In The

Supreme Court of the United States

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

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the standard of review for a federal appellate court analyzing a sufficiency-of-evidence claim in a petition for habeas corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d)(1)?

2. Did enactment of the AEDPA eliminate the need for direct application of *Jackson v. Virginia*, 443 U.S. 307 (1979) by a federal habeas court considering a sufficiency-of-evidence claim, and replace it with the "unreasonable application" standard found in §2254(d)(1)?

A. Should a federal habeas court reviewing a state conviction under §2254(d)(1) confine itself to an analysis of the state court's discussion of facts and law; or

B. Should a federal habeas court reviewing a state conviction under §2254(d)(1) perform its own *de novo* analysis of the entire trial record in order to draw its own conclusions under the *Jackson* standard; and, if so,

C. Would such a *de novo* review of factual issues under §2254(d)(1) render §2254(d)(2) and (e)(1) superfluous?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

Petitioners are Roy L. Hendricks, Administrator; the Attorney General of the State of New Jersey; and the Ocean County Prosecutor's Office.

The Respondent is Paul Kamienski.

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OPINIONS BELOW

The U.S. Court of Appeals for the Third Circuit did not publish its opinion (Appendix 1) or its order denying the State's petition for rehearing (Appendix 156).

The District Court for the District of New Jersey did not publish its opinion (Appendix 32).

The decision of the Superior Court of New Jersey is reported at 603 A.2d 78, (App. Div.), *certif. denied*, 611 A.2d 656 (1992) (Appendix 100).

JURISDICTION

The Third Circuit filed its decision on May 28, 2009, and denied petitioner's motion for rehearing on July 2, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari. *This Court has already granted certiorari in a case with a similar issue, which is scheduled for oral argument on October 13, 2009.*[1]

[1] In *McDaniel v. Brown*, Docket No. 08-559, the first question presented was, "What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?"

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254

(State Custody, Remedies in Federal Courts)

See Appendix 158 for full text.

STATEMENT OF THE CASE

Extraordinary relief was granted to Paul Kamienski in this case, whose 21-year-old robbery and double murder convictions were overturned by the Court of Appeals for the Third Circuit based on its finding of insufficient evidence. That ruling reversed the denial of Kamienski's petition for a writ of habeas corpus by the District Court for the District of New Jersey brought under 28 U.S.C. §2254(a), and renders the State unable to retry him.

The state appellate court, applying *Jackson v. Virginia*, 443 U.S. 307 (1979), found that evidence of Kamienski's activities before, during and after the robbery/murders was sufficient for any rational juror to find him guilty under an accomplice theory. The court found that Kamienski was at the scene of the robbery/murders, that he had isolated his live-in girlfriend beforehand so she would not witness the crimes, that he and his co-defendants had lured the victims to a private place so the crimes would not be detected, that he had helped dispose of the victims' bodies, that he was rewarded for his participation with free cocaine, and that he had threatened his

girlfriend with harm if she revealed her knowledge of the crimes. (App.135-139)

Conversely, and in contravention of the law, the Third Circuit acknowledged Kamienski's presence at the scene of the crimes and the isolation of his girlfriend beforehand, but found that he might have isolated her because he was about to consummate his largest drug deal ever – despite no evidence in that regard – and that his disposal of the bodies and receipt of free cocaine it labeled as "gifts" held no evidential significance to whether he was complicit in the robbery or murders. (App.27,29) The Third Circuit also ignored the state court's finding that the victims were lured to the private spot where they were robbed and murdered, and that Kamienski had threatened his girlfriend subsequent to the crimes so that she would not report them.

Petitioners rely upon the recitation of facts by the district court and the appellate court on direct review (App.109-114,132-138), but provide below important details from the record to substantiate the courts' findings, to demonstrate the errors of the Third Circuit, and to provide a framework to this Court for the arguments that follow.

In November 1988, Paul Kamienski was convicted of conspiracy to possess cocaine with intent to distribute, aiding and abetting first-degree murder, and felony murder, in connection with the robbery

and shooting deaths of Henry ("Nick") and Barbara DeTournay[2] in Ocean County, New Jersey, on September 19, 1983.[3] Kamienski was acquitted of conspiracy to commit robbery and murder, possibly influenced by the prosecutor's statements in summation that he did not think the evidence proved that Kamienski had conspired with his co-defendants to kill the DeTournays. That moment of unscripted candor in an 18-day trial played a large but inappropriate role in the disposition of this case by the Court of Appeals.

Kamienski brokered the sale of three kilos of cocaine between sellers Henry and Barbara DeTournay from Florida and buyers Anthony Alongi and Joseph Marsieno from New Jersey, for which the DeTournays expected to realize enough profit to be "set for life." (App.112) Kamienski knew the sellers and buyers socially, and he brought them together in September 1983 when the DeTournays told him they wanted to sell large quantities of cocaine on a recurring basis in Ocean County. Kamienski vouched for each party to the other. Henry DeTournay had long red hair and a big bushy red beard, and looked like a "hippie." (App.132-133)

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[2] Henry DeTournay is referred to herein as Henry unless identified as "Nick" within a quoted passage.

[3] Also tried and convicted with Kamienski were Anthony Alongi and Joseph Marsieno (a/k/a Marzeno and Marseno). Alongi's appeal from the denial of habeas corpus relief is pending in the Third Circuit Court of Appeals; Marsieno died while his direct appeal was pending.

The drug transaction did not go according to plan for the DeTournays, because instead of being paid, they were robbed of their cocaine, shot multiple times and dumped in Barnegat Bay. The State's theory at trial was that Kamienski's actions before, during and after the crimes proved his guilt as an accomplice to robbery and murder. (App.101,109-110)

When at the Jersey shore, Kamienski lived with his girlfriend Donna Duckworth on his boat, the Foreplay III, which was kept at the Ocean Beach Marina in Lavallette, where the DeTournays also docked their boat when visiting the state. Alongi and Marsieno each lived within several miles of the marina. (App.110-111)

After meetings between the participants around Labor Day in 1983, September 18 was set as the date for the deal. At 6:00 p.m. that night, Kamienski met with Marsieno and Alongi at the Toms River Holiday Inn, where the DeTournays' drug courier Sidney Jeffrey had a room and where the exchange originally was to occur. Marsieno, who did not drive, had arranged earlier to have his friend Jean Yurcisin pick him up exactly at 8:00 p.m. at the Holiday Inn, and told her not to be a minute late, because he would "be carrying." When Marsieno entered Yurcisin's car at 8:00 p.m., with a briefcase, he cursed "those lousy MF'ers" who "wanted to see the money first," referring to Henry's failure to bring the drugs to the initial meeting. Marsieno said that he had no intention of paying them and that he would kill them before they got his money. Back at Marsieno's condo,

Yurcisin saw him open his briefcase. In it was a gun, but no money. (App.7,111,113,134-135)

When Henry failed to bring the drugs to the first meeting, he was told that the buyers were "having trouble" getting the money together, and the deal would go down the next day. Significantly, its location was changed from the Holiday Inn, a public place, to the private residence of Anthony Alongi – a water-front house with a boat at the dock. The new plan contemplated that Henry would count the money while Barbara waited at the Holiday Inn with the cocaine, and she would then be picked up to bring the drugs to the transaction once Henry was satisfied there would be payment in full. (App.135-136)

On September 19, Kamienski told Duckworth that he was taking her to spend the day with her girlfriend Janet O'Donnell in Seaside Heights. Duck-worth was surprised and pleased, because she and Kamienski were never apart. Also unusual that day was that Kamienski drove his car, although his li-cense was suspended and he never drove in 1983. Kamienski dropped off Duckworth "only 30 minutes before the drug deal was to be finalized," and picked her up about five hours later. (App.136)

Sometime between 3:00-6:00 p.m. on September 19, Alongi's neighbor George Hunt saw a man with long red hair and a big red beard exit a car with Florida plates and walk toward Alongi's front door. Alongi came out from the back of the property to

greet the man – later identified as Henry DeTournay – and they both went behind the house. (App.8)

At the Holiday Inn around that same time, Barbara DeTournay was in Sidney Jeffrey's room with the kilos of cocaine packed in a green nylon bag, waiting to be picked up after Henry was supposedly done counting the money. She later left Jeffrey's room with the cocaine, entered a car fitting the description of Alongi's, and traveled east, in the direction of Alongi's house. (App.136)

Duckworth stayed with O'Donnell on September 19 from the time she was dropped off in the afternoon until Kamienski picked her up around dusk and drove her to Alongi's house. Kamienski told Duckworth to "wait here" in Alongi's kitchen with his girlfriend Jackie Sullivan. When Sullivan took a phone call, Duckworth went outside looking for Kamienski. She found him on the dock facing the boat and saw Alongi on the boat with what looked like a body in a blue sleeping bag. Duckworth also spotted a brown blanket covering something else, and the entire area was wet, as if it had been hosed down. When Alongi saw Duckworth he lunged for her, but Kamienski stopped him by saying, "She's all right." (App.136-137)

Duckworth ran into the house and into the bathroom, with Kamienski and Alongi following her. Sullivan suggested that she and Duckworth go out for a while, and when they returned, Duckworth saw that Marsieno was also at Alongi's house. Alongi took

Duckworth by the arm upstairs to a bedroom, showed her a phone with the words "hit man" on it, then displayed a gun and told her if she didn't keep her mouth shut, she'd end up like her friends and that Kamienski would not be able to save her. (App.141)

While driving back to the boat that night, Kamienski told Duckworth that he couldn't control what happened, that "Nick went first and Barbara didn't suffer," and that if they didn't keep their mouths shut, he would not be able to save them. As they boarded the boat, Duckworth noticed that Kamienski's teak box was missing from the dock. In that box Kamienski kept rags and towels and other boating-type supplies. Duckworth usually stepped on the teak box to stabilize her entry into the boat, because it was too high for her. That night she also noticed that the boat was difficult to board because it was "moved forward." (App.9,43,137-138) The next day, the Foreplay III was removed from the Ocean Beach Marina for repairs. (App.201-202)

On Saturday, September 24, Henry DeTournay's body was discovered afloat in Barnegat Bay, wrapped in a blue sleeping bag and a rust-colored blanket, tied with white rope and tethered to cement blocks. Enclosed in the bag and blanket with the body was a blue rose-patterned towel. Henry's wallet contained a business card of Kamienski with handwritten notations of apartment, beeper and boat numbers for "Paul" and/or "Donna," plus handwritten directions to, and a phone number for, Alongi's house. (App.34,109-110)

Around dinnertime that day, Duckworth and Kamienski were at the Top O'the Mast Restaurant when police came looking for Kamienski. Before talking to them, Kamienski instructed Duckworth to call Alongi, who appeared at the restaurant within minutes. (App.43) Yurcisin was working at the Top O'the Mast that night, and Alongi asked her if she had seen Marsieno. When she said no, Alongi replied that the police had "found a body" and it was very important for Marsieno to get in touch with him. (App.45)

The police told Kamienski that his business card had been found on a man's body recovered from Barnegat Bay. (App.34,132) Later that night, Kamienski saw Arthur ("Buddy") Lehman, an acquaintance of this social group and a heavy cocaine user, who had been told by Marsieno that he would have some kilo-quality coke on the 18th. (App.135) Kamienski told Lehman that his "friends" from Florida had been murdered, although Barbara DeTournay's body was not recovered until the following day. She also was wrapped in a rust-colored blanket tied with white ropes. (App.10,109)

On or about October 1, Kamienski, Alongi, and Marsieno dined at the Top O'the Mast with Duckworth and Sullivan, while Yurcisin was waitressing. Alongi and Marsieno discussed bodies being found, and Marsieno remarked that "it was easy" and "they were like scared puppies." (App.43) Alongi complained about not getting "his share," and Marsieno replied that was because the job was not done right,

that the bodies would never have surfaced had they been properly weighed down. Later that night in Marsieno's condo, Yurcisin glimpsed three blocks of cocaine wrapped in plastic contained inside a green flight bag, with one bag opened and half empty. (App.166-168)

Starting about that same time, high quality cocaine flowed abundantly in Ocean County, New Jersey. (App.44,138) During the first week of October, Lehman saw Sullivan in Atlantic City where her coat was "loaded with bags of cocaine," broken up into ounce-sized bags. (App.165-166) Throughout October and November, Marsieno doled out ounce-sized bags of cocaine to Kamienski and Alongi, without charging them. (App.10)

In late November or early December 1983, while Yurcisin and Marsieno were traveling to Atlantic City and snorting cocaine, he told Yurcisin about "the biggest drug deal that he ever made, with a long-haired, red-bearded hippie," who didn't look like he could be trusted and who failed to bring the drugs to the original meeting, wanting to see the money first. The second time, the hippie brought the drugs. Marsieno had never intended to pay for the drugs, but felt he had to teach the hippie a lesson, so he choked him, brought him to his knees, then shot him dead. Marsieno threatened Yurcisin and her daughter

with death if she ever repeated his confession.[4] (App.170-171)

At trial, Duckworth was shown a towel with a blue floral pattern that had been found with Henry DeTournay's body. She identified it as a towel that came from Kamienski's teak box that had been adjacent to the Foreplay III until the day of the murders. She also identified the two rust-colored blankets with satin borders found wrapped around the DeTournays' bodies as looking "like blankets off the Foreplay." (App.44) There were numerous blankets on Kamienski's boat, which slept eight, plus spare blankets kept in the boat's storage compartments, all brown or earth-colored with satin borders. Additionally, Duckworth testified that the knots securing the bodies in their wrappings were hitch-knots, which Kamienski typically used when boating. (App.44,137)

At trial Kamienski flatly denied any involvement in the robbery and homicides, and even in the planning of the drug transaction. He denied introducing the DeTournays to Alongi to arrange a cocaine deal, but admitted that he and Duckworth were drug

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[4] The court instructed the jury that this testimony was admissible as to Marsieno only; but the instruction did not pertain to his never intending to pay for the drugs because that evidence had been admitted earlier without objection as Yurcisin described Marsieno's remarks when she picked him up at the Holiday Inn on September 18 and he lamented the failed drug exchange caused by the seller not bringing the drugs.

users and that he had purchased drugs from Henry and Lehman, with Duckworth having witnessed some of those deals. (App.174-177)

He acknowledged taking the DeTournays in his boat to Alongi's house around Labor Day 1983, but claimed not to have heard or participated in any conversation about a drug deal while there that day, and he denied vouching for anybody to anybody. (App.175-178)

Kamienski testified that after Labor Day weekend 1983, he never again saw Barbara or Henry DeTournay. (App.181) He claimed also that he was not at the Holiday Inn on the 18th, the original scheduled date for the deal. (App.182-183) He stated that he never took Duckworth to O'Donnell's house on the 19th and that he was never at Alongi's house on the 19th, with or without Duckworth. Thus, he neither saw nor helped dispose of any dead bodies, and the blankets that were found around the bodies were not from his boat. (App.184,186-188)

Kamienski admitted to owning the teak box, but claimed it had been lost in a squall. He also said he never kept any rags or towels in it, just ropes and wax. He denied that the blue floral towel – found inside the wrappings around Henry's body and identified as his by Duckworth at trial – was ever in his teak box. (App.190-192)

Kamienski also denied being at the Top O'the Mast on October 1, as testified to by Duckworth and Yurcisin; thus, he could not have heard the

conversation at the table about the murders. He also said he did not tie hitch-knots, in general and specifically on the DeTournays' bodies. He never planned to rob the DeTournays because he had all the money he needed, he could get as much money as he wanted, and he never got any cocaine from Marsieno or Alongi in the fall of 1983. (App.192-195,197) He testified that the water in Barnegat Bay where the bodies were found was much too shallow for his big boat to pass, but was forced to concede that he had to go through that very area to reach Alongi's lagoon-front house, which he admittedly did at least once, with the DeTournays onboard. (App.179-180,199-200)

Kamienski denied almost 100% of the State's proofs against him, compelling a studied scrutiny of his honesty by the jury. Kamienski was the only defendant to testify, a crucial point when determining whether sufficient evidence existed to convict someone who put his credibility on the line before twelve jurors. While reviewing courts have seen only Kamienski's words, those jurors observed his countenance, his demeanor, his gestures, his angst or composure, his arrogance or humility, his directness or evasiveness. Those perceptions likely played an enormous role in the jury's conclusion that the evidence was sufficient to prove Kamienski guilty, particularly because his blanket denials – if disbelieved by them – could properly have been considered as substantive proof of his guilt.

The trial court granted judgments of acquittal notwithstanding the verdicts in favor of Kamienski

and Alongi for the two murders and felony murders, based on its erroneous legal conclusion that (1) there was an error in the jury charge that required a new trial, but (2) there was insufficient evidence to support convictions on those counts because the acquittals on the conspiracy counts made the evidence relative to conspiracy inadmissible as to the other counts on retrial.

On the State's appeal, the appellate division held, "even though the jury found that the State failed to prove a conspiracy to rob or to murder, much of the evidence presented to establish such a conspiracy was also relevant to establish Alongi's and Kamienski's guilt as accomplices to Marsieno in the commission of the substantive offenses of murders and felony murders." (App.126-127) The appellate division reversed the trial court's granting of judgment n.o.v. and reinstated the convictions. Of that decision the Third Circuit later said not only that it was erroneous, but that the appellate division had "conflated proof [of Kamienski's brokering a drug transaction] into its inquiry into evidence of murder and felony murder," rendering the decision unreasonable. (App.30-31)

Notwithstanding its holding, the Third Circuit determined that Kamienski was present at the scene of the robbery and murders, was undoubtedly involved in brokering the cocaine deal and vouching for the parties, and that he helped dispose of the DeTournays' bodies to cover up their murders, despite his denials. The Court found that Kamienski did attend the September 18th meeting at the

Holiday Inn with Alongi and Marsieno, which was the original date for the drug deal, and which he also denied. Finally, the Court concluded that Kamienski received cocaine from Marsieno after the murders, at no charge, again notwithstanding his denials. (App.20-21,24-25) Despite these four declarations that Kamienski had lied under oath, the Third Circuit still held that the jury could not properly have found the required elements of the charges from the proofs presented by the State, and from Kamienski's other denials as recited above. *Cf.*, *Wright v. West*, 505 U.S. 277, 296 (1992).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY, EXPOUND UPON, AND OTHERWISE GIVE MEANING TO THE "UNREASONABLE APPLICATION" CLAUSE OF 28 U.S.C. §2254(d)(1) IN A SUFFICIENCY-OF-EVIDENCE CLAIM.

Petitioners present the narrow question of what is the proper standard of review under the "unreasonable application" clause of 28 U.S.C. §2254(d)(1) in a sufficiency-of-evidence habeas claim. This case was decided entirely under that subsection, as the Third Circuit explicitly declined to address the issue under §2254(d)(2) and (e)(1).

The different functions of and societal interests served by direct versus collateral review are well

established. One such interest at stake is "the State's interest in the finality of convictions that have survived direct review within the State court system." *Brecht v. Abrahamson*, 507 U.S. 619, 633-35 (1993). A claim for habeas relief is not an opportunity to "relitigate State trials." Rather, relief is limited to extreme malfunctions or grievous wrongs in the state courts. *Id.* at 633-35.

A sufficiency-of-evidence habeas claim differs from other habeas claims in two significant ways. First, in non-sufficiency claims, the prospect of retrial involves the usual significant "social costs," *id.* at 647, but the grant of habeas relief on a sufficiency-of-evidence claim imposes the greatest of social costs because double jeopardy bars retrial. *Tibbs v. Florida*, 457 U.S. 31, 41, 45 (1982). Thus, while the grant of habeas relief on a sufficiency-of-evidence claim is extremely rare, the social cost when it does occur is extremely high.

Second, and more importantly, sufficiency-of-evidence claims on direct review involve the application of the most general legal standards to the most fact-sensitive issues. These types of claims require fine-tuned judgments by courts sitting in direct review, where the question of the scope and operation of the "unreasonable application" clause – essentially the quantum of deference to be given to the state court on collateral review – is most acute.

This Court granted certiorari in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008), *cert. granted*

sub nom., *McDaniel v. Brown,* 129 S.Ct. 1038 (2009), to consider the contours of the standard of review under the AEDPA, 28 U.S.C. §2254(d), specifically (d)(1). That case has been briefed and is pending oral argument.

The question as to whether any state court's opinion constitutes an unreasonable application under §2254(d)(1) is not resolvable in a sufficiency-of-evidence claim in the absence of clear standards. The radical contrast between the opinions of the state appellate court and the federal appellate court at issue here illustrates the problem.

A. The Allocation Of Burdens Under §2254(d) Gives Meaning To The Unreasonable Application Clause Of Subsection (d)(1) And Indicates That *Jackson v. Virginia* Need Not And Should Not Be Applied By A Federal Habeas Court.

This case was decided solely under the "unreasonable application" clause of §2254(d)(1), which places no burden on the State to relitigate the facts of its case in a federal habeas court. That subsection does not invite – or allow – a federal court to review the record below and examine the propriety of the state court's findings of fact, thus eliminating the role of *Jackson v. Virginia* when a federal habeas court performs this very specific type of collateral review under (d)(1).

Conversely, a claim involving factual issues may be asserted under §2254(d)(2). Such a claim is constrained by §2254(e)(1), which allocates a clear burden to the prisoner by providing that, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

> A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. §2254 applies, our habeas jurisprudence embodies this deference. *Miller-el v. Cockrell*, 537 U.S. 322, 340 (2003).

Subsections 2254(d)(2) and (e)(1) as discussed in *Cockrell* would be entirely superfluous if subsection (d)(1) also permitted inquiry into the basic facts of a case as conditionally permitted under (d)(2), unfettered by the burden allocated to the applicant under (e)(1). Were the rule otherwise, and if challenges to the record were permitted under subsection (d)(1), the statutorily-allocated burden now placed on the prisoner regarding factual issues would shift to the State to "relitigate" the case and, as happened here, to prove that the evidence adduced at trial met the reasonable-doubt standard. But federal habeas actions are not meant to be retrials and do not impose any burden on the state under the code or the common law. *Williams v. Taylor*, 529 U.S. 362, 375-90

(2000). Instead, subsection (d)(1) exemplifies the customary and intended deference to a factfinder as well as to the state court that analyzed the record on direct review.

Thus, under subsection (d)(1), a federal habeas court may not disturb the facts as established by the state court's direct review. Factual issues are only challengeable under the constraints of subsections (d)(2) and (e)(1), and then with the burden placed squarely upon the prisoner.

The Third Circuit's relitigation of the facts and inferences in this case under subsection (d)(1), with the State as the burdened party,[5] was contrary to the purpose for which the AEDPA was enacted, i.e., to place "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003).

Although sufficiency questions are inherently fact-bound, under the "unreasonable application" clause of subsection (d)(1) the only issue is a legal one, whether the state court reasonably applied the rule of *Jackson v. Virginia* to the established facts and inferences. The function of the federal court under the (d)(1) reasonableness clause is to determine whether the correct constitutional standard was applied to the established facts, and then to decide whether that

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[5] *See*, Point III D, *infra*.

application was reasonable or rational, i.e., whether the outcome falls within a range of reasonable outcomes.

Notwithstanding the plain language of (d)(1), many courts, including the Third Circuit here, review the record *de novo* to decide if the facts support a conclusion under *Jackson v. Virginia* that any rational trier of fact could determine the elements of a crime beyond a reasonable doubt. Yet, with the enactment of the AEDPA, Congress signaled that a habeas court need only determine whether the state court's decision was an "unreasonable application" of "law" with deference given to the facts as established by the state courts. 28 U.S.C. §2254(d)(1).

This Court's post-AEDPA decisions in *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), and *Yarborough v. Alvarado,* 541 U.S. 652, 665-66 (2004), illustrate the point that subsection (d)(1) does not contemplate *de novo* inquiry into underlying facts. In those cases, this Court observed, "We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the State court was correct as a *de novo* matter. . . . Relief is available under 2254(d)(1) only if the State court's decision was objectively unreasonable." *Ibid.*, citing *Williams v. Taylor*, 529 U.S. 362 (2000) and *Lockyer v. Andrade*, *supra*, 538 U.S. at 71.

Because the Third Circuit's analysis was flawed in the process and in the result, Petitioners seek a ruling from this Court for future analyses under 28 U.S.C. §2254(d)(1).

B. The Meaning Of The "Unreasonable Application" Clause Depends Upon The Determinacy Of The Legal Rule To Be Applied And Is Ultimately Reasonable If, Where The Rule Is General, The Decision Fits Within A Wide Matrix Of Reasonable Decisions.

An "application" of federal law under subsection (d)(1) is not always rule-bound, with determinate, settled, and defined limits. Where the law allows wide discretion or speaks in terms of degrees or multi-factored tests, application of those tests may require a wide degree of judgment. This is particularly true where the broad nature of the legal principle and the fact-sensitive nature of the problem require a fine-tuned judgment to be made, as in sufficiency claims. *See generally*, *Ides, Allen*, "Habeas Standards of Review Under 28 U.S.C. Sect. 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent." 60 *Wash. & Lee L. Rev.* 677 (2003).

As this Court has observed, the inherent "reasonableness" of the rule application by the state court may depend upon the type of rule being applied:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have*

> *in reaching outcomes in case-by-case determinations. Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (emphasis added).

The factual debatability of the *Miranda*[6] issue in *Alvarado* triggered this Court's finding that the state court did not unreasonably apply clearly established federal law. Extending that logic, and in a circumstantial-evidence case such as this being challenged on sufficiency grounds, the principle of factual debatability becomes most acute:

> [C]ircumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. *Holland v. United States,* 348 U.S. 121, 140 (1955).

Under these principles, sufficiency challenges merit the highest degree of AEDPA deference, especially in a circumstantial-evidence case. The deference "may well be at its highest when a habeas petitioner challenges a state court determination that the record evidence was sufficient to satisfy the state's own definition of a state law crime." *Policano*

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

v. Herbert, 453 F.3d 79, 91-92 (2d Cir. 2006) (Raggi, J., dissenting). That is, of course, the exact scenario now presented to this Court.

Because the *Jackson* test is general and already deferential, application of it by a state court will fit within a wide matrix of reasonable decisions. *Id.* at 665. *See also*, *Wright v. West*, 505 U.S. 277 (1992), in which Justice Kennedy in a concurring opinion opined that applications of law to fact depend in part on the nature of the rule. If the rule in question requires a "case-by-case examination of the evidence," then a number of applications are tolerable.

> The rule of *Jackson v. Virginia* . . . is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. *Wright v. West*, *supra*, 505 U.S. at 308-09 (Kennedy, J., concurring).

Therefore, the conclusions of jurists evaluating a myriad of factual contexts will fall within a wide matrix of decisions that will be reasonable, as was the state court decision in this matter.

II. THIS COURT SHOULD RESOLVE THE CONFLICT WITHIN AND AMONG THE CIRCUITS AS TO WHAT CONSTITUTES AN "UNREASONABLE APPLICATION" OF FEDERAL LAW IN A PETITION FOR HABEAS CORPUS UNDER §2254(d)(1) BASED ON A SUFFICIENCY-OF-EVIDENCE CLAIM.

This Court is presented with an opportunity to clarify a federal habeas court's function when reviewing a sufficiency-of-evidence claim under subsection (d)(1), and, while doing so, to precisely delineate the separate functions of subsections (d)(2) and (e)(1), which have not yet been addressed in a sufficiency claim. Federal appellate courts are producing opinions inconsistent with other circuits and within their own circuits based on conflicting impressions of the proper scope of their review under 28 U.S.C. §2254(d)(1) as compared to §2254(d)(2) and (e)(1), and in light of the pre-AEDPA mandate of *Jackson v. Virginia*.

The First, Fourth, Fifth and Eighth Circuit Courts generally presume the state court's findings of fact to be correct and analyze only its legal application of *Jackson* for reasonableness. (App.162A) The Second, Third and Seventh Circuit Courts review the record evidence independently and apply the *Jackson* standard *de novo*. (App.162B) The Sixth and Ninth Circuit Courts' opinions vary, as they have applied both standards in different cases. (App.162C) The Tenth Circuit admittedly does not know whether

a sufficiency-of-evidence claim under the AEDPA is a question of law or fact, and it has declined to directly address the issue by conducting a *de novo* review of the record. (App.163D) Finally, there are also opinions which vary slightly from those above in which the First, Sixth, Eighth, Ninth and Tenth Circuits have acknowledged the presumption of correctness to factual determinations but nevertheless conduct *de novo* reviews of the record. (App.163E)

The confusion in this area seems to stem from the *Jackson* opinion itself, in which this Court granted certiorari to decide if "a federal habeas corpus court must consider not whether there was *any* evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Jackson*, *supra*, 443 U.S. at 312-13. In then deciding *Jackson*, this Court recognized the deference ordinarily given to state court opinions at that time, but nevertheless acknowledged that federal courts must review the state record when considering a sufficiency-of-evidence claim, to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Id.* at 324.

Justice Stevens disagreed with that standard of review in a concurring opinion, noting that "habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials." *Id.* at 333, n.5. He regarded the standard as inconsistent with the

prohibition against overturning state court findings of fact. *Id.* at 336, citing *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).

The standard of review was later debated in *Wright v. West*, 505 U.S. 277 (1992). Justice Thomas, writing for the majority, indicated that the Court "rejected the principle of absolute deference" in *Brown v. Allen*, 344 U.S. 443 (1953). Justice Thomas noted the *Brown* holding that "a district court must determine whether the state-court adjudication 'has resulted in a satisfactory conclusion,'" but never explored "whether a 'satisfactory' conclusion was one that the habeas court considers *correct,* as opposed to merely *reasonable.*" *Wright*, *supra*, 505 U.S. at 287, quoting *Brown*, *supra*, at 463 (emphasis in original). Finally, Justice Thomas observed the Court's continued failure to resolve whether this type of review should be *de novo* or deferential, and noted that "Jackson itself contributed to this trend." *Id.* at 290, citing *Jackson*, *supra*, at 323-26.

Congress attempted to settle these uncertainties when it enacted the AEDPA and completely revised the language of 28 U.S.C. §2254(d), deleting the prior subsection (d) and creating new subsections (d) and (e). Subsection (d)(1) does not allow for an assessment of facts, while (d)(2) permits review of the reasonableness of a state court's findings of fact under the constraints of (e)(1), which places the burden upon the habeas petitioner in such a proceeding. Despite its clear language, however, many courts still review findings of fact under (d)(1), as the Third Circuit did

in this case, thereby usurping the authority of the state courts and the efficacy of the AEDPA.

After enactment of the AEDPA, Justice O'Connor noted in *Williams v. Taylor*, 529 U.S. 362 (2000), that the new statute "modifies the role of federal habeas courts in reviewing petitions filed by state prisoners," and agreed with Justice Stevens that it seeks to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Id.* at 404.[7] The Court found that the "contrary to" and "unreasonable application of" clauses require independent analysis, *id.* at 412-13, indicating unquestionably that the proper focus of a federal habeas court is on the application of law, and that an "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410.

In summary, the AEDPA changed federal habeas corpus practice so that a habeas court should not apply the *Jackson* standard to a state court adjudication of a sufficiency-of-evidence claim as it did prior to enactment, but should merely review the opinion and determine whether the state court reasonably applied the correct legal standard. Notwithstanding passage of the AEDPA, the circuit courts' methods of analysis now conflict so severely as to prevent the predictability, uniformity and finality

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[7] Justice Stevens wrote for the majority in Parts I, III and IV; Justice O'Connor in Part II.

that the AEDPA was intended to establish. Thirteen years have passed since 28 U.S.C. §2254 was amended to include section (d)(1), which is now in dire need of clarification. The time has come for this Court to instruct and guide the federal courts to properly analyze a sufficiency-of-evidence claim.

III. THE THIRD CIRCUIT COURT OF APPEALS REVIEWED THE RECORD *DE NOVO*, CONTRARY TO THE AEDPA. EVEN IF SUCH *DE NOVO* REVIEW WERE APPROPRIATE, THE THIRD CIRCUIT PERFORMED IT IMPROPERLY UNDER THE *JACKSON* STANDARD BY DRAWING ITS OWN INFERENCES IN FAVOR OF KAMIENSKI AND REJECTING INFERENCES FOUND BY THE APPELLATE COURT IN FAVOR OF THE STATE.

A. The Third Circuit Applied The Wrong Legal Standards To This Case.

The Court of Appeals erroneously framed the issue, "[w]e are presented with the single claim: whether Kamienski's murder convictions are supported by sufficient evidence. Kamienski's primary argument is that his murder convictions should be vacated under §2254(d)(1) because the "evidence failed to prove all the required *actus reus* or *mens rea* elements of the offenses beyond a reasonable doubt." (App.17)

The court defined its duty to "[v]iew each strand [of evidence] as it is connected to the whole and determine if the totality of evidence, viewed in the light most favorable to the government, establishes guilt beyond a reasonable doubt" (App.29) and concluded, "this record does not contain *evidence that would allow an inference* that Kamienski purposely or knowingly assisted Marsieno in killing the DeTournays." (App.28) (emphasis added).

As stated in Points I and II above, the function of a habeas court is not to determine *de novo* whether the evidence was sufficient, but to determine whether the state court's application was unreasonable.

The Third Circuit reasoned in deciding the sufficiency question, "If the evidence tends to give equal or nearly equal circumstantial support to guilt or innocence . . . reversal is required: When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt," citing *United States v. Ortegna Rena*, 148 F.3d 540, 543 (5th Cir. 1998). (App.27) Even if application of *Jackson* were proper under §2254(d)(1), the Third Circuit's analysis was contrary to that opinion, which held that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences *must presume* . . . 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. at 326 (1979) (emphasis added).

After deciding *de novo* that the appellate division's analysis was erroneous, the Third Circuit leaped to the conclusion that it was therefore unreasonable, with little by way of discussion to support that determination. The court attempted to bolster its conclusion by summarily finding that the state court "unreasonably applied the standard governing when inferences may be relied upon . . . [t]hat standard requires that the inference in question must be more likely than not to flow from the facts already established," citing *Leary v. United States*, 395 U.S. 6, 36 (1969).

However, the "more likely than not" standard from *Leary* applies to mandatory presumptions and has nothing to do with inferences, which are not presumed but must be drawn by the trier of fact. Applying this standard to the "unreasonable application" test decreases rather than increases the deference to be given to a state court decision, an undesirable result under the AEDPA. *See*, *County Court of Ulster County, N. Y. v. Allen,* 442 U.S. 140, 157-60; n.16-17 (1979), where this Court first described the difference between mandatory presumptions and permissive presumptions or inferences and their effect upon the reasonable doubt standard.

Nevertheless, the state court properly applied the *Jackson* standard by giving all inferences in favor of the State and presuming that any conflicts in the inferences were resolved by the jury in favor of the State. Specifically, the state court correctly noted that

"[i]t was up to the jury to determine the meaning and significance of Kamienski's conduct." (App.138)

The Third Circuit not only failed to properly give deference to the state court, but also based its "unreasonable application" finding upon an incorrect legal standard.

B. As Part Of Its *De Novo* Review Of The Record, The Third Circuit Improperly Ignored Inferences Favorable To The State and Found Inferences Favorable To The Defense.

The state appellate court detailed the testimony demonstrating the involvement of Kamienski, Alongi and Marsieno in these murders, from which it acknowledged the inferences in favor of the prosecution. The Third Circuit either ignored those inferences or revised them in favor of Kamienski.

1. The "scheme" or plan to lure the victims to Alongi's home.

The state court recognized a "scheme" of the buyers to lure the victims and their cocaine away from the public Holiday Inn to a more private place. (App.136) This luring was necessary because there never was $150,000 to pay for the three kilos and because the victims had been so careful for their personal safety and that of their property when initially planning the transaction. The state court observed, "Jeffrey and Henry had agreed that Henry

would meet with the buyers first without the cocaine." (App.135)

Thus, on September 18, the first scheduled transaction at the Holiday Inn failed because Henry did not bring the drugs, so "the buyers informed Henry that they were having some difficulties getting the money together." (App.135)

At 6:00 p.m. that evening, Kamienski, Alongi and Marsieno met at the Holiday Inn. Marsieno had a briefcase containing a gun but no money. Of this scenario the state court commented:

> Marzeno said the *sellers wanted to see the money first* but he had no intention of turning over any money to them and that he would kill them before they got any of his money. A reasonable inference can be drawn that Marzeno had planned to rob and maybe kill the DeTournays to obtain the cocaine on the 18th because he had only a gun in the briefcase and because he had promised to obtain the cocaine on the 18th and to sell some to Lehman on the same day. But the Holiday Inn was rather public and Henry did not bring the drugs, so a *scheme was devised to get Henry and Barbara to Alongi's home which was much more isolated.* (App.135-136) (emphasis added).

On the 19th, the exchange was set for 3:00 but postponed to 6:00. The state court described the new plan as one in which Alongi "escorted Henry into his house *under the pretext of counting the money* before

the cocaine was to arrive." (App.140-141) (emphasis added).

The failure of the Third Circuit to address the plan to lure the victims to the scene of the robbery and murders extinguished yet another inference of the premeditative aspect of this case. Equally significant is the court's drawing of an inference in favor of Kamienski on this point. Noting that the victims told Jeffrey that the original drug deal was delayed because the buyers were still getting their money together, that court said:

> To the extent Kamienski was involved in the actual exchange, the evidence only allows an inference that Kamienski believed, like the DeTournays, that Marsieno intended to pay for the cocaine he was to buy the next day. (App.28-29)

While believing that the promise of payment made to the victims as part of the set-up was untrue, the Third Circuit found the only inference to be drawn as to Kamienski was that he too believed the lie. That finding was made despite the Third Circuit's concession that Kamienski brokered the drug deal, despite a reasonable inference to be drawn that the broker of the deal would know the status of the money, and despite his testimony at trial denying any involvement whatsoever in the deal. Indeed, Kamienski denied even being at the Holiday Inn that night; yet the Third Circuit failed to find any inference favorable to the State in light of *his* lie and attached no significance to his untruthfulness under

oath being part of a credibility assessment by the trier of fact. The Third Circuit's finding of this inference in favor of Kamienski was an inappropriate exercise of its review function, and an example of the type of analysis that ran rampant throughout its decision.

2. Kamienski's sequestration of a witness.

The state court recognized the inference that Kamienski sequestered Donna Duckworth from the scene of the robbery and murders:

> The jury could infer that because Kamienski and Duckworth were always together, he needed to be free of her as a potential witness to what was to transpire when the drug deal was finalized. Kamienski was not with Duckworth between 2:30 and 7:30 or 7:45 p.m., at which time Kamienski took her to Alongi's home and told her to stay upstairs in the kitchen. *The jury could have inferred that by prearrangement,* Kamienski took steps to remove a potential eye witness from the scene of a robbery and murder and that his conduct constituted facilitating the commission of the crimes with the required shared intent or purpose. (App.139) (emphasis added).

The Third Circuit did acknowledge, as it must, that Kamienski's prearranged isolation of the witness was because he knew a significant event was about to

occur a short time later. However, it labeled the appellate division's inference as speculative, and found that Kamienski's isolation of Duckworth could not "suggest anything more than his reluctance to have her witness the only major cocaine transaction he was involved in during their relationship (at least there was no evidence of any other large cocaine transaction)." (App.27)

Thus, the Third Circuit improperly rejected the state court's examination and interpretation of the record and drew its own inference against the State and in favor of Kamienski, admittedly on an assumption made without evidential support.

Inferring that the prearranged sequestration of Duckworth was due to the size of this particular drug deal, although the evidence demonstrated that she had witnessed other drug deals, has less support from the record than inferring that it was in anticipation of what actually happened – the robbery and murders.

The State's inference regarding Duckworth's isolation is strengthened by another fact given short shrift by the Third Circuit. Duckworth testified that the floral towel found inside the blanket that was wrapped around Henry DeTournay's body was in fact Kamienski's floral towel from his teak box, and that the blankets looked just like his blankets from the Foreplay III. (App.44) Kamienski's boat was docked several miles away from Alongi's house, yet Duckworth saw those items in Alongi's yard on September 19, giving rise to the inference that Kamienski did not

just happen to appear there after the murders, but had in fact participated in them by bringing supplies to dispose of the bodies. He apparently knew that the location of the deal had been changed, because he showed up at Alongi's house. Kamienski's isolation of Duckworth and his furnishing of materials provide strong proof of premeditation on his part, sufficient to convict him as an accomplice to robbery and murder.

3. The wrappings on the bodies.

The rust-colored blankets with satin borders that wrapped the DeTournays' bodies looked like those from Kamienski's boat, the hitch-knots that secured them were the type that he customarily tied when boating, and the blue floral towel was identified by Duckworth as coming from his teak box. All of that testimony, cited by the state appellate court, permits an inference that Kamienski "lent assistance" to Marsieno and Alongi on September 19. (App.137)

Instead of commenting upon the state court's inference, the Third Circuit attacked what it called the State's "selective reliance" on that evidence and noted that on cross-examination Duckworth acknowledged that she had seen hitch-knots used in other circumstances. The court again ignored an inference from evidence reasonably found by the state court and favorable to the prosecution.

As to the blankets, towel and knots, the Third Circuit found there was "more than sufficient evidence" that Kamienski was involved in disposing of the

bodies and covering up the murders, but did not consider that evidence with regard to his accomplice liability for either the robbery or the murders. (App.22-23) Therefore, it necessarily did *not* view the evidence in the light most favorable to the prosecution.

Viewing all of the direct and circumstantial evidence adduced at trial and considering reasonable inferences flowing therefrom, the state court concluded that the jury reasonably found that Kamienski was part of a conspiracy to obtain drugs from the DeTournays and that he purposefully lent assistance and aid to Marsieno in the commission of the robbery and murders, even if he did not originally conspire to rob or murder them. (App.138)

Regarding the inferences as a whole, the state court indicated, "It was up to the jury to determine the meaning and significance of Kamienski's conduct. His intent or purpose can be inferred from all that Kamienski did and/or said *before, during and after* the robbery." (App.138-139) (emphasis added). While a true statement of the law, that seminal philosophy was disregarded by the Court of Appeals to overturn the lower state and federal courts and reverse a 21-year-old conviction.

The Third Circuit branded the state court's opinion as not only incorrect but unreasonable, for allegedly "conflating" proof of the drug deal into proof of the robbery and murders. (App.30) In sharp contrast to the state courts' view of the evidence and the

reasonable inferences it allows, the Third Circuit analyzed those same factors to reach a very different result by improperly ascribing other possible meanings to the evidence and motives to the parties.

C. The Third Circuit Improperly Considered Non-Evidential Material In Reaching Its Decision.

The Third Circuit inappropriately emphasized the prosecutor's comments in summation, reproducing them no fewer than three times in its opinion yet claiming they played no part in its determination. (App.12-13,23-24,29-30) The Third Circuit noted twice that the prosecutor conceded at the motion for judgment n.o.v. that there was nothing suggesting that Kamienski conspired to commit a robbery or a murder before September 19, but the court failed to also note that that concession went only to the conspiracy charges and not to the accomplice liability for which Kamienski was found guilty. (App.14,24-25,125)

As the trial court instructed the jury several times during the proceedings, the remarks of counsel do not constitute evidence; yet the Third Circuit used the prosecutor's remarks to bolster its otherwise unsupported view of the alleged insufficiency of the evidence.

D. The Third Circuit Improperly Shifted The Burden Of Proof To The State.

Just prior to oral argument, the Third Circuit demanded that the State submit a supplemental brief to "identify evidence" from the 5,000-page record that would allow a reasonable jury to find Kamienski guilty beyond a reasonable doubt. (App.23,26) Yet, when shown such proof, the Court refused to apply inferences to evidence of the drug deal to prove either of the other crimes, instead segregating the evidence of each crime from the others as if there were no connection whatsoever among this chain of events. The shifting of the burden to the State was improper and contributed to the Third Circuit's reaching an incorrect result. This improper positioning of the parties in a habeas claim under §2254(d)(1) illustrates that the Third Circuit reviewed the evidence as if it were the jury instead of reviewing the state court's opinion under the standards of the AEDPA.

E. The Third Circuit Misconstrued The Findings Of The State Trial And Appellate Courts.

The Third Circuit misconstrued the holding of the trial court when it said, "[t]he trial judge who saw all of the witnesses and heard their testimony agreed that the government had not proven either charge beyond a reasonable doubt," and further accused the state appellate court of incorrectly believing that

the acquittal was based on inconsistent verdicts. (App.25,15-16,n.11)

To the contrary, in its opinion the state appellate court quoted the trial court's statement that, "While . . . all the conduct of [defendant] before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder, the verdict acquitting them of conspiracy to rob or to murder renders this theory untenable." (App.129) Thus, the trial judge did, in fact, agree that the evidence was sufficient, but wrongfully determined that the evidence of Kamienski's conduct before the murders could not be considered as part of the sufficiency claim because of the acquittal on the conspiracy charge.

CONCLUSION

Federal courts need guidance regarding their precise role in reviewing a sufficiency-of-evidence habeas claim under 28 U.S.C. §2254(d)(1). Absent guidance, the decision of the Third Circuit was flawed in that it employed an incorrect standard of review, resulting in a misinterpretation of the state appellate court's direct review, and culminating in the improper reversal of Kamienski's conviction with the grant of the writ of habeas corpus. Accordingly, Petitioners urge the Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Dated: September 29, 2009

Respectfully submitted,

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