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July 23, 2009

By ECF Filing
Hon. Stanley R. Chesler, USDJ
Martin Luther King Bldg & Courthouse
50 Walnut Street, PO Box 419
Newark, NJ 07101-9971

Re: Paul Kamienski v. Roy Hendricks, 3:02 CV 03091 (SRC)

Dear Judge Chesler:

Please accept this letter in response to the State's letter dated July 22, 2009, in opposition to Kamienski's proposed order for issuance of a writ of habeas corpus, which letter was filed in this Court on July 23, 2009.[1]

The State says there is no authority for the relief requested in Kamienski's proposed order. It is wrong. Attached is an order granting a writ of habeas corpus to a state prisoner upon a finding of insufficient evidence issued in *Newman v. Metrish*, 04-cv-74582-DT, (E.D. Mich., Mar. 16, 2009). In that case, the mandate has been issued and a petition for certiorari is pending. Thus, *Newman* is identical to Kamienski in terms of both its legal context and procedural posture. As seen in the attached exhibit, the relief granted in the *Newman* court's order is also virtually identical to that sought here.

The court in *Newman* found authority for its order in *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006). *Satterlee* directly addressed the question of whether habeas relief is limited to ordering the defendant's release from custody. Drawing on the language of the AEDPA and extensive case law authority, it held that it was not:

> Finally, the state objects to the portion of the unconditional writ ordering the expungement of the record of Satterlee's conviction.…The state argues that this remedy was improper because a district court's only power when granting a writ of habeas corpus is to order the release of the prisoner. It appears that we have never expressly addressed whether

[1] While the State opposes Kamienski's proposed order, it does not submit a counter proposed order with language it thinks is appropriate and thus leaves it up to the Court to fashion the order as is sees fit.

> habeas courts have the power to order the expungement of the record of a conviction. We conclude that they do. The habeas statute provides that "[t]he court shall . . . dispose of the matter as law and justice require ." 28 U.S.C. § 2243 (emphasis added). Based on this broad language, the Supreme Court has explained that the remedial power possessed by habeas courts is not limited to ordering a prisoner's discharge from physical custody. *Preiser v. Rodriguez*, 411 U.S. 475, 487, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973); *Carafas v. La Vallee*, 391 U.S. 234, 239, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968); *Peyton v. Rowe*, 391 U.S. 54, 66-67, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968). Accordingly, other circuits have already recognized the power to order expungement. *A.M. v. Butler*, 360 F.3d 787, 802 (7th Cir. 2004); *United States v. Sumner,* 226 F.3d 1005, 1012 (9th Cir. 2000); *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993); *White v. White*, 925 F.2d 287, 292 (9th Cir. 1991); *Mizell v. Att'y Gen*., 586 F.2d 942, 948 (2d Cir. 1978), cert. denied, 440 U.S. 967, 99 S. Ct. 1519, 59 L. Ed. 2d 783 (1979); *Woodall v. Pettibone*, 465 F.2d 49, 53 (4th Cir. 1972), cert. denied, 413 U.S. 922, 93 S. Ct. 3054, 37 L. Ed. 2d 1044 (1973); 2 HERTZ & LIEBMAN, supra, § 33.4, at 1688, 1698-99 ("[P]otentially appropriate remedies include . . . [o]rders requiring . . . expungement of criminal records . . . ."). Once again, the state cites no authority limiting the power of a habeas court in the manner that it suggests. Therefore, we affirm the unconditional writ's order of expungement.

Id. at, 370 (citations in original). The foregoing authority overwhelmingly supports Kamienski's application.

None of the cases the State cites in its July 22 Letter in opposition to Kamienski's proposed order is even close to being on point. *Smith v. Spina*, 477 F.2d 1140 (3d Cir. 1973), was a 28 U.S.C. § 1983 civil rights case in which the issue on appeal was whether the trial court erred by admitting into evidence the fact of the plaintiff's prior conviction when that conviction was subsequently set aside in a habeas proceeding because of improper jury selection. *People v. Green*, 66 Cal. App. 801 (1st. Dist. 1977), was concerned solely with whether the state could seek trial and resentencing of defendant as a habitual offender for various prior convictions when a habeas court ruled that their earlier consideration at trial was improper because the defendant had not been given adequate notice. *Matter of Hackett*, 190 N.J. Super. 300, 308 (App. Div. 1983), involved the appeal of a the decision of the state police department which denied appellant applicant's application for a private detective license because appellant's unchallenged habeas corpus motion nullified his state criminal conviction for kidnapping and appears to actually support Kamienski's position because it remands the matter to allow the applicant to obtain the license. And, *Fay v. Noia*, 372 U.S. 391 (1963), which was cited in *Hackett*, addressed exclusively the issue of exhaustion of state court remedies in a pre-AEDPA habeas case. None of these cases holds that the language in the AEDPA providing that "[t]he court shall . . . dispose of the matter as law and justice require" *see* 28 U.S.C. § 2243, limits relief to the release of a state prisoner from custody.

Given that the State here secured the reinstatement of Kamienski's murder convictions that had been dismissed by a judgment N.O.V. by perpetrating a fraud on the State Appellate Division and this Court by submitting materially false and misleading briefs (and sought unsuccessfully to repeat this at the Third Circuit), "law and justice" require that Kamienski's unconditional habeas judgment be given full effect. This is particularly appropriate here in light of the State's inability to re-prosecute him because of the Double Jeopardy Clause.

Accordingly, Kamienski asks that the order he submitted be approved and filed with the Court.

Respectfully submitted,

/S

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