

**[J-49-2011][M.O. – McCaffery, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 58 MAP 2010
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court at No. 1199 EDA 2007 dated
	:	11/23/09 vacating the judgment of
v.	:	sentence and remanding the order of the
	:	Delaware County Court of Common Pleas,
	:	Criminal Division, at No. CP-23-CR-
ANTOINE MILLER,	:	0004026-2006 dated 4-17-07
	:	
Appellee	:	ARGUED: May 11, 2011

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: January 20, 2012**

I have difficulty with the majority's treatment of the Superior Court's decision in Commonwealth v. Austin, 906 A.2d 1213 (Pa.Super. 2006). The majority relies on a passage from Austin for the proposition that, in order to obtain a felony murder conviction, the Commonwealth is not required to prove that the accused actually committed the predicate offense. See Majority Opinion, slip op. at 11-12. Yet, the import of Austin's rationale is that the Commonwealth is, in fact, required to essentially establish the predicate offense when that offense is robbery. See Austin, 906 A.2d at 1220-22. To the extent that the majority is rejecting the Superior Court's reasoning on this point, I believe the rationale should be addressed on its terms, particularly because the predicate offense in this case, also, is robbery.

Indeed, I am sympathetic to the Superior Court's treatment in Austin, since, as I indicated in my concurring and dissenting opinion in Commonwealth v. Magliocco, 584

Pa. 244, 883 A.2d 479, (2005), I believe that Magliocco's reasoning lends itself to application beyond the scope of the ethnic intimidation statute. See id. at 268, 883 A.2d at 493 (Saylor, J., concurring and dissenting); see also Austin, 906 A.2d at 1222 (“To paraphrase the Supreme Court by substituting the relevant facts of this case, ‘since the factfinder in this case specifically found that Appellant did not commit the offense of robbery, the conviction for felony murder, which requires as an element the killing while in the perpetration of a robbery, simply cannot stand.’”) (citing Magliocco, 584 Pa. at 267, 883 A.2d at 493); Commonwealth v. Miller, No. JA 05-02408, slip op. at 14-15 (Pa.Super., Nov. 23, 2009). I support the majority’s decision effectively to limit Magliocco to its facts, because I am not persuaded, at least at this juncture, that the practice of tolerating inconsistent verdicts should be abandoned, while, again, acknowledging that there are policy considerations on both sides of this question. See Magliocco, 584 Pa. at 268-70, 883 A.2d at 493-94 (Saylor, J., concurring and dissenting).