IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

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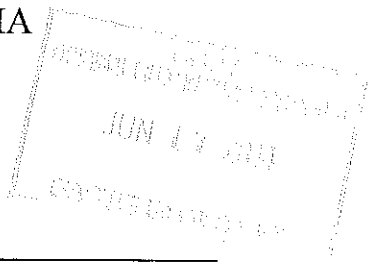
96 EDA 2013

COMMONWEALTH OF PENNSYLVANIA

V.

MIKECHEL BROOKER, APPELLANT



REPLY BRIEF OF APPELLANT

On Appeal from the Judgment of Sentence in the Court of Common Pleas, Philadelphia County, Docket No. 0006874 of 2009, Dated December 17, 2012.

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June, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

I. STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Mikechel Brooker filed his brief on February 3, 2014. The Commonwealth filed its brief on May 6, 2014. Appellant timely sought an extension of time in which to file his reply brief and now files this reply brief within that requested extension. Appellant relies upon the Statement of the Case in his original brief.

II. SUMMARY OF THE ARGUMENT

Mikechel Brooker's conviction and sentence are improper for three reasons: because the evidence was legally insufficient, because there were errors committed by the trial court, and because the statute under which Mikechel Brooker was sentenced was unconstitutional.

An examination of the trial evidence demonstrates that it was insufficient to establish murder of the first degree. The Commonwealth failed to establish beyond a reasonable doubt that Mikechel Brooker had the specific intent to kill the victim, which requires a finding that the killing was premeditated, willful and deliberate. The evidence showed that Mikechel Brooker did not share the specific intent to kill with his co-defendant, who stood over the victim and shot him in the head. The Commonwealth failed to establish the *mens rea* required to convict Mikechel Brooker of first degree murder, as the evidence presented required the fact finder to speculate as to Mikechel Brooker's specific intent.

Additionally, the trial court erred in denying the defense motion for a mistrial after excluding an improper question posed by the prosecutor.

Lastly, the law under which Mikechel Brooker was sentenced was unconstitutional. Prior to June 25, 2012, Pennsylvania mandated that the trial court impose a mandatory life sentence without the possibility of parole irrespective of the

age of the defendant. On June 25, 2012, the United States Supreme Court in *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455 (2012), struck down as unconstitutional the mandatory imposition of a life sentence upon those under the age of eighteen at the time the homicide crime was committed. While the Pennsylvania legislature attempted to "fix" the deficiency in Pennsylvania law following *Miller*, the effort that culminated in Act 204 of 2012 (the law under which Mikechel Brooker was sentenced) resulted in an unconstitutional statute. Act 204 is unconstitutional because the original purpose of the bill dramatically changed during the legislative process in violation of Article III, Section 1 of the Pennsylvania Constitution; because it violated the 'single subject' mandate of Article III, Section 3 of the Pennsylvania Constitution; because it violated the United States and Pennsylvania constitutional ban against cruel and unusual punishment; and because it violated the ex post facto clauses of the United States and Pennsylvania Constitutions.

III. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO FIND MIKECHEL BROOKER GUILTY OF FIRST DEGREE MURDER BECAUSE THE COMMONWEALTH FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT HE HAD THE SPECIFIC INTENT TO KILL.

The Commonwealth asserts that Mikechel Brooker, armed "with a .32-caliber revolver, and his codefendant Ellison, [armed] with a 9-mm semi-automatic weapon, shot the victim several more times in the head and chest, as he lay on his back, helpless on the ground (N.T. 7/10/12, 110-58, 7/11/12 50-62)." Commonwealth's Brief as Appellee at 2. Supposedly, Mikechel Brooker's actions occurred **after** "codefendant Smith pointed a .45 caliber gun at the unarmed victim and shot him several times in the head." The Commonwealth's indiscriminate citation to a full 60 pages of the record without specificity to support these assertions was intentional because a careful review of the entire record does not support its argument. The indiscriminate citation is also unhelpful because it does not focus this Court's or counsel's attention to particularly relevant portions of the record.

A more careful review of the record reveals the following. Ms. Gray, while allegedly an eyewitness, testified at trial that she did not recall Barry Jacobs being killed or her having made a statement to the police (N.T. 7/10/12, 113, 115). She was impeached at trial with the statement she supposed gave to the police shortly after the

homicide; in that statement she said "Worm" shot Jacobs in the head and then "Butter" and "Doughnut" shot him while he was on the ground in the head and chest (N.T. 7/10/12, 125)[1]. "Worm" had a .45 caliber gun, "Butter" had 9 millimeter and "Doughnut" had a .32 revolver (N.T. 7/10/12, 128-129).

However, the physical evidence does not support this repudiated testimony by a drug addict. Dr. Edwin Lieberman, the Assistant Medical Examiner who conducted the autopsy, described a single wound to the head (N.T. 7/12/12, 40), a single wound to the chest (N. T. 7/12/12, 42), a wound to the shoulder (N.T. 7/12/12, 43), one to the top of one ear (N.T. 7/12/12, 43), another to the top of the right ear (N.T. 7/12/12, 44), one below the right ear (N.T. 7/12/12, 44) and one exiting the left side of the face (N.T. 7/12/12, 44-45). Though three bullets were recovered from the decedent's body (N.T. 7/12/12, 50-51), there was no testimony that any came from the .32 caliber gun supposedly used by Mikechel Brooker. In fact, the Commonwealth's expert ballistician testified that two of the bullets from the decedent's body were fired from a .380/9 millimeter gun and the other was fired from a .45 caliber gun (N.T. 7/12/12, 217-219). A bullet fragment found at the scene that was in "the range of a .32

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[1] "Worm was later identified at Ferock Smith (N.T. 7/10/12, 130); "Butter" was identified at Alonzo Ellison (N.T. 7/10/12, 130); and "Doughnut" was identified at Mikechel Brooker (N.T. 7/10/12, 131).

caliber" (N.T. 7/12/12, 207) but was unsuitable for microscopic examination (N.T. 7/12/12, 204).

The Commonwealth must prove that Mikechel Brooker took an action that is of such a nature that there can be no reasonable doubt that it was his conscious objective and purpose to cause death to the victim. Commonwealth v. Stewart, 336 A.2d 282, 285 (Pa. 1975). Here they did not meet that burden. There was no physical evidence that connected Mikechel Brooker to the crime. There was no evidence that a gun that was used by Mikechel Brooker caused the fatal injuries or any injuries at all. The three Commonwealth witnesses all recanted their statements. At most, the Commonwealth established that Mikechel Brooker was merely present at the time of the homicide but mere presence and knowledge that a crime is committed is insufficient to convict that person of the crime. The verdict of guilty of first degree murder, in this case, is based on conjecture and surmise. The fact finder, and this Court, are required to look at the totality of the circumstances in rendering a judgment. Commonwealth v. Davis, 479 A.2d 1077, 1079 (1984). Here, there is insufficient evidence to show that Mikechel Brooker had fully formed an intent to kill. Therefore, this Court should vacate the murder conviction.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT.

At Mikechel Brooker's trial, the prosecutor improperly asked a police detective a question from which the jury could infer that Mikechel Brooker was actively involved in the sale of illegal drugs in competition with the victim in the area in which the murder occurred, and that this was the motive for this killing.

Pa.R.Cr.P. states:

> (B) when an event prejudicial to the defendant occurs during trial only the defendant may move for mistrial; the motion shall be made when the event is disclosed. Otherwise the trial judge may declare a mistrial only for reasons of manifest necessity.

Here, the prosecutor asked:

> Q. Based on the information that you received and Mr. Phillips had asked about Barry Jacobs, Jr. and the information that he was actively dealing in the same area; correct?
>
> A. Yes ma'am.
>
> Q. Based on the information you received from the witnesses-- were these three defendants also actively dealing in the same area?
>
> Defense counsel: Objection
>
> Trial Court: Sustained. The jury will totally disregard that last question....

N.T. 7/12/12, 131-132.

Defense counsel, dissatisfied with the trial court's admonition, moved for a mistrial and this motion was denied. While the Commonwealth finds great solace in the trial court's instruction, this instruction was insufficient to correct the bias in the minds of the jurors caused by the prosecutor's improper question.

The argument of co-defendant, Ferock Smith, contained in Argument IV of his brief, is adopted. Pa.R.App.P. 2137. This Court should order a new trial.

III. ACT 204 OF 2012 IS UNCONSTITUTIONAL BECAUSE THE ORIGINAL PURPOSE OF THE BILL DRAMATICALLY CHANGED DURING THE LEGISLATIVE PROCESS IN VIOLATION OF ARTICLE III, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION.

Senate Bill 850, which became Act 204 of 2012, violated Article III, Section 1 of the Pennsylvania Constitution because the bill's original purpose changed dramatically during the legislative process. The Commonwealth agrees that if the original purpose of the bill changes, it violates the Pennsylvania Constitution. However, the Commonwealth opines that this argument must be rejected here because "the original and unchanged purpose of SB 850 was to regulate juvenile justice." Commonwealth's Brief as Appellee at 21. That, however, is factually incorrect. The Commonwealth ignores the significance that the original purpose of the bill was to

establish the new juvenile crimes of cyberbullying and sexting, provide for expungement of juvenile records and adopt new provisions and procedures regarding the right to counsel for juveniles and the handling of summary offenses. Those provisions were gutted in the final bill which added completely new provisions for the sentencing in adult criminal court of persons convicted of first or second degree murder who were juveniles at the time of the offense, proposed amendments to the parole statute and added new provisions regarding the Office of the Victim Advocate. This substantial change requires that this Court find that Act 204 violated the Pennsylvania Constitution.

The Commonwealth is certainly correct that the legislature can and should legitimately change a bill during the legislative process. Commonwealth's Brief as Appellee at 28. While the Commonwealth suggests that the initial and final bills were "juvenile justice" initiatives (Commonwealth's Brief as Appellee at 21), the facts undercut that declaration.

The Commonwealth notes the original bill's provisions in its brief as bullet points (Commonwealth's Brief as Appellee at 24). It is clear that these provisions deal with juveniles who are being treated and prosecuted as juveniles. Hence, the Commonwealth is correct that the original bill was a juvenile justice initiative

because its scope was largely confined to juvenile court. However, contrast the original provisions with the final bill's provision (Commonwealth's Brief as Appellee at 25-26). While several provisions deal with juveniles in juvenile court, the vast majority of the final version deals with the adult criminal court sentencing for persons convicted of first or second degree murder who were juveniles at the time of their offense. It is this dramatic shift that creates the constitutional infirmity.

The Commonwealth hopes that this Court will be mollified by the fact that the legislature decided to abandon its original goal juvenile justice reform to instead come up with a Miller fix (Commonwealth's Brief as Appellee at 25). Rather, the intervening decision in Miller demonstrates precisely why the legislature should not have highjacked a juvenile bill to fix an adult sentencing problem.

The entirely unrelated original version of S.B. 850 was gutted and redrafted to establish a new sentencing scheme for persons found guilty of juvenile homicides in adult court in order to comply with *Miller – a case that had not even been decided when the Senate passed its version of S.B. 850.* Act 204 violated Article III, section 1 of the Pennsylvania Constitution.

IV. ACT 204 OF 2012 IS UNCONSTITUTIONAL BECAUSE IT CONTAINS MORE THAN ONE SUBJECT IN VIOLATION OF ARTICLE III, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION.

The Commonwealth concedes, as it must, that if the statute contained more than one subject, it would violate Pennsylvania's Constitution. While the Commonwealth repeatedly argues that the only subject addressed by SB 850 is "juvenile justice" (see, e.g., Commonwealth's Brief as Appellee at 29), in Pennsylvania the juvenile justice system is an entirely distinct jurisdictional entity from the adult criminal justice system. Both of these systems may hear cases involving juveniles, and both are impacted by provisions included in SB 850. That does not make them one system, however, as Appellee's argument[2] would require. The systems are authorized by different statutes, overseen by different administrative bodies, and run by different personnel with entirely distinct policies and regulations. Significantly, the purpose of each system is different.

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[2] For example, Appellee contends that "all of the provisions of Act 204 are directed at the juvenile justice system" and that Act 204 "'revamp[ed] the juvenile justice system' with the tools--amendment or creation of various statutory provisions-needed to accomplish that purpose." Commonwealth's Brief as Appellee at 32. However, the statutory provisions amended or created were not all within the juvenile justice system. Instead, several related to the adult criminal justice system, while others did address aspects of the juvenile justice system. Either by intention or inattention, the Commonwealth is oblivious to the distinction between the two systems.

The Juvenile Act, which establishes the juvenile justice system, explains that it exists to effectuate the following purpose:

> to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.

42 Pa.C.S.A. §6301 ("The Juvenile Act").

The Juvenile Act, 42 Pa.C.S.A. §6302, expressly explains that the term "delinquent act" does not include "[t]he crime of murder" - which is precisely the crime that the relevant portion of SB 850 addresses. 18 Pa.C.S.A.§1102.1.

By contrast, the purpose clause of the statutory scheme that authorizes the criminal justice system to impose sentences for criminal conduct, 18 Pa.C.S.A. §104, explains that:

> The general purposes of this title are:
>
> (1) To forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest.
>
> (2) To safeguard conduct that is without fault from condemnation as criminal.
>
> (3) To safeguard offenders against excessive, disproportionate or arbitrary punishment.

> (4) To give fair warning of the nature of the conduct declared to constitute an offense, and of the sentences that may be imposed on conviction of an offense.
>
> (5) To differentiate on reasonable grounds between serious and minor offenses, and to differentiate among offenders with a view to a just individualization in their treatment.

The differences in the language used in the two purpose clauses are stark. The juvenile justice system exists to supervise, care for and rehabilitate young people in order to develop competencies "to become responsible and productive members of the community" (42 Pa. C.S.A. §6301), and excludes murder. The Pennsylvania statute that governs "Crimes and Offenses" prosecuted in adult court, on the other hand, includes no language about rehabilitation or development and, instead focuses on "forbid[ing] and prevent[ing] conduct." 18 Pa.C.S.A. §104. Indeed, as enacted, the relevant portion of Act 204 amends the adult sentencing code, parole statute and provisions regarding the Office of the Victim Advocate, and not the juvenile justice system.

Furthermore, children who are subject to the juvenile justice system do not face life without parole sentences, nor are they subject to even the lowest sentencing option available under Act 204: 20 years to life for those who were convicted of second-degree murder committed when they were fourteen years or younger. 18 Pa.C.S.A. §1102.1. The juvenile justice system's jurisdiction terminates when a

young person turns twenty-one, and often far sooner. A young person sentenced to serve, at a minimum, twenty years, is not subject to "juvenile justice"- instead, that young person is part of the criminal justice system, with all the direct and collateral consequences that involvement with that entirely separate system creates. Therefore, although Act 204 does include provisions related to practices in the juvenile justice system, it also includes provisions that relate to a distinct subject, which is adult criminal justice. It therefore violates the "single subject" mandate of Article III, Section 3 of the Pennsylvania Constitution.

V. ACT 204 OF 2012 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENTS AS INTERPRETED AND APPLIED BY *MILLER v. ALABAMA* AND *GRAHAM v. FLORIDA*.

Miller and Graham together require that a juvenile convicted of a homicide offense must have the option of receiving a sentence that provides a meaningful opportunity for release. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012); Graham v. Florida, 560 U.S. 48, 75 (2010). The Commonwealth attempts to justify Mikechel Brooker's lengthy 35-year mandatory minimum sentence by declaring it "obviously is not" the equivalent to a life sentence (Commonwealth's Brief as Appellee, 35). What is obvious is that the Commonwealth's conclusion that such a lengthy minimum sentence provides a meaningful opportunity for release is not obvious.

The Commonwealth asserts that the U.S. Sentencing Commission definition of a "life" sentence is inapplicable since a juvenile offender serving a life sentence may survive more years behind bars than a middle-age person serving life (and therefore serve a longer "life" sentence) by virtue of the young age at the start of their incarceration. (Commonwealth's Brief as Appellee at 35-36). Though life expectancies for juveniles serving life without parole sentences are generally not available,[3] at least some data suggest that juveniles sentenced to life without parole may die younger than adults receiving the same sentence[4]. In light of this imprecision, the U.S. Sentencing Commission's definition of a "life" sentence as less than 40 years provides a useful framework to determine when an opportunity for release may be meaningful.

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[3] See Stacie Nelson Colling & Adele Cummings, *There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, at 12 available at http://fairsentencingofyouth.org/wp-content/uploads/2014/02/Life-Expectancy-Article-with-Watermark1.pdf.

[4] A study of individuals serving life without parole sentences in Michigan found that adults incarcerated for life had a life expectancy of 58.1 years, while the life expectancy of juveniles sentenced to life without parole had a shorter life expectancy of 50.6 years. *See Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf. This data is consistent with research that suggests that incarceration decreases life expectancy. See Colling & Adele Cummings at 29. A 17-year-old serving a 35-year mandatory sentence would not be eligible for release until age 52 - a year and a half past the life expectancy in the Michigan data.

Due to its uncertainty and imprecision, life expectancy data cannot dictate when a meaningful opportunity for release is required. As the Iowa Supreme Court has found, in invalidating a 52 1/2 year sentence imposed on a juvenile:

> [W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at ___, 130 S.Ct. at 2030, 176 L.Ed.2d at 845-46. We also note that in the flurry of legislative action that has taken place in the wake of *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration.

State v. Null, 836 N.W.2d 41, 71-72 (Iowa 2013).

For an opportunity for release to be meaningful, it must provide a chance for fulfillment outside prison walls, a chance for reconciliation with society, and hope. *Cf.* Graham v. Florida, 560 U.S. 48, 79 (2010) ("Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for

reconciliation with society, no hope."). A mandatory minimum sentence that deprives a juvenile offender this opportunity violates Graham and Miller.

Pursuant to Miller and Graham, a sentence of thirty-five years without the possibility of parole - the mandatory minimum sentence for juveniles convicted of first-degree murder - does not provide a meaningful opportunity for release. For example, relying on Miller, the Iowa Supreme Court invalidated a thirty-five year sentence without the possibility of parole for a juvenile convicted of a non-homicide offense. State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013). The Court held that:

> ... in light of the principles articulated in *Miller* and *Null* [an Iowa Supreme Court case] that it should be relatively rare or uncommon that a juvenile be sentenced to a lengthy prison term without the possibility of parole for offenses like those involved in this case. Otherwise, we would be ignoring the teaching of the *Roper-Graham-Miller* line of cases that juveniles have less culpability than adults, that the few youth who are irredeemable are difficult to identify, and that juveniles have rehabilitation potential exceeding that of adults.

The court noted that, "[T]hough *Miller* involved sentences of life without parole for juvenile homicide offenders, its reasoning applies equally to Pearson's sentence of thirty-five years without the possibility of parole for these offenses." *Id.* Again, relying on Miller, the court decided that "a minimum of thirty-five years without the possibility of parole for the crimes involved in this case violates the core

teachings of Miller. We think the principles in Miller as developed by the Supreme Court in its Eighth Amendment jurisprudence are instructive on the resolution of this case." *Id.* Children convicted of crimes - even first degree murder - must have the option of receiving a sentence that provides meaningful opportunity to re-enter society and fulfillment outside of prison. As the Iowa Supreme Court has found, a thirty-five year sentence does not provide this meaningful opportunity.

Finally, Appellee contends that Miller does not create a presumption against juvenile life without parole sentence. (Commonwealth's Brief as Appellee at 36). This is in spite of the fact that the Miller Court specifically concluded that the imposition out of a life without parole sentence for a juvenile should be "uncommon" or "rare." Miller. at 2469. Courts faced with this issue have provided guidance to effectuate Miller's requirement that life without parole sentences should rarely be imposed. See, e.g., State v. Null, 836 N.W.2d 41, 75 (Iowa 2013) ("the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon case"); State v. Long, 138 Ohio St.3d 478, 8 N.E.3d 890, 899 (2014) ("Yet because of the severity of that penalty, and because youth and its attendant circumstances are strong mitigating factors, that sentence should rarely be imposed on juveniles"). See also People v. Gutierrez, 58 Cal.4th 1354, 324 P.3d 245, 250 (2014) (invaliding juvenile

life without parole sentences because the trial courts "operated under a governing presumption in favor of life without parole"). The legislature must provide guidance to ensure that life without parole sentences are rarely imposed on juvenile offenders. Because no such guidance is provided by Act 204, the Act violates Miller.

VI. ACT 204 OF 2012 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EX POST FACTO CLAUSES OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.

Appellant stands on the arguments presented in his original brief.

IV. CONCLUSION

For the reasons stated above, Mikechel Brooker requests that this Honorable Court vacate the judgment of sentence and remand for a new trial. Alternatively, this Court should remand for a new sentencing hearing at which he will be sentenced for third degree murder.

Respectfully submitted,

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