

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAUL KAMIENSKI,
Appellant

v.

NO. 06-4536

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

Transcript from the audio recording of
the oral argument held Thursday, April 16, 2009, at
the United States Courthouse, 601 Market Street,
Philadelphia, Pennsylvania. This transcript was
produced by James DeCrescenzo, a Fellow of the
Academy of Professional Reporters, a Registered
Diplomate Reporter, an Approved Reporter of the
United States District Court.

BEFORE:

THE HONORABLE THEODORE A. McKEE

THE HONORABLE D. BROOKS SMITH

THE HONORABLE FRANKLIN S. VAN ANTWERPEN

1 APPEARANCES:

2 TIMOTHY J. McINNIS, ESQUIRE
3 mcinnisesq@aol.com
4 Suite 1700
5 521 Fifth Avenue
6 New York, New York 10175
7 212.292.4573
8 Attorney for Appellant

6

7 SAMUEL J. MARZARELLA, ESQUIRE
8 smarzarella@co.ocean.nj.us
9 Office of County Prosecutor
10 Ocean County
11 119 Hooper Avenue
12 Toms River, New Jersey 08754
13 Attorney for Appellees

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 THE COURT: Kamienski versus
2 Hendricks.

3 MR. McINNIS: May it please the Court,
4 Timothy J. McInnis on behalf of appellant Paul
5 Kamienski.

6 Two administrative things: One, I
7 would like, respectfully, to reserve four minutes
8 of rebuttal time.

9 THE COURT: Okay.

10 MR. McINNIS: And the other is, by
11 motion the court granted me the opportunity to use
12 six exhibits during the oral argument and I have
13 those. They were attached to the motion. They
14 were also --

15 THE COURT: We have them.

16 MR. McINNIS: Okay. So I don't need
17 to hand them up?

18 THE COURT: No. Please, no more
19 paper. I don't think any of us wants any more
20 paper, no more letters, no more motions.

21 THE COURT: But if they do come, make
22 sure they have careful citations on them.

23 THE COURT: Yes. Right. Right.

24 MR. McINNIS: This is a New Jersey

1 state prisoners' appeal of the denial of an habeas
2 petition filed under the AEDPA. That petition
3 seeks to vacate convictions for accomplice
4 liability to first degree and felony murder is
5 grounded in the due process clause --

6 THE COURT: We understand. Believe
7 me, we are really familiar with this case. Why
8 don't you just go ahead with your argument.

9 THE COURT: Is sufficiency of evidence
10 a question of law under (d)(1) or a fact under
11 (d)(2)?

12 MR. McINNIS: Yes, that's correct.

13 THE COURT: Which?

14 MR. McINNIS: It's both.

15 THE COURT: Okay.

16 MR. McINNIS: Oh, I'm sorry.
17 Sufficiency of the evidence is under (d)(1) where
18 we say that the state appellate court made an
19 unreasonable application of the Jackson standard.
20 And the argument under (d)(2) and (e) is that the
21 various fact finding it made were clearly
22 erroneous.

23 THE COURT: Go ahead. I just wanted
24 to get your view.

1 MR. McINNIS: Then with those
2 standards in mind, to summarize --

3 THE COURT: So with those standards in
4 mind, what you then need to demonstrate to us is
5 that the appellate division's decision as to the
6 first degree murders was not just incorrect but
7 also unreasonable under AEDPA; is that right?

8 MR. McINNIS: That's exactly right.

9 THE COURT: All right.

10 MR. McINNIS: And to summarize my
11 argument, it would be that a full and fair reading
12 of the record under the appropriate standards will
13 show not only a complete lack of evidence of
14 accomplice liability on Kamienski's part, but also
15 that his murder convictions were reinstated as a
16 result of the state submitting a false and
17 misleading appellate court brief.

18 Thus the proper review of the trial
19 record will illuminate an injustice that shocks the
20 conscience. This is particularly troubling since
21 Kamienski is currently serving the 20th year of a
22 double life sentence.

23 THE COURT: You mentioned at one point
24 in your supplemental brief, the one you attached

1 Exhibits A through F to, you mentioned on page
2 seven that the state concededly -- the state
3 repeatedly conceded at trial, and then you have in
4 parentheses, and in post-trial motions, that there
5 was absolutely no evidence of foreknowledge,
6 premeditation or coordinated planning on the
7 appellant's part.

8 The prosecutor made that statement in
9 argument. Was there a motion filed post trial in
10 which that concession was made? Because I looked
11 for it and I couldn't find it. I did find --

12 MR. McINNIS: Yes. If -- well, I'll
13 give you an example --

14 THE COURT: There's a statement that
15 the prosecutor makes in response to the post-trial
16 motions that were filed where he says that. But is
17 there any motion, response to a motion where that
18 concession is made?

19 MR. McINNIS: Yes. I would refer the
20 court to page 4612 of the supplemental appendix
21 where, which was the post-trial motion, and the
22 court said, if I could quote, "You indicated to the
23 jury, and I think you had to, that you were correct
24 that there was nothing to suggest by the requisite

1 standard that prior to the afternoon of the 19th
2 he, Kamienski, knew of and agreed to assist in or
3 conspire to commit a murder -- a robbery or
4 murder."

5 And the prosecutor said: "I agree."

6 And the court: "And the jury so
7 found."

8 The prosecutor: "I agree with you."

9 THE COURT: Okay, but I'm trying to
10 find out whether or not there was a pleading or
11 response to a pleading where that concession was
12 made, and I did read that, what you just referred
13 to I have in front of me now.

14 The issue I'm wondering in my mind is
15 whether or not that's tantamount to a judicial
16 admission.

17 THE COURT: Judicial admission. But
18 nobody really acts upon making that a judicial
19 admission, do they?

20 THE COURT: No one. No.

21 THE COURT: It certainly to me, as
22 Judge McKee suggests, has all the stuff of judicial
23 admission, but it appears nobody actually took the
24 initiative, either at trial or in the post-trial

1 proceedings to have it rendered as such.

2 THE COURT: Totally ignored that.

3 THE COURT: For purposes of review.

4 THE COURT: In the state appeals it's
5 totally ignored.

6 MR. McINNIS: Should I move on to
7 another point?

8 THE COURT: Well, go ahead.

9 THE COURT: Do you have anything to
10 the contrary?

11 MR. McINNIS: Well, it arose in the
12 context of the motion to dismiss and it was
13 something that the prosecutor I think gave up in
14 order to try --

15 THE COURT: I'm not sure he should
16 have given it up, appears to have given it up, but
17 nobody took him to task for it.

18 MR. McINNIS: And obviously they
19 should have because what the prosecutor did in this
20 case was he sent a charge to the jury, sent a count
21 to the jury that he himself didn't believe in,
22 by -- he had presented and allowed the
23 conspiracy --

24 THE COURT: Yes, but let me ask this

1 because that issue has really bugged me. If the
2 jury is the finder of fact, and I've read the
3 prosecutor's, that part of the prosecutor's
4 argument, I haven't read the entire argument, but
5 if the prosecutor says that I don't think, not from
6 what I've heard, that there's evidence of X, Y, Z,
7 well, the prosecutor is not the finder of fact.

8 The jury then goes back deliberates,
9 considers all the evidence and the jury concludes
10 beyond a reasonable doubt, well, there is evidence,
11 we're convinced beyond a reasonable doubt of X, Y,
12 Z, comes back with a verdict convicting, I don't
13 know where that leaves us, I don't know where it
14 gets your client.

15 MR. McINNIS: Well, first of all the
16 jury came back with a verdict of acquittal on the
17 conspiracy charge. So the jury heard the
18 prosecutor and considered that and ultimately went
19 along with it. But the bigger point is if you
20 consider the Jackson standard --

21 THE COURT: The accomplice liability
22 is the problem on the murder.

23 MR. McINNIS: -- how could a rational
24 juror have found premeditation when the prosecutor

1 who's charged with presenting the case and
2 articulating a theory --

3 THE COURT: Premeditation can arise in
4 an instant, can't it?

5 MR. McINNIS: Yes, it can.

6 THE COURT: And the jury's going --
7 the judge is going to tell the jury that they're
8 the sole finders of facts, statements of counsel
9 don't constitute evidence.

10 Why couldn't, in response to your
11 question, why couldn't the jury find that? I'm not
12 sure it's here, but why couldn't the jury find it?

13 MR. McINNIS: It would be irrational
14 for a juror to find premeditation when the
15 prosecutor who's charged with presenting the case
16 says there was none.

17 THE COURT: Well, let's assume that
18 the prosecutor never said such a thing, and you
19 still have the same trial record that you have
20 here. All three members of this panel,
21 interestingly, were state trial court judges here
22 in Pennsylvania. Every one of us --

23 THE COURT: There are days in our
24 past.

1 THE COURT: Judge McKee was much, much
2 longer ago than some of us, but each one of us has
3 had to deal with demurers under Pennsylvania
4 procedure, each one of us has had to deal with what
5 are called motions in arrested judgment under
6 Pennsylvania procedure. And I think what you have
7 in New Jersey and what was dealt with here was
8 actually called a judgment NOV. Is that correct?

9 MR. McINNIS: That's correct.

10 THE COURT: Even in a criminal
11 context. So we would hear those with an argument
12 from both sides as to just what the record shows,
13 an iteration of the pieces of evidence that go
14 towards supporting the elements of the charges and
15 why they do or do not give rise to reasonable
16 inferences.

17 So you're the defense, you're before
18 us right now, not as an appeals panel but as the
19 trial judge. What is your motion to dismiss or
20 what would be a motion for demurer under
21 Pennsylvania law?

22 MR. McINNIS: It would be as follows:
23 The accomplice liability statute, which is what's
24 at issue here, did the state prove the elements of

1 that by proof beyond a reasonable doubt, requires
2 at least some act before or during the commission
3 of the crime. And then you have to go to the other
4 analysis, was it done with the shared purpose and
5 knowledge and so on.

6 There's not a single fact -- first of
7 all, in terms of during the crime, the only
8 testimony came in through the mouth of Jeanie
9 Yurcisin, the girlfriend of the shooter, who
10 described how the shooter said he single-handedly
11 committed this crime, he shot the people and stole
12 the cocaine, he makes no mention of Kamienski
13 having been there or having any role.

14 THE COURT: We all know that presence
15 at a crime, presence at the scene is in and of
16 itself is not enough.

17 Tell us what the evidence shows in
18 this record simply to demonstrate presence at the
19 scene.

20 MR. McINNIS: There is no evidence of
21 presence at the scene.

22 THE COURT: At the time of the
23 commission of the crime.

24 MR. McINNIS: At the time of the

1 crime. We don't --

2 THE COURT: Saying Barbara didn't --
3 saying Nick went first, Barbara didn't suffer, that
4 doesn't show --

5 MR. McINNIS: I was going to come to
6 that, your Honor. What we do have is Barbara --
7 Donna Duckworth's testimony that Kamienski said
8 that to her. And it was from that that the court
9 inferred one interpretation of that is that he was
10 an eyewitness. But beyond that there's no evidence
11 of him being present at the crime.

12 THE COURT: Well, he also said there's
13 nothing I could do, I couldn't help... Didn't he
14 say that at one point?

15 MR. McINNIS: Yes, he said he couldn't
16 control what happened.

17 THE COURT: That's my point. It is
18 circumstantial evidence though that one could
19 reasonably use to say he's there.

20 MR. McINNIS: That's correct. And the
21 court --

22 THE COURT: Now we have a relationship
23 between Duckworth and your client. They did drugs
24 together, didn't they?

1 MR. McINNIS: That's correct. In the
2 sense of using them.

3 THE COURT: All right. But all of a
4 sudden, for some reason, this particular day he
5 wants her elsewhere. Now, couldn't a jury infer
6 from that that maybe he didn't want her there
7 because something bad was going to happen and he
8 knew something bad was going to happen and didn't
9 he share in the stolen cocaine and weren't his
10 towels and blankets arguably used for disposal of
11 the body? Don't you have all that?

12 MR. McINNIS: Yes, you do have all
13 that. However, the court said that he secreted
14 Duckworth because he knew something bad was going
15 to happen.

16 That's not enough. He has to know
17 more than --

18 THE COURT: Can't the jury read into
19 that whatever they want to --

20 MR. McINNIS: No.

21 THE COURT: With reasonable --

22 MR. McINNIS: No. There has to be
23 something in the record. There has to be some
24 evidence of a conversation he had or that he knew

1 that his codefendant was armed or that even that
2 they were intending to rob these people.

3 THE COURT: Mr. McInnis, what if it is
4 a reasonable inference that Mr. Kamienski knew that
5 not only was there to be a drug deal but that the
6 victims were going to be shot, but there is also a
7 reasonable inference that in fact is of equal
8 believability that competes with that other
9 inference? Then what's the impact of that
10 legally?

11 MR. McINNIS: Then there is no proof
12 beyond a reasonable doubt.

13 THE COURT: Isn't that what the
14 Supreme Court said is not the rule, that when
15 you're faced with conflicting inferences we must
16 presume the jury resolved the conflict in favor of
17 the prosecution? Isn't that what they said in
18 Jackson?

19 MR. McINNIS: No.

20 THE COURT: They didn't say that? I
21 just quoted from it. It looks to me like it's what
22 they said.

23 MR. McINNIS: Well, that's not what we
24 have here though. It's not that we have that type

1 of competing inferences. What we have is what the
2 Supreme Court described in I believe the Yates case
3 where you have two equally reasonable inferences
4 drawn. In that situation the state has not met its
5 burden of proof beyond a reasonable doubt.

6 Another point I'd like to make about
7 the Jackson case is there the facts were
8 uncontested, here -- and there was direct
9 evidence. Here the facts are sharply contested.
10 Just for example the woman who supposedly had Donna
11 Duckworth at her house denied that.

12 THE COURT: That may be, but again
13 juries deal with those things all the time.

14 MR. McINNIS: Well, I just come back
15 to my point that there's absolutely no evidence
16 that Kamienski did anything during the crime
17 itself, and there's no evidence that he did
18 anything prior to the crime. And the court has to
19 give effect to the fact that the jury acquitted
20 Kamienski on the conspiracy charge. It would be
21 impossible --

22 THE COURT: Yes, but that doesn't help
23 you as much you seem to think it does, because you
24 can have inconsistent verdicts. In fact, that

1 seems to be kind of a red herring here because the
2 appellate court seemed concerned that the trial
3 court thought that there couldn't be inconsistent
4 verdicts. I'm not sure that's why the -- I don't
5 think that's why the trial court granted judgment
6 NOV at all.

7 MR. McINNIS: It's more than just an
8 inconsistent verdict. It's that the jury acquitted
9 Kamienski of the conspiracy charge, meaning that
10 there was no evidence of any agreement. And so
11 when the appellate court said there was something
12 done by prearrangement, for example, dropping
13 Duckworth off, or the district court said that
14 Kamienski did certain things --

15 THE COURT: Hey, if I come upon you in
16 the hallway later on and you're in the process of
17 killing somebody and I help you do it, I'm an
18 accomplice, aren't I? Even though we didn't
19 discuss it ahead of time?

20 MR. McINNIS: Yes, because then there
21 would be evidence of something that you did during
22 the course of the crime itself, which we don't have
23 here.

24 THE COURT: And that can be

1 circumstance -- and you don't dispute that he
2 threatened Duckworth, he said something bad was
3 going to happen if she talked about what happened
4 afterwards, right?

5 MR. McINNIS: I do dispute that that
6 constitutes a threat. He warned her that if --

7 THE COURT: All right. He warned
8 her. He warned her.

9 MR. McINNIS: But he applied it to
10 himself too. He said if, if --

11 THE COURT: Yeah, we'll both be in
12 trouble.

13 MR. McINNIS: Right. So, so that's
14 not a threat. And Duckworth said that she was not
15 threatened by Kamienski. And the prosecutor during
16 his closing, again it's not evidence, but I cite
17 it, the prosecutor said it was true that she
18 didn't -- threaten.

19 But I've run out of time. I haven't
20 had a chance to go through the exhibits. I did
21 submit a supplemental brief which I think --

22 THE COURT: You have some -- believe
23 me, we have looked through them and the response to
24 them.

1 MR. McINNIS: Okay. But --

2 THE COURT: You saved about four or
3 five minutes for rebuttal I think, didn't you?

4 MR. McINNIS: Right. But the biggest
5 point that I wanted to make with respect to the
6 conduct beforehand is the state relies on a meeting
7 that supposedly took place the evening before the
8 murders. That's what they say constitutes the
9 conduct. They say that --

10 THE COURT: We're going to ask the
11 state about that, believe me. I would like to know
12 just what in that meeting myself, what the evidence
13 is that they knew ahead of time, yes.

14 THE COURT: Why don't you hold on and
15 save what you want to say to us for rebuttal.

16 MR. McINNIS: All right. Thank you
17 very much.

18 THE COURT: Believe me, you're going
19 to get plenty of time to respond and your opposing
20 friend, Mr. Marzarella, will also get plenty of
21 time to respond.

22 MR. McINNIS: Thank you very much.

23 MR. MARZARELLA: May it please the
24 court, Samuel Marzarella, Ocean County prosecutor's

1 office on behalf of the state.

2 I'll start, your Honors, with --

3 THE COURT: Maybe you can start by
4 helping me out with the problem I had as I read
5 your brief and became almost apoplectic. Why would
6 you put in your brief evidence against Kamienski
7 and then put in parentheses admitted only insofar
8 as Maiano, or whatever his name, Marzeno was
9 concerned?

10 And even in your response you've got
11 at one point evidence that you put in here and then
12 there's a footnote: "The parties discussed a
13 cocaine deal" -- this is on page two of your
14 response in response to his affidavits. "The
15 parties discussed a cocaine deal. This was
16 stricken from the record."

17 If it's stricken from the record why
18 in the world would you put that in your brief and
19 argue it? And you do that repeatedly throughout
20 your brief. You'll say that the evidence is such
21 and such and then you'll put in parentheses
22 admitted only as to codefendant.

23 MR. MARZARELLA: Well, I think it's
24 important --

1 THE COURT: It's improper, that's what
2 it is, it's totally improper.

3 MR. MARZARELLA: I apologize to the
4 court if that's improper, Judge. That was what was
5 done at the state level.

6 THE COURT: That's his point.

7 MR. MARZARELLA: Yes, and --

8 THE COURT: And that's what caused the
9 state to rule the way they did.

10 MR. MARZARELLA: Well, in order for us
11 to show concerted action, your Honor, we have to --

12 THE COURT: You can't show us
13 concerted action by evidence that's not admissible
14 against your client. Go back and read U.S. vs.
15 Bruton. How can you show us evidence against X by
16 relying upon evidence that's only admissible as to
17 A, B and C?

18 MR. MARZARELLA: I would respectfully,
19 Judge, I would ask that the court obviously not
20 consider -- you're not going to consider it. I
21 apologize for the error.

22 THE COURT: Well, if you don't want us
23 to consider it why do you put it in your brief and
24 tell us about it and then ask permission to file an

1 over-length brief? And you did the same thing with
2 the supplemental response.

3 I got the supplemental responses it's
4 accompanied by a motion for an over-length brief.
5 You don't respond to his exhibits, you don't begin
6 to respond to his exhibits until page 22, and then
7 it takes about four or five pages to respond to the
8 exhibits. You'll get a chance to do that today.

9 But this case, it seems to me, is a
10 troubling case and I'm not sure either side has
11 helped us a great deal the way they've gone about
12 presenting the issues to us.

13 THE COURT: It could also be a very
14 easy case, because, I mean easy in a legal sense
15 and easy even in a factual sense, because as all of
16 our questions have suggested in terms of state law,
17 this is purely about sufficiency. And we're
18 looking at it simply with the AEDPA overlay.

19 Now, going back to the question I
20 asked your adversary and asking you to put yourself
21 in the position of responding to a motion to
22 dismiss or motion to demur, even a motion for
23 judgment NOV here, you could iterate in a page or
24 two those facts which constitute direct evidence

1 here of Kamienski's guilt.

2 In fact, that wouldn't take up very
3 much space at all. And that evidence from which
4 reasonable inferences can be drawn, to wit the
5 circumstantial evidence here.

6 All of the pages could be distilled
7 into nothing but that, at least for my purposes
8 here.

9 THE COURT: Mine too.

10 THE COURT: So at least for my
11 purposes, tell me, please, muster your evidence for
12 purposes of responding to this motion to dismiss.
13 What reasonably ties Kamienski to the shootings,
14 the murders.

15 THE COURT: In a way to get accomplice
16 liability for murder.

17 MR. MARZARELLA: I'm sorry, Judge?

18 THE COURT: Tie it to him in a manner
19 that gives you proof beyond a reasonable doubt of
20 accomplice liability for murder, either
21 premeditated murder or felony murder.

22 MR. MARZARELLA: There's two
23 overlaying principles, your Honors. First is
24 concerted action. And that shows shared intent.

1 The other is a specific type of
2 concerted action or action which is concerted
3 vis-a-vis the other defendants but which Kamienski
4 himself did.

5 The concerted action goes like this.
6 On the 9th Kamienski places a phone call to the
7 Boutsikaris residence, that's where the victims are
8 staying. On the 10th they come up --

9 THE COURT: You're going to go through
10 all the business about setting up a cocaine deal.

11 MR. MARZARELLA: Right.

12 THE COURT: I don't think there's any
13 doubt, certainly no doubt in my mind -- I'd be
14 surprised if my colleagues harbor any doubt at
15 all -- that he was involved in advancing a cocaine
16 deal.

17 MR. MARZARELLA: Right.

18 THE COURT: So let's get past the
19 Labor Day party, get past all the business where
20 he's setting up a cocaine deal.

21 MR. MARZARELLA: Okay.

22 THE COURT: Is there anything to show
23 ahead of time he knew they didn't have the money to
24 pay for it?

1 MR. MARZARELLA: Yes, Judge, there is.

2 THE COURT: What?

3 MR. MARZARELLA: He isolated a
4 witness, a witness who was at drug deals before,
5 many times before.

6 THE COURT: For three kilos? She has
7 testimony that she's with him 24 hours a day, she's
8 always with him, they're like --

9 MR. MARZARELLA: Right.

10 THE COURT: -- Siamese twins, these
11 two, they never leave one another's sides.

12 MR. MARZARELLA: Right.

13 THE COURT: And then all of a sudden
14 he, if you will, from your perspective he ditches
15 her.

16 MR. MARZARELLA: Yes, he does.

17 THE COURT: -- for a time while the
18 drug deal --

19 MR. MARZARELLA: And he does it, he
20 takes --

21 THE COURT: You're arguing that he's
22 always -- she's always with him when drug deals go
23 down before. Where is there something from which
24 the jury could attach that kind of significance

1 that she accompanied him on major drug purchases?

2 MR. MARZARELLA: Well, she never --
3 you know, we don't know whether she accompanied him
4 on major drug purchases. But --

5 THE COURT: Well, there weren't any.
6 There's no evidence here of any other major drug
7 purchases at all.

8 MR. MARZARELLA: He ditched her, your
9 Honor, taking an awful chance. His license was
10 suspended. There's testimony all over the record
11 that says he could never drive. He drove. He took
12 an unusual car, 300 of them were made per year, and
13 with courtesy plates, with his initials on them,
14 and he drove -- he isolated this witness --

15 THE COURT: Let's assume that a jury
16 could, and I think a jury could easily find, he
17 knew that there was going to be a drug sale that
18 night of three kilos, a lot of money, he did not
19 want her to see that.

20 MR. MARZARELLA: And that's --
21 exactly. And that's --

22 THE COURT: The question you're being
23 asked was where is the evidence that he knew that
24 no money was going to change hands? There was

1 going to be a rip off?

2 MR. MARZARELLA: Here's the evidence.

3 Here's the evidence. He -- they lured -- he was

4 at, he was at, according to the evidence, he was at

5 the premises, the Alongi premises on the 19th.

6 Duckworth puts him there.

7 THE COURT: The murder is on the 18th.

8 MR. MARZARELLA: No. The murder is on

9 the 19th, respectfully, your Honor.

10 THE COURT: All right.

11 MR. MARZARELLA: He was there. In

12 order to get there they had to lure the DeTournays

13 away from a public place, namely the Holiday Inn in

14 Toms River. They did that with a change in plans.

15 That last minute change in plans is crucial. That

16 luring --

17 THE COURT: You say "they." Don't --

18 please, do not use "they." We're not talking third

19 person plural here. We want third person singular,

20 Kamienski.

21 MR. MARZARELLA: Understood, your

22 Honor. We don't know precisely who was the prime

23 mover in the change of plans. But we know that at

24 the last minute on the 18th -- I'm sorry, on the

1 19th --

2 THE COURT: What do we know Kamienski
3 knew about the change in plans?

4 MR. MARZARELLA: We know that
5 Kamienski knew to be, instead of at the Holiday
6 Inn, he knew to be at Alongi's house.

7 THE COURT: He knew to be there.

8 MR. MARZARELLA: He knew it before,
9 before the act occurred. He isolated the witness
10 an hour before the drug deal was originally
11 scheduled, which was 3 o'clock in the afternoon.

12 THE COURT: Because he knew he had to
13 be there, a large drug deal was going to go down.

14 MR. MARZARELLA: Well, he knew he had
15 to be there and that more than a large drug deal
16 was going to be made. These people lured these
17 victims --

18 THE COURT: Don't say "these people."
19 That's the problem with the darn brief.

20 MR. MARZARELLA: Someone did, your
21 Honor, and he was present at the scene.

22 THE COURT: Present at what scene?

23 MR. MARZARELLA: At the scene of the
24 murders. He was present at the scene and he knew

1 to be present there. And the reason that it was
2 more --

3 THE COURT: If we were at a trial
4 court I would ask the reporter to read the question
5 back. I believe the question we've been stumbling
6 around, bumping into occasionally but pretty much
7 stumbling around for the past ten minutes was Judge
8 Van Antwerpen's question where on the record is
9 there evidence from which the jury could infer that
10 Kamienski knew no money was doing to change hands?

11 And you started out with a response
12 that got us back into Labor Day and a party on the
13 10th.

14 Forget all that business.

15 MR. MARZARELLA: I apologize, Judge.

16 THE COURT: Why don't we answer the
17 question.

18 MR. MARZARELLA: It's precisely this.
19 That on the 18th, which was the originally
20 scheduled meeting where the drug deal was supposed
21 to take place, Marzeno asked to be picked up by his
22 driver, Yurcisin, at 8 o'clock. And when he got in
23 the car after the meeting had taken place, he said,
24 "They wanted to see the money. I'll kill them

1 before I give them any of my money."

2 THE COURT: And where was Kamienski at
3 that point?

4 MR. MARZARELLA: Kamienski was at the
5 Holiday Inn, Duckworth put him there at 6 o'clock.

6 THE COURT: And where was the
7 briefcase, the empty briefcase?

8 MR. MARZARELLA: The empty briefcase
9 was on Marzeno's person.

10 THE COURT: But didn't he leave before
11 that was said?

12 MR. MARZARELLA: No, Judge. As my
13 brief points out, my supplemental brief points out,
14 they got back to the boat -- there's four things
15 that happened at 8 o'clock on the 18th, four
16 things.

17 Now, you can take Sid Jeffrey's
18 testimony about it was originally scheduled for 6
19 o'clock and just accept that like I think the jury
20 did, or you can back into it with four things.

21 The first thing is that Marzeno left
22 at 8 o'clock and he had a gun and no money.

23 The second thing is that --

24 THE COURT: Okay, now why did he

1 leave? Who was where he left? He left the Holiday
2 Inn?

3 MR. MARZARELLA: He left at the
4 Holiday Inn. His driver was told to pick him up at
5 the Holiday Inn at 8 o'clock and don't be late,
6 I'll be carrying. And then she saw a gun in the
7 briefcase with no money. That's at 8 o'clock.

8 THE COURT: And where was Kamienski
9 then? He was still in a meeting in the Holiday
10 Inn?

11 MR. MARZARELLA: Kamienski had gotten
12 home, Duckworth testified, to the boat at 8 to 9
13 o'clock that night.

14 THE COURT: Where was Kamienski at the
15 time of this meeting at the Holiday Inn?

16 MR. MARZARELLA: He was -- we don't
17 know for sure.

18 THE COURT: Whoa.

19 MR. MARZARELLA: But, but Duckworth
20 says they were all together, all three defendants
21 were in each others' company at the Holiday Inn.
22 She says, at approximately 6 o'clock at night.

23 THE COURT: Forget what you know for
24 sure. What does the evidence show? What does the

1 record show about where he was?

2 MR. MARZARELLA: Well, the record
3 shows that he was at the Holiday Inn, that he was
4 speaking with the three -- the two other
5 defendants, and that Duckworth was not privy to
6 their conversation. He was there at 6 o'clock, and
7 at 8 o'clock a lot of things happened. All the
8 parties on their way home were talking about how
9 this was a bust.

10 THE COURT: Wait, wait, wait a
11 minute. Where is there evidence that Kamienski was
12 involved in a conversation that this was a bust?

13 MR. MARZARELLA: Well, what we're,
14 what I'm trying --

15 THE COURT: Didn't you just say that,
16 all the parties were talking about on the way home
17 this was a bust? That's what you just said.

18 MR. MARZARELLA: I don't think that we
19 need to show --

20 THE COURT: Isn't that what you just
21 said?

22 MR. MARZARELLA: Yes. Yes.

23 THE COURT: All the parties.

24 MR. MARZARELLA: Yes.

1 THE COURT: Where's the evidence to
2 support that, or an inference to that effect?

3 MR. MARZARELLA: The inference goes as
4 follows, Judge. Kamienki left at 8 o'clock, or
5 was, at least we can say he was at his boat between
6 8 and 9 o'clock, along with everyone else who
7 left. Eight o'clock was the time when everybody
8 pretty much scattered. And in Henry DeTournay's,
9 the victim's words, when he called Sid Jeffrey he
10 called him at 8 o'clock and said, No, we're going
11 to do it on the 19th, the next day.

12 Buddy Lehman said that Marzeno had
13 previously promised to him to be at his residence
14 between six and --

15 THE COURT: If Nick DeTournay made
16 that call then, the only thing that you could infer
17 from that is that whatever happened inside the
18 Holiday Inn room did not suggest anybody who didn't
19 otherwise know that the DeTournays were going to
20 get ripped off.

21 He's still thinking that they're
22 having trouble getting the money together.

23 MR. MARZARELLA: That's true.

24 THE COURT: He didn't see a gun, I

1 would assume. Was there anything to suggest that
2 he did?

3 MR. MARZARELLA: No, he didn't. No,
4 he didn't.

5 THE COURT: So help me again, where --
6 you said a few minutes ago that all of them were
7 talking about this was going to be a bust. How do
8 you get there?

9 MR. MARZARELLA: Well, the concerted
10 action, Judge, everyone left at a specific time,
11 only two hours after Duckworth placed all the
12 defendants in each other's company. And so we can
13 infer, I think it's a reasonable inference, that
14 there was a meeting at the Holiday Inn. And by the
15 way, as I said at the outset --

16 THE COURT: But finish that train of
17 thought, we can infer that there was a meeting that
18 -- go ahead.

19 MR. MARZARELLA: At the Holiday Inn
20 with respect to this drug deal that was supposed to
21 have occurred. Now, we can also infer that it was
22 a robbery from the get-go because there was never
23 any money and that's all throughout the record.

24 THE COURT: That doesn't -- we're

1 going around in one huge circle here. Where is the
2 evidence from which a jury could infer that
3 Kamienski knew there wasn't going to be any money?
4 That was the question Judge Van Antwerpen started
5 --

6 MR. MARZARELLA: I'm sorry, your
7 Honors, I'm doing the best that I can to answer
8 your question.

9 THE COURT: That may not be any fault
10 of yours. It may simply be a fault of the record.

11 THE COURT: Maybe the evidence isn't
12 there. Yes, maybe the evidence isn't there.

13 MR. MARZARELLA: I think that his
14 isolation of the witness, per the change of plans
15 where they lured the DeTournay -- not they, I'm not
16 going to say they, someone lured the the DeTournays
17 from --

18 THE COURT: The jury could conclude
19 there was going to be a big drug deal, three kilos
20 worth, and that he did not want Duckworth being
21 there. No doubt about that. That's a slam dunk.

22 You've taken that further in saying
23 that everybody knew, and it was your term,
24 everybody knew this was going to be a rip off, a

1 bust.

2 And I'm still trying to find out the
3 evidence that lets you jump over that hurdle from
4 going from a drug deal that Kamienski not only knew
5 about but facilitated, to Kamienski knowing that
6 his agenda was not the same as Marzeno's agenda.
7 Marzeno was planning to rip these folks off, says
8 he'll kill them before he gets any money.

9 If you can point me to somewhere in
10 the record where Kamienski heard that that would be
11 incredibly helpful. But I haven't heard that yet.

12 And we're still trying to find out
13 what in the record suggests Kamienski knew this was
14 going to be a robbery, which would then get you
15 felony robbery, I think, or felony murder?

16 I'm still looking for that.

17 MR. MARZARELLA: Your Honors, I think
18 that the inferences all taken together, the
19 concerted action, the luring, the isolation of the
20 witness, as Judge Coleman later Justice Coleman of
21 the New Jersey Supreme Court said, these are
22 reasonable inferences and I think that your Honors
23 will defer in the appropriate case and I think this
24 is the appropriate case --

1 THE COURT: Under 28 -- 2254(d)(1) do
2 you agree that the sufficiency of evidence is a
3 question of law under (d)(1)? Defense counsel said
4 it was.

5 MR. MARZARELLA: It's a question of a
6 due process question. Certainly that, the
7 constitutional question of law, yes, but I think
8 that that's a little bit different from being the,
9 acting as the trier of fact at the inception.

10 I mean you, you respectfully, I think
11 your role is to find whether evidence is
12 sufficient, whether there's anything in the record
13 that, reasonable that the jury could --

14 THE COURT: There's a standard of
15 deference -- yes or no, are we under 2254(d)(1) or
16 (d)(2)? Which standard applies?

17 MR. MARZARELLA: I think it's (d)(1),
18 your Honor.

19 THE COURT: Okay.

20 MR. MARZARELLA: That would be the --

21 THE COURT: Fine. Go ahead.

22 THE COURT: Go ahead. Continue.

23 THE COURT: Here we have a weird
24 situation where the trial judge who sat through all

1 the testimony, that we're always told we need to
2 defer to, sees the jury come back with a conviction
3 and then says that he's going to grant post-verdict
4 motions.

5 The prosecutor who put this case
6 together tells the jury, "Did Kamienski know about
7 this being a robbery in advance? I don't think
8 so."

9 "Did Kamienski know that this was
10 going to be a murder, that Marzeno was planning on
11 murdering these folks? I don't think you can find
12 that from the evidence." Says that again in the
13 course of addressing the judge during the course of
14 the post-verdict motions.

15 Was he looking at the same record
16 you're looking at?

17 MR. MARZARELLA: Judge, I don't think
18 he, respectfully, I don't think he said precisely
19 that. I think what he said was that "I don't
20 believe Kamienski conspired, I don't believe he
21 agreed with respect to the murder and the robbery."
22 But I don't think he addressed the accomplice
23 portion of it. And --

24 THE COURT: Well, I'll find it. Now,

1 actually this is one area where a computer is
2 slower than flipping through pages because the
3 appendix is so voluminous it takes this thing about
4 45 seconds to get to a page.

5 MR. MARZARELLA: And as the district
6 court --

7 THE COURT: But the reference, and
8 maybe your opposing counsel has it --

9 THE COURT: You're saying it could
10 still -- excuse me, I didn't mean to interrupt.

11 THE COURT: Go ahead. Go ahead.

12 THE COURT: You're saying it could
13 still arise. In other words, he takes part as an
14 accomplice, he helps with the murder, he helps
15 dispose of the body, he does all those things.

16 MR. MARZARELLA: Right. That's
17 correct, your Honor.

18 THE COURT: He just didn't agree way
19 ahead of time that that was the way it was going to
20 go?

21 MR. MARZARELLA: Right. I think, I
22 think that that's what the prosecutor was saying.

23 THE COURT: You've got a killing in
24 the course of a felony, so you've got felony

1 murder. The question is do you have the necessary
2 elements for first degree or what, I assume New
3 Jersey is the same as Pennsylvania, willful,
4 deliberate, premeditated.

5 MR. MARZARELLA: Right. Sharing in
6 the intent --

7 THE COURT: Would he have to know
8 about the robbery to get felony murder?

9 MR. MARZARELLA: Well, yes, because
10 you would have to share in the intent of the
11 underlying crime, so certainly he would have to
12 know about the robbery.

13 THE COURT: Right. And it has to be
14 robbery. A drug deal doesn't give you felony
15 murder.

16 THE COURT: Right.

17 MR. MARZARELLA: Right. That's
18 correct. You know, I think that the prosecutor's
19 statement was addressed by the district court,
20 which said that it's of no legal consequence. It's
21 strategy, it's argument.

22 THE COURT: Post-verdict motions, that
23 wasn't strategy.

24 MR. MARZARELLA: Before the jury.

1 THE COURT: Right.

2 MR. MARZARELLA: But in any case, your
3 Honor --

4 THE COURT: Can a prosecutor in New
5 Jersey drop a charge without court approval?

6 MR. MARZARELLA: Not that I know of,
7 your Honor.

8 THE COURT: No, I didn't think you
9 could either. I didn't think you could either.
10 And his remarks are just argument, they're not
11 evidence in the case.

12 MR. MARZARELLA: Right. And I think
13 the district court correctly pointed that out.

14 I see my time has expired. Are there
15 any other questions?

16 THE COURT: I had one but I can't
17 remember what it was now. Not surprising.

18 MR. MARZARELLA: Thank you, your Honor.

19 THE COURT: Thank you.

20 I did have one, I'm sorry. The
21 continuing nature of the murder, Mr. Marzarella,
22 what do we do with that? This was a bizarre
23 argument to the jury about, and I'm not sure the
24 court ever instructed -- ever stepped in and

1 corrected it. Where he talks about the murder is
2 not complete when the murder is achieved, when the
3 person dies, the murder continues.

4 MR. MARZARELLA: Not the murder, your
5 Honor, it's the robbery. And the end of a robbery
6 is a question for the jury. And because it's a
7 question for the jury they could have found that
8 the defendants who were in constructive possession
9 of the loot, so to speak, on the 19th in back of
10 Alongi's house, when the bodies were being prepared
11 for disposal, that that, they as the fact finder
12 could find reasonably that that was part of a
13 continuing robbery. And that was the point I made
14 in my, I think it was my supplemental brief, or
15 actually the main brief.

16 THE COURT: Okay.

17 MR. MARZARELLA: Thank you.

18 MR. McINNIS: The court had asked for
19 citations with respect to the prosecutor's closing
20 remarks and those are at supplemental appendix
21 4345.

22 THE COURT: 4345?

23 MR. McINNIS: Right. Also 4325. That
24 is during the closing. And the comments during the

1 post-trial argument appear at 4611 really through
2 4625. Both of those set of cites appear on our
3 revised Exhibit E in the right-hand column.

4 The court expressed some frustration I
5 guess with the amount of papers that have come in
6 and the type of arguments --

7 THE COURT: Well, the quality of the
8 papers. Not just the volume alone but the
9 quality. If we get a lot of really good papers,
10 they're still really good papers, maybe there's too
11 many really good papers.

12 When we get a lot of papers that are
13 not very good and not very helpful, it's a lot of
14 stuff that's not very helpful.

15 THE COURT: And when they lack useful
16 citations to the record they're not very helpful.

17 MR. McINNIS: Well, I've tried my best
18 to have very precise citations to the supplemental
19 appendix. I'm not aware of any errors or typos in
20 mine. If there are, I apologize to the court. If
21 there's anything specific I'd be happy to address
22 it.

23 But I think that what has happened
24 here and the reason for this is that the truth here

1 is quite simple, the lies to cover it up are
2 tortuous and complex.

3 The simple truth is that there's no
4 evidence that Kamienski did anything during the
5 homicides themselves and there's no evidence that
6 he did anything beforehand.

7 The pieces of evidence the court
8 referred to before, the blanket, knot and so on,
9 all postdate the crime itself and would not be
10 relevant to an accomplice liability analysis.

11 The state is really basing their case
12 and their argument today on this meeting that
13 supposedly took place at the Holiday Inn the night
14 before. It's not just a meeting among the
15 defendants. They say it's a meeting with Kamienski
16 and the two victims.

17 They make him an active participant at
18 that meeting and they say that he deliberately
19 lied, they use the word duped, lured the victims to
20 their death the next day.

21 And what I've said or I've tried to
22 say, I'll say it now in simple terms, that is a
23 complete fantasy. Kamienski did not meet with the
24 victims any time on that day, let alone at the

1 Holiday Inn that night.

2 The evidence in the record is
3 conclusive and irrefutable as to that. Donna
4 Duckworth describes the chronology of how they
5 spent that day. They got up on his boat, they
6 stayed on the boat until about 5 o'clock, they went
7 to the Holiday Inn and had drinks, nothing happened
8 there, the victims were not there, they went back
9 to their boat.

10 Even more to the point, and I refer to
11 the court because I think this is the most
12 important thing that disposes of that argument by
13 the state, which is at supplemental appendix 1578.
14 Sidney Jeffrey, the courier, is in the Holiday Inn
15 bar between 6:00 p.m. and 8:00 p.m. when he later
16 goes and meets the DeTournays at Denny's. And he's
17 asked who else was in the bar? And he says no
18 one.

19 If the DeTournays were there meeting
20 with Marzeno or Kamienski or anybody else, he would
21 have said that, he was their friend, he was their
22 courier. The DeTournays were not in the Holiday
23 Inn, they did not meet with Kamienski at any time
24 on the 18th. There's no proof --

1 THE COURT: Wasn't there some
2 testimony that one of them would not have gone to
3 the Holiday Inn?

4 MR. McINNIS: There was even that
5 testimony which was Nick had long red hair, a huge
6 beard, he looked like a hippie, he was afraid that
7 if he went there he would bring the attention of
8 law enforcement on him, and they have three kilos
9 stashed under a bed up in the third floor bedroom.

10 Now, I can't -- I'm just running out
11 of time -- I can't fully address this, but the
12 state submitted a supplemental brief where they
13 said that there's a waitress that identified the
14 DeTournays as having been in the night before and
15 to try to undercut their own witness's claim that
16 the, that Nick never went into the Holiday Inn.

17 I'd ask the court to take a look at
18 her description of the people she saw there. She
19 describes the man as light brown hair, no distinct
20 facial features.

21 Nick has bright red hair and a huge
22 bright red Santa Claus beard.

23 If I could just then take a minute to
24 close.

1 THE COURT: Go ahead. Go ahead.

2 MR. McINNIS: To paraphrase another
3 person, a person who is wrongly imprisoned clings
4 to hope like a drowning man clings to a plank.

5 THE COURT: You know, this is not a
6 jury.

7 THE COURT: Please.

8 THE COURT: Next you're going to be
9 citing us to Kipling and Kafka, although this does
10 have elements of Kafka attached to it, I'll grant
11 you that.

12 We understand your argument.

13 MR. McINNIS: There is a terrible
14 injustice that needs to be corrected. It was an
15 injustice that was caused by the state filing --

16 THE COURT: We understand your
17 argument. Thank you very much.

18 MR. McINNIS: Thank you, your Honor.

19 THE COURT: We'll take about a five
20 minute break.

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATION

I, JAMES DeCRESCENZO, a Registered
Diplomate Reporter, Certified Realtime Reporter,
Certified Shorthand Reporter of New Jersey, License
Number XI 00807, and Notary Public, hereby certify
that the foregoing is a true and accurate
transcript.

I further certify that I am neither
attorney nor counsel for, not related to nor
employed by any of the parties to this action; and
further, that I am not a relative or employee of
any attorney or counsel employed in this action,
nor am I financially interested in this case.

James DeCrescenzo
Registered Diplomate Reporter
Certified Shorthand Reporter
Notary Public

