**IN THE SUPERIOR COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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**EDA 2013** **No. 1121**

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**COMMONWEALTH OF PENNSYLVANIA**

**V.**

**RONALD THOMAS,**

**Appellant**

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# REPLY BRIEF FOR APPELLANT

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Appeal from the March 18, 2013 Judgment of Sentence of the Philadelphia County Court of Common Pleas, Criminal Trial Division, Imposed on Information No. CP-51-CR-0013001-2010

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## ARGUMENT

Appellant's instant Reply Brief addresses several of the Commonwealth's meritless contentions in its October 27, 2014 Appellee's Brief. Appellant's instant Reply Brief incorporates all arguments presented in his June 3, 2014 Principal Brief.

Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and dismiss the First-Degree Murder and PIC charges. Alternatively, Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and remand this matter for a new trial.

### I. THE COMMONWEALTH'S CLAIMS CONCERNING THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE ARE MERITLESS

The Trial Court abused its discretion in admitting the decedent's hearsay statements to his brother, prosecution witness Hasan Ashmore. The admission of the hearsay violated Appellant's confrontation rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution. The erroneously admitted hearsay evidence deprived Appellant of due process and a fair trial.

The Commonwealth incorrectly relies on a 2000 case, *Commonwealth v. Fletcher*, 750 A.2d 261, 276 (Pa. 2000). (Commonwealth, 10/27/14, at 22-23). Yet, the Commonwealth wholly fails to acknowledge that a later Pennsylvania Supreme

Court case, *Commonwealth v. Moore*, severely limited the applicability of *Fletcher* in situations such as the instant case. 937 A.2d 1062 (Pa. 2007).

The *Moore* defendant, convicted of first-degree murder, argued on appeal that the trial court had erroneously admitted inadmissible hearsay; the "statements were made out of court and were offered for their truth, i.e., as substantive evidence that [the defendant] had bullied the victim on previous occasions." *Id.* at 1069. The *Moore* defendant argued "that the trial court erred in admitting this evidence under the state of mind exception to the hearsay rule...." *Id.* Like the Commonwealth in the instant case, the prosecution's appellate arguments in response "relie[d] exclusively" on *Fletcher*. *Id.* at 1070.

The Pennsylvania Supreme Court in *Moore* instructed, "*Fletcher*'s broad approach to the admissibility of hearsay evidence touching on a victim's state of mind in a criminal homicide prosecution is in substantial tension with the limitations described and applied in the subsequent decisions of the [Pennsylvania Supreme] Court." *Id.* at 1071. The *Moore* Court added, "Even those decisions adopting a broader view of the state of mind exception support the proposition that statements offered as evidence of a declarant's state of mind may not be admitted for their truth." *Id.* The *Moore* Court instructed that *Fletcher* could not be read "as granting authorization to engage in a wholesale diversion of the focus from the victim's state

of mind to proof of underlying facts, as occurred here." *Id.* at 1073.

The *Moore* Court crucially reasoned that "the testimony of the victim's father, sister, and friend contained statements made by the victim concerning bullying by [the defendant]. While under some of this Court's decisions, these statements would be admissible as circumstantial evidence of the victim's fear of [the defendant], they could not properly be admitted as substantive evidence of these prior incidents ...." *Id.* at 1072. *Moore* cogently reasoned that the hearsay was "plainly relevant to [the defendant's] motive only to the degree that the hearsay statements were true." *Id.*

Here, as in *Moore,* the decedent's "state of mind" was not relevant to the prosecution's allegations. Pa. R. Evid. 401, 402. Instead, the prosecution impermissibly used the decedent's hearsay statement to establish that the decedent had, in fact, stolen drugs from Appellant; in other words, the Commonwealth impermissibly used the decedent's hearsay statements for "the truth of the matter asserted." *See, e.g., Moore,* 937 A.2d at 1071-73.

Similarly, in *Commonwealth v. Thornton*, 431 A.2d 248, 251 (Pa. 1981), the Pennsylvania Supreme Court held that a victim's statement regarding his fear that the defendant "was after" him was inadmissible because the victim's state of mind was not at issue in the case. *Id.* The *Thornton* Court explained, "It was [the defendant's] state of mind, not that of the victim, which was material to the establish the degree

of guilt, if any, of the charge of criminal homicide." *Id.* Like the *Moore* Court, the *Thornton* Court cogently noted that the victim's statement could only be relevant as evidence of the defendant's intent to kill if the testimony was offered for its truth; yet, if the testimony was offered for its truth, it would be inadmissable hearsay. *Id.*[1]

The Pennsylvania Superior Court decision in *Commonwealth v. Green* follows the controlling reasoning of the Pennsylvania Supreme Court in *Moore*. 76 A.3d 575 (Pa. Super. 2013) (holding that victim's hearsay statements were inadmissible under the state of mind exception because if the statement were to be considered evidence of defendant's motive, the statement would have to be impermissibly accepted for the truth of the matter asserted). Appellant's Principal Brief explained that under *Green,* the hearsay evidence in the instant case was inadmissible. (Appellant Principal, 06/03/14, at 37-40).

Nonetheless, the Commonwealth feebly attempts to distinguish *Green.* The Commonwealth makes the decidedly odd argument that *Green* is not controlling because it involved domestic violence - not drugs. (Commonwealth, 10/27/14, at 24). Absent an explicit directive, the applicability of an evidentiary rule does not turn on the nature of the criminal charges. Under the Pennsylvania Rules of Evidence, no

[1]Likewise, in *Commonwealth v. Laich*, the Pennsylvania Supreme Court held that the hearsay statements of the decedent (the defendant's girlfriend) concerning the defendant's threats were inadmissible under the state of mind exception. 777 A.2d 1057, 1062 (Pa. 2001). *Laich* is also controlling in the instant case.

such directive applies to the state of mind exception. Pa. R. Evid. 803(3).

The Commonwealth's assertions concerning *Green* and the state of mind exception are erroneous. The Commonwealth's reliance on *Fletcher* is misplaced and is contrary to recent Pennsylvania Supreme Court and Superior Court authority.[2]

As a final matter, the Commonwealth saliently fails to make any argument concerning harmless error. (Commonwealth, 10/27/14, at 21-24). Appellant's Principal Brief argued that the erroneous admission of the hearsay statements did not constitute harmless error. (Appellant Principal, 06/03/14, at 40). The Commonwealth's silence appears to concede that if the Trial Court erred in admitting the hearsay statements, the error would not have been harmless.

As to the issue of harmless error, the situation in *Commonwealth v. Laich* is controlling. 777 A.2d at 1063. In *Laich,* the Pennsylvania Supreme Court concluded that the erroneous admission of the victim's hearsay statement under the state of mind

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[2]Additionally, the facts and procedural posture of *Fletcher* are distinguishable from those of the instant case. 750 A.2d at 275. The *Fletcher* defendant argued that his "trial counsel was ineffective for failing to object to statements contained in a witness' statement to police pertaining to what the murder victim had related to him about the [defendant]." *Id.* An ineffective assistance claim raised on collateral review requires a more demanding showing from a defendant than does a claim of trial court error raised on direct appeal. *See, e.g.,* 42 Pa.C.S.A. § 9541 *et seq.; Commonwealth v. Burno,* 94 A.3d 956, 976 (Pa. 2014) (noting three-prong ineffectiveness standard and observing that "test for prejudice, as an element of ineffective assistance of counsel, is more exacting than the test for harmless error, and the burden of proof is on the defendant, not the commonwealth.")

Here, Appellant's claim is not an ineffective assistance of counsel claim; to that extent, Appellant's claim is not subject to the more demanding standard which may have informed the result in *Fletcher.*

exception did not constitute harmless error. *Id. Laich* reasoned that there was no "properly admitted cumulative evidence." *Id.* Here, there was no "properly admitted cumulative evidence" indicating that the decedent purportedly stole any drugs from Appellant. *See id.*

## II. THE COMMONWEALTH'S ARGUMENTS CONCERNING THE RAP MUSIC AND RELATED VISUAL IMAGES ARE MERITLESS

The Trial Court abused its discretion in admitting evidence concerning Appellant's rap music and rap-related visual images. The prosecution improperly cited the "Take It How You Wanna" lyrics as evidence of a purportedly "inculpatory story." Furthermore, the prosecutor impermissibly used the lyrics and visual images to depict Appellant in a manner that (1) would buttress its purported evidence and (2) would bias the jurors against Appellant.

Under the Sixth, Thirteenth and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 1, 9 of the Pennsylvania Constitution, the evidence (1) was irrelevant and (2) constituted impermissible character evidence. The evidence deprived Appellant of a fair trial and violated his Equal Protection and Due Process protections. The Commonwealth's contentions are meritless. (Commonwealth, 10/27/14, at 8-21).

First, the Commonwealth labels the rap lyrics as "threatening words."

(Commonwealth, 10/27/14, at 10). The Commonwealth misapprehends the nature of rap music. Rap lyrics and other visual and verbal expressions of the rap genre are often inherently violent; yet, these artistic expressions are frequently fictional and should not be viewed as depictions of real events. (Appellant Principal, 06/03/14, at 27-29).

The Commonwealth inserts string cites of case law from other jurisdictions in support of its contentions.[3] Nonetheless, the Commonwealth fails to discuss the August 2014 New Jersey Supreme Court decision in *State v. Skinner,* 95 A.3d 236 (N.J. 2014).

*Skinner* held that a trial court erred where it allowed the prosecution to present the defendant's "violent and profane" rap lyrics. *Id.* at 238. The New Jersey Supreme Court concluded that the lyrics would have been admissible only if (1) they had a direct connection to the specifics of the offense and (2) the evidence's probative value was not outweighed by its prejudicial potential. *Id.* at 238-39. The *Skinner* Court also instructed that in deciding to admit rap music evidence, courts should consider the existence of other evidence that can be used to establish the same fact. *Id.*

[3] The Commonwealth points out that Appellant made a typographical error in the citation for *Commonwealth v. Gray,* 978 N.E.2d 543, 560-61 (Mass. 2012). (Commonwealth, 10/27/14, at 16 n.3). In his Principal Brief, Appellant had cited the case as "Pa. 2012" instead of "Mass. 2014." (Appellant Principal, 06/03/14, at 27). Nonetheless, Appellant's Principal Brief expressly stated that *Gray* was a Massachusetts Supreme Court case - not a Pennsylvania case. (Appellant Principal, 06/03/14, at 27-28).

Furthermore, the *Skinner* Court instructed that the evidence should be redacted to ensure that the jury does not receive irrelevant, inflammatory content. *Id.*

Here, as Appellant explained in his Principal Brief, "Take It How You Wanna" and the related visual images lacked a direct connection to the decedent's death. (Appellant Principal, 06/03/14, at 25-26). The prosecution presented absolutely no evidence that Appellant had even been aware of any purportedly missing drugs that would have corroborated the prosecution's "interpretation" of "Take It How You Wanna." (63g-64g, 33i-34i). In fact, the evidence more strongly suggested that the song was not related to the fatal shooting of the decedent.

To illustrate, Appellant had recorded at least thirty to forty rap songs. (79i). The prosecution failed to produce any other rap song that referenced the alleged theft of Appellant's drugs. If Appellant were, as the prosecution claimed, truly "angered" at this purported theft, common sense dictates that Appellant would have produced a lot more rap songs about the "theft." Likewise, the prosecution failed to produce any evidence establishing the date on which the song lyrics were written. Additionally, the prosecution alleged that the decedent had stolen a sandwich bag of powder cocaine from Appellant. (13k-15k, 25k-27k). Yet, "Take It How You Wanna" discusses "half a brick." (APPENDIX D). Furthermore, the decedent actively promoted the CD that included the "Take It How You Wanna" song. (APPENDIX E;

55g, 6h, 30i-31i, 21k).[4]

The Commonwealth attempts to minimize Appellant's relevancy arguments by asserting they "bear only on the weight of the evidence, not its relevance." (Commonwealth,10/27/14, at 11-12). Consequently, the Commonwealth misapprehends the standard for relevancy. Evidence is relevant if (1) "it has any tendency to make a fact more or less probable than it would be without the evidence" and (2) "the fact is of consequence in determining the action." Pa. R. Evid. 401. "Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in light of reason, experience, scientific principles, and the other testimony offered in the case." Pa. R. Evid. 401 cmt. Appellant's arguments concerning the relevancy of the rap lyrics are consistent with the Pa. R. Evid. 401 standard. (Appellant Principal, 06/03/14, at 25-29).

The Commonwealth also asserts that Appellant "speculates without evidentiary support that he "may have written the song in 2007 [even though he] did not record it until 2009]." (Commonwealth, 10/27/14, at 11). The Commonwealth fails to understand Appellant's argument. No evidence was presented concerning the

[4]In contrast to the instant case, the prosecution in *Skinner* conceded that the defendant's lyrics did not pertain to the attempted murder for which the defendant was on trial. *Id.* at 438. Here, however, the prosecution insists that "Take It How You Wanna" was somehow linked to the fatal shooting of the decedent. Yet, as Appellant explains, the evidence in the instant case failed to establish that "Take It How You Wanna" bore some actual connection to the fatal shooting of the decedent. (Appellant Principal, 06/03/14, at 25-26).

composition date of the song. At trial, Spearman explained that the song was "old." (64g). During deliberations, the jurors asked what the release date was for "Take It How You Wanna." (APPENDIX I; 9o). Defense counsel noted that "there was never anything put in the record in this particular trial about the release date for the song and CD." (9o). The prosecutor did not offer any argument to the contrary. (9o). The Trial Court instructed the jury that the release date "is a matter for your recollection." (13o).

The Commonwealth erroneously claims that Appellant failed to object to the admission of the CD cover. (Commonwealth, 10/27/14, at 17 n.4). The certified record establishes otherwise. As to all of the rap-related evidence, defense counsel argued, "99 percent of what [the prosecution] is asking the Court to accept into evidence constitutes either hearsay, speculation, or conclusions." (47a; APPENDIX H). Defense counsel argued that the evidence was irrelevant and unfairly prejudicial. (42c-46c, 50c-51c, 31d; APPENDIX H). He explained that "what it is depicting is the lifestyle - whether you like it or not, ...of some of what goes on in North Philadelphia." (50c).

Defense counsel specifically objected to the admission of the *Ear Bleed* CD cover; a tattoo reading "Money, Sex, Murder" was visible on Appellant's chest. (15a-16a, 86a, 48c-49c, 73c, 130c-31c, 140c-41c; APPENDICES D, F-G). He urged, "The

prejudicial nature...is absolutely clear-cut and poignant, from the CD cover, and as far as the song goes, it is exactly that...[i]t is a song." (130-31c). Defense counsel explained that the materials would serve "no purpose, other than to portray [Appellant], once again, as a drug dealer...who utilizes firearms, and shooting firearms in a song." (142c).

Additionally, the Commonwealth notably fails to address the prejudicial nature of the photographs. (Commonwealth, 10/27/14, at 16-18). The Commonwealth blandly asserts, "[Appellant] could not have been prejudiced because the pictures were merely cumulative of Spearman's and Brown's testimony that [Appellant], the victim, and the witnesses were members of the same rap group." (Commonwealth, 10/27/14, at 17).

Ironically, in making this argument, the Commonwealth has undercut its claims that the pictures were not prejudicial. *See, e.g., Commonwealth v. Gordon,* 673 A.2d 866, 870 (Pa. 1996) (noting that whether relevant evidence is unduly prejudicial is partially a function of the degree to which it is necessary to prove the case of the opposing party). The visual images exacerbated the unfair prejudice that the rap music lyrics created. (APPENDICES F-G). The images depicted a drug deal between Spearman and Brown as well as Appellant's tattoos. (APPENDIX F).

As a final matter, the Commonwealth again fails to make any argument concerning harmless error. (Commonwealth, 10/27/14, at 8-21). Appellant's Principal Brief argued that the erroneous admission of the rap lyrics and related visual images did not constitute harmless error. (Appellant Principal, 06/03/14, at 36). To that extent, the Commonwealth appears to concede that if the Trial Court erred in admitting the rap lyrics and related visual images, the error would not have been harmless. *See, e.g., Green,* 76 A.3d at 582.

## III. THE COMMONWEALTH'S COUNTER-STATEMENT OF THE CASE MISSTATES THE CERTIFIED RECORD

The Commonwealth's brief includes assertions that are contrary to the certified record. To illustrate, the Commonwealth's brief incorrectly claims, "[Appellant] mailed a copy of [prosecution witness Kareem] Brown's statement to fellow Team A member Darren Haynesworth...." (Commonwealth, 10/27/14, at 3).

In actuality, on March 15, 2012, the police entered an abandoned house in the Stanley and Huntingdon Streets neighborhood. (82j-83j, 114k). They discovered in a bag an opened envelope addressed to Haynesworth; the return address indicated that it was sent from Appellant at "CFCF." (85j). The envelope contained a copy of Brown's statement. (85j). The envelope was postmarked August 2010. (160c). Critically, however, the Philadelphia District Attorney's Office had provided Brown's

statement to Appellant on November 12, 2010. (261k, 66L). In November 2010, Appellant was housed at PICC - not CFCF. (260-61k, 66L). Thus, it was impossible that the statement had been mailed in the envelope. On a table, the police recovered a letter addressed to another Team-A member named Wink; nothing linked the letter to Appellant. (84j-89j, 115k, 119k).

The Commonwealth also asserts that "[Appellant] predicted to associates that Brown would claim that police had beaten his statement out of him, and [Raphael] Spearman would send something to [Appellant's] lawyer 'clear[ing] [Appellant]." (Commonwealth, 10/27/14, at 4). Critically, however, the record is far more ambiguous than the Commonwealth would like this Honorable Court to believe. (92g, 24h-25h, 28i-29i, 72k, 80k-85k). To illustrate, at one point, Appellant remarked, "What's a call him did what he was supposed to do, so that should come through." (63c, 72k, 80k-85k).[5]

The Commonwealth also asserts that Appellant received a consecutive sentence of two-and-a-half to five (2 ½-5) years of incarceration. As Appellant noted in his Principal Brief, the Trial Court stated that the PIC sentence was "concurrent." (6p). (Appellant Principal, 06/03/14, at 5).

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[5]The Commonwealth makes the same incorrect assertions in Part IV of its brief. (Commonwealth, 10/27/14, at 34-36).

## CONCLUSION

For all of the reasons stated in both Appellant's June 3, 2014 Principal Brief and his instant Reply Brief, Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and dismiss the First-Degree Murder and PIC charges. Alternatively, Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and remand this matter for a new trial.

Respectfully submitted,

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## VERIFICATION

The below parties (1) verify that the statements made in Appellant's Reply Brief are true and correct and (2) understand that false statements are subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

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## CERTIFICATION OF SERVICE

The below parties certify that a true and correct copy of Appellant's Reply Brief has been served on:

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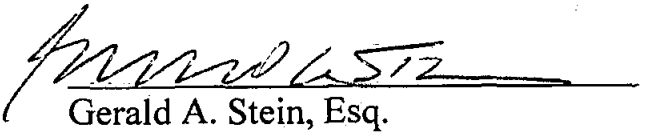

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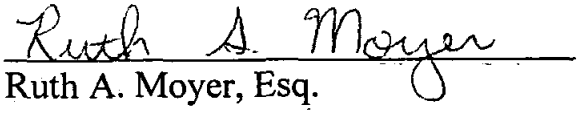

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