028)]

In late November or early December 1983, Yurcisin had another conversation with Marsieno.

He told me that, as we were driving - as I was driving, he had told me that he was going to tell me about the biggest drug deal that he ever made, and he had told me that it involved a long haired, red bearded hippie, and he actually didn't think the drug deal would go down because he didn't like the gentleman that he was describing did not look like he could be trusted. But they had a first meeting, he had told me, and there was no drugs at the meeting and he didn't intend to pay him, anyway. At the second meeting, the gentleman did have the drugs with him, and Mr. Marsieno had told me that he had to teach him a lesson. He choked him, brought him to his knees and shot him, and then after he told me that, he told me that if I ever told anybody this, that myself and my daughter would be killed, if not by him, by someone he knew or a family of his. (SA 3029) ⁷

Marsieno told Yurcisin that the woman with long brown hair was sent out of the room and that after he shot the hippie he had hoped he could give the woman money to keep her quiet. (SA 3029-3031) (limited to Marsieno)

⁷ [The trial judge limited this testimony to the case against Marsieno only. (SA 3030)]

We refer this Court to our main brief regarding the phone activity between Kamienski and Alongi including multiple calls between the two on the day the first body was found.

Defendants Alongi and Marsieno did not testify. However, Defendant Kamienski testified. His testimony appears at (SA 3636-3874)

Kamienski's testimony amounted to a blanket denial. He denied meeting with the Detournays at the Holiday Inn or any where else on September 18, 1983. He denied that he had any discussions of a drug deal involving three kilos of cocaine with anyone. (SA 3679-3680) Kamienski admitted that he did not drive in September of 1983 because he lost his license and did not want to get caught and that Duckworth primarily drove him around, but denied that he ever drove Duckworth at any time to Janet O'Donnell's house, and specifically denied having driven her there on September 19, 1983. (SA 3682-3686) He also denied being at the scene of the murders at Alongi's house on September 19, 1983, or having anything to do with the murders. Specifically he denied witnessing the murders, or having helped dispose of the bodies. (SA 3686-3688)

I. **Exhibit A**

Defendant argues the State "cites testimony about a lay witness being able to match a particular knot on the victim's legatures to appellant [but] they omit the crucial testimony on cross examination where the witness admits that the knot was common place (sic)."

"[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences 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 v. Virginia, 443 U.S. 307, 324 (1979). (emphasis mine)

Yet there is no conflict on cross examination with that which was adduced on direct examination; Duckworth indicated on cross merely that the particular type of "hitch" knot Kamienski tied was not used by boaters, although she has seen it used in other circumstances. (SA 2517-17 to 2518-12)

Significantly counsel continues, "appellees also omit the trial court's finding that the knot was not unique, as well as its conclusion that the knot had no evidentiary value and should be excluded from evidence on that basis."

(Db4)

The record is contrary to appellant's assertions. When defense counsel attempted to place the physical wire or rope which secured the bodies into evidence, the judge ruled: "Number one; the items themselves are not in evidence There is testimony about the items that is in evidence." (emphasis mine) (4046-12 to 4046-18)

Significantly, even Kamienski's defense counsel at trial admitted "I believe the inference is that, **certainly, the inference that they can draw, he tied the knots.** Let them look [at the actual rope]. (SA 4045) (Emphasis mine)

Of further note is counsel's chart exhibit A, in the right column. The last entry claims the judge denied admission of the knot evidence "on relevance grounds." On the contrary, the judge explained there was testimony about the style of knot used to tie the bodies as the same style Kamienski used to tie his boat.

We invite this Court to look at State's exhibit A16 attached hereto, which is "S-35 in evidence". Duckworth was examined about this photograph. She identified the knots in the picture as the "same type of knots Paul would tie." (SA 2055) The photograph clearly shows the nature of the knots in question. We challenge counsel to show this court "the

trial courts finding" that the knot was not unique "as well as its conclusion that the knot had no evidentiary value and should be excluded from evidence on that basis."

II. **Exhibit B**

Counsel claims there is no record support for the State's claim that Kamienski and Alongi threatened Donna Duckworth and that "appellant never threatened the witness." (emphasis in original)

Duckworth and Kamienski were questioned by police 5 days after the event on September 24th 1983. During that interview, Duckworth admitted on cross examination that she did not tell police about the conversation she and Kamienski had in the car on the 19th after leaving Alongi's house to the effect "Nick went first. Barbara didn't suffer", see SA 2034. She also admitted she didn't tell police about the conversation she had on the 19th with Alongi in which he pointed to a phone with "hit man" written on it and said "if I didn't be quiet, I'd end up like my friends", and that if she opened her mouth, Paul wouldn't be able to save her. (SA 2031-2033) She also admitted she didn't tell police about Marsieno's threat towards her that she "should straighten up or I could end

up like them" (SA 2045-2046).

When asked whether she was "prompted" by Paul Kamienski to lie by omission to police concerning these threats she stated; "I had prompting several times before that. I had my life threatened by Tony Alongi and Paul Kamienski, and that was still fresh in my memory." (SA 2400) She also made clear that in the aftermath of the event, she was "afraid [Paul] was going to get me. . . .I didn't want to get hurt. I didn't want to get killed. (SA 2257)

III. **Exhibit C**

Counsel complains that the assurance given Buddy Lehman around September 10, 1983 to September 15, 1983 was not properly limited to defendants Marsieno and Alongi, but instead the State used the generic "defendant". The State stands by its brief. Counsel has quoted a paragraph from the legal argument section of the brief.

The information at issue appears in our brief in the factual statement as follows;

Around September 10 to September 15, 1983, Lehman attempted to purchase cocaine **from Defendants Marsieno and Alongi**. Lehman had complained about the lack of potency of previous purchases. Defendant assured him that within the week **they** would have access to "kilo quality coke for you

at about one thousand dollars less an ounce than you're paying now. . . ." (SA 2687) (15T 59-1 to 59-14) Alongi offered to extend Lehman credit on what Alongi described as "a ton [of] South Florida Coke. . . ." (SA 2688) (15T 60-2 to 60-8) [See State's brief at p. 21] (Emphasis mine)

Counsel quotes the paragraph at issue from our *legal analysis* section under the heading "Intent to promote or facilitate murder, participation, and **shared intent**" (emphasis mine).

Indeed it was all three defendants' deal. Kamienski introduced and vouched for the parties on September 5th 1983. He called the Boutsikaris residence on September 9th 1983. It was around September 9th that Christine Longo said the DeTournays left for "Paul" the "funeral director's" boat which they slept on, and when they came back 2 or 3 days later, they were excited about a "big drug deal" they were going to make. By September 11th, Sid Jeffrey was being told by Henry DeTournay to obtain 3 kilos of cocaine from Florida. DeTournay said the people were friends of Barbara's who had the money for this. Kamienski owned multiple funeral homes, drove expensive cars, and lived in Florida where he had a automobile business, and other assets. Note the car Alongi was driving.

When Jeffrey came back to New Jersey on the 17th he

checked into the Holiday Inn on Henry's instructions because that was "close to where the deal would take place". The deal was originally set for the 18th. Kamienski was specifically being sought out on the morning of the 18th by the DeTournays at the Alongi residence. The DeTournays reported immediately after leaving the Alongi residence that the "people" were still getting their money together. Kamienski, was present at the Holiday Inn at 6pm. on September 18th in the company of Alongi and Marsieno. At that time Marsieno had a gun and no money in his briefcase--he stated he fully intended to get the cocaine without paying for it. Marsieno left the Holiday Inn that night at 8pm according to his driver Yurcisin. Henry DeTournay called Jeffrey and met him at Denny's at approximately 8pm where the final plans for the deal on the 19th were first revealed to Jeffrey. These plans had been changed from those set forth for the 18th and now, Henry would be dropping Barbara off at the Holiday Inn, but someone different would be picking her up. This is consistent with Marsieno's statement that on the 18th "those lousy m'fers wanted to see the money" but he had no intention of paying them any money. Hence the deal failed that night. Marsieno had expected to have the cocaine in hand on the evening of

the 18th because he had previously instructed Lehman to come to his house on the evening of the 18th for the purpose of selling him cocaine. Lehman showed up between 6 and 8pm but Marsieno did not have it and assured Lehman he would have it "in a few days". Hence the deal failed that evening-- September 18th -- according to the statements attributed to Henry DeTournay and Joe Marsieno, as well as the testimony of Buddy Lehman and Jean Yurcisin. All these statements revealed that at approximately 8pm on the night of the 18th, all concerned were stating the original plans were dead, and were shifting gears towards new plans for the 19th.

Kamienski was at the scene of the robbery and murder; Duckworth saw him at Alongi's with the bodies already wrapped. She related he was at the scene via his eyewitness account of the murders. He tied the knots that secured the bodies, as captured in Duckworth's testimony and the State's photographic evidence. He supplied the blankets, sleeping bags, and the peculiar white towel from his boat to wrap the bodies. He supplied the peculiar white towel from his teak box to wrap the bodies. His boat had been moved on the night of the crimes, and the teak box which was used as a step was not in its place.

Kamienski isolated a witness beforehand, Duckworth,

even though Duckworth had been present for mere drug deals before. He took a chance driving his rare car with courtesy plates when his license had been suspended in the town in which he was driving. He shared in that particular rock "South Florida coke" taken from Barbara's green flight bag which Marsieno had in his possession without paying for it, and was looking for a grinder to grind the rock into powder. He threatened Duckworth along with Alongi and Marsieno after the event. Toll records revealed intense interaction with Alongi when the bodies were found and in the aftermath of the event, even though Kamienski claimed before the jury he had met Alongi only a month before. Certainly he shared in the intent of these crimes. Hence, while it was Alongi and Marsieno who made the statement to Lehman, as correctly articulated and cited in our brief, Kamienski shared in their intent, also correctly articulated in our brief.

Aside from that, at the September 17th party at Alongi's all were talking about a ton of good cocaine coming into town via "friends of Paul's and Donna's". At trial Kamienski denied he heard any of this. Because he took the stand in his defense and denied hearing any of this talk, the jury had the right to disbelieve him—as they

obviously did.

The point is that counsel wants this court to believe Kamienski had nothing to do with the particular cocaine anticipated to come into town a short time later. That simply cannot be shown as Kamienski was an integral part of the deal.

Note that counsel cites to the statement of facts in the brief before the District Court, and the legal argument before this court, and the legal argument before the Appellate Division, as it suits him.

IV. **Exhibit D**

Counsel complains that it was improper to use the term "Defendants" when writing that Barbara DeTournay described the people she was joining to make the drug deal with as friends of her ex-husband. Counsel maintains that only Alongi and Marsieno were friends of her former husband.

The record powerfully negates that argument. Christine Longo, Barbara DeTournays sister testified on this subject from Barbara's perspective. Longo testified:

Q. Chris, did you have a conversation with your sister, Barbara Detournay, where she indicated that she was leaving again?

A. Yeah. She left again on a Friday or a Saturday, and she said she was going down to a funeral director's boat.

Q. Okay, Now, is that how the conversation went: She said a funeral director's?

A. No. First she said, "Paul." And I said, "Who is Paul"? And she said, "It's our friend, a funeral director,"

Q. All right. Had she ever talked about Paul before?

A. I heard them mention his name.

Q. Okay.

A. And I think a few times I had asked, you know, who was Paul, and she had said, "The funeral director." (emphasis mine) (SA 0886)

. . . .

Q. Do you recall what day that was? In looking at the calendar does that refresh your recollection at all?

A. I'd say the 9th.

Q. Ninth of September?

A. Yes.

Q. Did Nick and Barb, in fact, leave on that day?

A. Yes.

Q. Do you recall when they came back?

A. No, I don't.

Q. Can you pin it down?

A. Well, they came back maybe two-two days later, three days later. I am really not sure of that,

but I know they left to go down to Paul's boat.

Q. On the 9th?

A. Yeah.

Q. Now, when your sister came back from going down to Paul's boat, did you have any conversation with her concerning drugs?

A. Yes.

Q. What was that conversation, if you can recall?

A. Well, she was very - -
(SA 0887)

. . . .

Q. Did you have a conversation with your sister, Barbara, where she was discussing a drug deal that she was intending to get involved in?

A. Yes, she was going to make a big drug deal.

Q. Would you tell me about her demeanor or attitude after she came back from the shore?

A. She was ecstatically happy. She was very happy she was going to make this new deal.

Q. Did she tell you anything about the deal itself? What did she tell you about the deal?

A. Well, I had said to her, "Are you sure you know what you are doing"? And I had tried, you know, to talk her out of it and say, "Please, **do you know the people you are dealing with** or what you are doing?"

And she came back to me and said, "Well, I know **these people** from my former husband and I trust them."

They were friends of her former husband.

Q. She told you that?

A. Yes.

Q. And who was your sister Barbara's former husband?

A. His name is Bill Rispoli.

(SA 0888 to 0889) (emphasis mine)

Sid Jeffrey, testified that on September 17th he talked with Nick DeTournay about who the people were who were to complete the drug deal scheduled for the next day, September 18th.

Q. And that's when he told you that it's going to - - this big transaction, the transfer of the cocaine and the money, is going to take place the next day, is that right?

A. Yes.

Q. Did you say to Nick, "Who are these people?"

A. Yes.

Q. What did he tell you?

A. He said they were people that Barbara had known very well. (1650-1651)

. . . .

Q. Jeffrey, I realize it was five years ago, but you've testified here continuously as to specific conversations you had with Nick and Barbara, have you not?

A. Yes, sir.

Q. And you've - - you have recollection, for example, of discussion as to who this deal was going to be with, correct?

A. Yes.

Q. You had discussions about the fact that **it was Barbara's friends, and Barbara was the person that knew the people, and that the people knew her ex-husband.** You recall that?

A. **Yes, sir.** (emphasis mine) (SA 1672-1673)

. . . .

Q. Tell me about that conversation that you had at that time with Nick and Barbara DeTournay.

A. When Nick got there, when he started talking, he told me he wasn't able to sell all the merchandise that he had, but Barbara had contacted some people that she had known up in New Jersey, and they wanted three kilos of cocaine. **And these people supposedly had the money to do that, and she had told me she had known them for a long time when she was living with her ex-husband.**

Q. Okay. She said she knew them through her ex-husband?

A. She knew them through her ex-husband, yes.

Q. Did she say whether this was one person or more than one person?

A. She said "people". She never said person. (1465-1466)

V. **Exhibit E**

Counsel complains there is "no reasonable basis" for

an inference of premeditation of the crimes. We rely on our main brief as well as this response. Briefly, there never was any money for the drug deal to have occurred. When the DeTournays wanted to see the money on the 18th, where it was kept at a public place such as the Holiday Inn, defendants could not rob them of it at that time. A change in plans was necessary to lure the suppliers and cocaine from the relative safety of the Holiday Inn, to Alongi's house where they could be robbed in isolation. Hence, it was necessary for Kamienski to isolate Duckworth from that activity, dropping her off at O'Donnell's house only an hour before the deal was scheduled to take place in his unusual car and driving without a license.

Note the care with which the DeTournays originally acted towards defendants, and then note the careless change in plans. On the evening of September 18th Nick DeTournay called Sid Jeffrey and asked to meet him at a Denny's Restaurant. He told Jeffrey the deal was going to be the following day at 3 o'clock. From Howard Johnsons; he would be dropping Barbara off to pick up the cocaine at the Holiday Inn. However, Jeffrey testified that Henry told him on the 18th that "the people were having trouble getting their money put together, and it was going to be delayed

from three o'clock till six o'clock. (SA1567-1568) On the 18th Henry met Jeffrey and told him the deal had been finalized for the 19th and that it did not occur on the 18th because "the people did not have their money together, and it was delayed for that reason." (SA 1568)

However, the real reason is reflected in Jean Yurcisin's testimony. She received a phone call on September 18 from Marsieno who told her to pick him up at the Holiday Inn on Rt 37. "He said specifically to be there at eight o'clock, not to be a minute late, because he would be carrying." Significantly, when Yurcisin met Marsieno at the Holiday Inn, she testified, "he told me that as were pulling away, he said, those lousy MF'ers. He said they wanted to see the money first, and that he had no intention of paying them any money, that he would kill them before they got any of his money." When they arrived at his condo in Island Heights he opened that briefcase, which he had at the meeting, and she only thing that was in it that I saw was a gun. . . . no money."

See main brief page 55-60.

VI. Exhibit F

Counsel claims Kamienski was not at the September 18th 1983 "failed" drug deal. He claims the State "completely

made up an event that does not exist in the trial record." Counsel is wrong. In footnote 5 above, we set forth the facts supporting the date and time that the deal was to have taken place on September 18th 1983. The text following footnote 5 gives cites to the record in support of each fact in the footnote.

As for counsel's claim that Henry DeTournay "never once came onto the grounds of the Holiday Inn", he is wrong. As our factual statement herein makes clear, a cocktail waitress indentified the DeTournays as being in the Holiday Inn late in the evening of September 17th, 1983, and Kamienski's counsel confirmed that the photograph of the couple the waitress saw was in fact a photograph of the DeTournays. Further, Henry came by the Holiday Inn on other occasions.

On September 18th, Nick called Jeffrey and asked him to wait for him outside the Holiday Inn because "he didn't want to come into the hotel." (8T 138)

On September 19th Nick fully intended, according to Jeffrey to "drop Barbara off to pick up the merchandise, and then he would pick her up. But he wasn't going to come into the hotel because of the way, you have know, the way he looked." (8T 140)

On September 19th Nick called Jeffrey and, fully consistent with the plan, "said he was going to be a little late. It was going to be at six o'clock and not at three o'clock." Jeffrey said he was "**waiting for them** or her" (emphasis mine), and only Barbara showed up. When Jeffrey asked where Nick was, she said he "didn't want to come by because of the way he looked and driving a Florida car." (SA 1474) Barbara said Nick was going to be "busy counting money" instead. But the point is, Nick was going to go up to Jeffrey's room at the Holiday Inn per the original plans, and Jeffrey found out at the last minute that Nick wasn't coming.

CONCLUSION

For the reasons above, this Court must deny Appellant the relief he seeks.

Respectfully Submitted,

April 13, 2009

S/Samuel Marzarella

Samuel Marzarella,
Supervising Assistant County Prosecutor,
Of counsel and on the brief

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that the lawyer listed below is admitted to practice before this Court.

/s Samuel Marzarella

Samuel Marzarella, Esq.

ELECTRONIC FILING CERTIFICATIONS

I hereby certify that this brief as provided to the Court in electronic form includes the same text as the hard copies of the brief filed by regular mail with the Court. I hereby certify that the electronic version of this brief was scanned with Barracuda anti-virus software.

/s Samuel Marzarella

Samuel Marzarella, Esq.

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/s Samuel Marzarella

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2009, I served two copies of the State's brief via electronic mailing and via regular mail to:

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