No. 19-8635

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH W. BROWN — PETITIONER

v.

KENTUCKY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

PETITIONER'S REPLY BRIEF

Respectfully Submitted

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PRO-SE LITIGATION

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to rebut arguments made by the Respondents in the Brief in Opposition. The failure to address a particular issue should not be taken as a reflection that petitioner believes the issue has no merit or less merit than issues which have been addressed in this reply brief, but have been omitted due to page limitation.

THE RESPONDENT'S ARGUMENT WAS ERRONEOUS

THE RESPONDENT'S CLAIM THAT "THE PETITIONER CANNOT CONVINCE THIS COURT THAT A DECISION TO REJECT THE PLEA BARGAIN WOULD HAVE BEEN RATIONAL UNDER THE CIRCUMSTANCES" LACKS ANY MERIT AND IS IN COMPLETE CONTRAST TO THE RECORD.

A. Brown was not guaranteed to get the maximum sentence had he taken the PFO II to trial.

In Respondent's Brief in Opposition, it stated: "Had the Petitioner not reached a plea agreement, he almost certainly would have received the maximum penalty of 10 years...."

This claim was made to Lend weight to the Commonwealth's theory that Kenneth rejecting the plea would not "have been rational under the circumstances." Padilla v. Kentucky, 599 U.S. 356, 372 (2010). However, it is widely known that juries are unpredicitable and often do not hand down the maximum sentenceces in even the worst crimes.

Brown, with his long and lustrous criminal career, knows this adage to be true from first-hand experience.

In 2004, Kenneth rejected a 10 year plea agreement in Mississippi for aggrevated Assault (firearm) and discharging a firearm into an occupied dwelling (Washington County Case #2003-228). He faced a maximum sentence of 30 years imprisonment but chose to go to trial where he was found guilty, but only received a 1 year sentence with 5 years probation. Regardless of the exceedingly light sentence, he still appealed the conviction which was subsequently reversed and remanded by the Mississippi State Supreme Court, then dismissed by the DA. See, Brown v. State of Mississippi, 986 S.o. 2d 270 (2008).

Brown also rejected a plea agreement for 17 years before going to trial in 2012 for First-Dgree Murder, First-Degree Wanton Endangerment (2 counts), Tampering with physical Evidence, and trafficking in Marijuana over 5 pounds with a firearm (Jefferson County Case# 10-cr-2631, 11-cr-1107). He faced a maximum of life without parole but he only received 24 years (the mandatory minimum for First-Degree Murder is 20 years), after being found guilty in a jury trial. He also filed an appeal in this case. See Brown v. Commonwealth, 416 S.W. 3d 302 (2013).

After being found guilty of the Murder Charge, the commonwealth offered Kenneth a 1 year prison sentence, for a D.U.I. and Promoting Contraband in the First-Degree (Jefferson County Case# 10-cr-1993) that he had pending prior to the murder case. Despite facing an additional consecutive 5 years in prison, Kenneth rejected the plea and prepared for trial. The commonwealth, however, offered a concurrent 1 year jail sentence for a reduced misdemeanor charge of promoting contraband in the Second-Degree. Brown accepted the deal.

In his latest court battle stemming out of Oldham County, Kentucky, Brown was offered a total of 12 years for Solicitation of Murder (3 counts), Intimidating a participant in a legal process, and P.F.O. II (2 counts) (Oldham Case #'s: 16-cr-0105, 2017-cr-0014). Although he faced a combined total of 80 years consecutive with the 24 years he's already serving, he rejected this plea as well.

So if history is any indicator, Kenneth has never been "rational" when faced with plea agreements. Contrarily, Brown has always rejected seemingly generous plea bargains when facing insurmountable amounts of prison time, yet he has always received less than the maximum

sentence. Therefore, the Respondent is in error to suggest that "He almost certainly would have received the maximum penalty of 10 years."

B. **The Respondent has switched gears regarding the gravity of the extra time Brown would have to do before he sees the parole board.**

In the "Commonwealth's Reply Brief" to the Kentucky Court of Appeals concerning the case at hand, it stated: "In Pridham..... The court specifically held that the deferral of parole eligibility for not more than a year or two was not severe like the sharp increase in parole eligibility required by the violent offender statutes..... Therefore, the court concluded that the challenged advice in that case did not fall outside what the Sixth Amendment requires of counsel." citing Commonwealth v. Pridham, 394 S.W. 3d 882.

In the Respondent's "Brief in Opposition" filed in this court, it stated: ".....Under these Circumstances, the petitioner would not have been eligible for a parole hearing for 22 years, instead of 21 years and four months." This statement was also part of the claim made to lend weight to the Commonwealth's theory that Kenneth rejecting the plea deal would not "have been rational under the circumstances." Padilla.

Ironically, the Respondent is suggesting that an additional 8 months in prison is a disparity, but an additional 17 months is of little consequence! The irony and contradiction is overtly evident considering the fact that Brown would have retained his right to appeal (which he has always been wont to exercise no matter how light the sentence), and he knew from experience that the jury could

have very well recommended a sentence far less than 7 years offered by the Commonwealth. Furthermore, the respondent has overlooked the fact that this extra one to two years is in addition to a "severe.....sharp increase in parole eligibility required by the violent offender statute."

C. Brown had several sound appeal issues making the rejection of plea deal clearly "rational."

Kenneth's trial counsel, Michael Goodwin, is a well renowned Appellate attorney out of Louisville Kentucky, who just so happens to take on trial cases when the need arises for a conflict counsel. Being his area of expertise, Mr. Goodwin left Kenneth with several avenues for relief in the Appellate courts in the event of his conviction. We will briefly touch basis on two of them here.

On the first day of trial, Brown's counsel renewed a motion for presiding judge, Hon. Karen Conrad, to recuse herself because the threat made against the prosecutor happened in her court room. After making the motion he stated: "Had the court recused itself .....I would've called your Honor as a witness....." VR: 12/1/17; 10:33:28. the court denied the motion.

The court was in error for failing to recuse itself because it had personal knowledge of disputed evidentiary facts concerning the proceeding and it was a material witness concerning the matter in controversy. KRS 26A.015(2)(a)(b). See also, SCR 4.300, and Wood v. Commonwealth, 793 S.W. 2d 809 (1990), Johnson v. Mississippi, 403 U.S. 212, 215-216 (1971) (held that impartialjudge is an element of due process) Williams v. Pennsylvania, 136 S. Ct. 1899 (standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable).

Secondly, the legitimacy of the P.F.O. II charge was in question before the trial even started!

Prior to the trial date, the commonwealth did not turn over certified records for convictions as is required for P.F.O. proceedings. This late disclosure of evidence is in direct violation of RCr 724, 7.26. VR: 12/1/17; 11:44 am. Admittedly, Brown was not notified of this discrepancy by his counsel during trial, but was only made aware of this issue by his post-conviction counel Steven Goens during an attorney client conference sometime later. Had he known this, he most certainly would not have taken the plea agreement!

Kenneth's lack of knowledge aside, had he chosen to proceed to trial, and appeal his conviction, this issue was properly preserved thereby making it eligible to be argued during his appeal.

Taking into account the fact that Brown had at least two sound appeal issues, a rejection of a plea deal was beyond "rational." In fact, it should have been recommended!

CONCLUSION

Once again, the Respondent has made erroneous claims despite the record disproving them, offered no sound legal precedent to support them, and has chosen to either ignore or misapply whatever legal precedent supports the petitioner's argument. True to form, the Commonwealth of Kentucky has decided to go its own way. Therefore, granting the petitioner's Writ of Certiori is a necessity.

Respectfully Submitted
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