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

x_____x

PAUL KAMIENSKI,	:	**Reply to Appellant's Opposition to Motion For Stay of Execution and Enforcement of Mandate Pending Filing of Petition for Writ of Certiorari in the Supreme Court of the United States**
Appellant,	:	
v.	:	
ROY L. HENDRICKS, et al.	:	
Appellees.	:	

x_____x

Appellees hereby reply to the opposition filed by Appellant to Appellees' motion to stay the execution and enforcement of the mandate pending filing of a petition for writ of certiorari in the United States Supreme Court.[1]

1. Appellees realize that the mandate has been issued and did not seek to imply otherwise in the motion, which is why it sought to stay not the issuance but the execution and enforcement of the mandate based on 28 U.S.C. § 2101(f), which reads: "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or

[1] The caption has been changed to designate the State as Appellees; the caption designating the State as Appellant was as the result of its current status, the petition for writ of habeas corpus having been granted and the petition for writ of certiorari to the United States Supreme Court pending filing.

As to the alleged incorrect reference to Appellant's counsel as "pro hac vice counsel," the State notes that said designation was taken directly from counsel's own letterhead, on his letter to the District Court dated July 17, 2009.

decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. *The stay may be granted by a judge of the court rendering the judgment or decree* or by a justice of the Supreme Court. . . ." The italicized language rebuts Appellant's claim that this provision "must be construed to limit Appellees to making the instant motion to the Supreme Court." (Opp., fn2)

2. The State reasonably relied upon 28 U.S.C. § 2101(f) above *and* Fed.R.App.P. 41(d)(2), which is a self-contained provision pertaining specifically to the current posture of this case that does not include a time limit in days but refers to moving for a stay "pending the filing of a petition for a writ of certiorari in the Supreme Court." The State has until the end of September 2009 to file its petition and, therefore, submits that it may move within that time to stay the enforcement of the mandate.

3. The State notes that it is in a different position from the usual petitioner for writ of certiorari who remains incarcerated while the Supreme Court decides if his petition was denied in error. In this instance, the State is in the extraordinary position of petitioning the Supreme Court while the prisoner, out on release on a $1,000,000 bond, seeks to modify the terms of that bond in the district court[2] and will likely seek to eliminate the bond altogether if a stay is not

[2] On July 14, 2009, Appellant filed a motion to modify his bail to avoid in-person reporting and to travel freely without consent of the probation department. Said motion will be decided by order of the district court on August 17, 2009.

issued, at which time the State will lose all ability to monitor his whereabouts while its petition for writ of certiorari is pending in the Supreme Court.

This Court is able to treat the State's motion for a stay as a motion for a recall and stay, and grant the stay based on the State's unique status, without unduly burdening the appellant. While finality of judgments is always an important interest in jurisprudence, the State has made known since before the denial of rehearing that it would petition for a writ of certiorari if rehearing were denied. Thus, the appellant – who has been released from incarceration on a bond that by its terms is effective until the State's petition is denied or the Supreme Court's decision is rendered – has no vested interest in his freedom and no expectation that it is final, even if the State's chances of its petition being granted by the Supreme Court are slim.

4. Regarding the likelihood of the Supreme Court granting a writ of certiorari, Appellant asserts that the State's petition will most likely be denied because in a handful of cases cited by him as "garden variety" sufficiency-of-evidence cases, the writ was denied. (Opp., parg. 6) Neither Appellant's assessment of the odds nor the unanimous non-precedential nature of the opinion rendered by this Court are dispositive of the State's chances of being granted certiorari, especially because the State enjoys the benefit of two other vital factors that bode well for its probability of success.

5. The case pending in the U.S. Supreme Court cited by the State in its motion is not identical in facts but is identical in the issue presented. *McDaniel v. Brown, No. 08-559*. Appellant asserts that the State is "incredibly wrong" to claim similarity to that case, but appellant failed to address the first prong of the issue that the Court accepted for certiorari, which is: *What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?* The expansion of the record is a sub-issue in the *McDaniel* case, just as the State will posit several sub-issues in its petition.

6. Another factor to be considered by the Supreme Court is whether the circuits are in conflict on the issue presented, examples of which were cited in the State's moving papers and were not disputed by Appellant.

7. Regarding the State's likelihood of success on the merits, it need only show the *possibility* that five justices would find that the jury, the appellate division, the state supreme court and the district court did not act unreasonably, or the *possibility* that five justices would find that this Court overstepped its duties and substituted its own judgment for that of the finders of fact.

8. The State's alleged failure in this application to "cite at least one solid fact" from the record that establishes Appellant's guilt is immaterial. The State submits that its

pleadings do cite sufficient evidence for a conviction, especially when viewed in the absence of the prosecutor's summation, which does not constitute evidence and should not have been cited by this Court in rendering its decision. In any event, the prosecutor's remark went only to the conspiracy charges, not the substantive charges. Nevertheless, the State relies upon the analysis of the appellate division of the state court as well as the district court's opinion below.

Regarding the State's "opportunity" at oral argument to so cite to the evidence, that opportunity is embodied in the transcript and the audiotape of the proceedings, and those items speak for themselves.

9. As to irreparable harm, the State's claim has never been "unspecified" as Appellant asserts. (Opp. Parg. 11) The very specific harm is that the State may not be able to make Kamienski serve the balance of his term if the Supreme Court decides against him. Appellant has already sought to alter his travel restrictions and his in-person reporting requirements while out on bond. The State need not show that Kamienski has the "resources or connections to flee" as he alleges; it need only show a risk of flight, which it submits is high in light of his unique circumstances.

10. Appellant's repeated references to Kamienski's status, opportunities and motives remaining the same (Opp. Pargs. 12 & 13) with or without a stay of the mandate bolster the State's

argument that he will suffer little if any harm should a stay issue, especially since it will not be of long duration.

11. The "equity and public interest" factor does not go only to Kamienski posing a threat to the community by committing a crime; it goes also to the public interest and equities in allowing an aggrieved party to complete its process of appeals before enforcing a mandate that by its very nature is a final adjudication if not stayed.

Wherefore, for the reasons stated in its original moving papers and hereinabove, Appellees respectfully move the Court for an order staying the execution and enforcement of the mandate pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, and until final disposition of that petition.

CERTIFICATION

As counsel for the above-named Appellees, I certify that the foregoing motion to stay execution and enforcement of the mandate is, and application to the Supreme Court of the United States for a writ of certiorari will be, presented in good faith. Such application will not be frivolous nor filed merely for delay.

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Samuel Marzarella

July 24, 2009

CERTIFICATION OF SERVICE UPON COUNSEL
(Motion to Stay Mandate by Appellees)

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 Motion to Stay Mandate and Certification of Samuel Marzarella, Esq., dated July 24, 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: July 24, 2009

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