

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA: E.D. ALLOCATUR DKT. 2014

VS. : NO.

MIKECHEL BROOKER, :  
Petitioner

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PETITION FOR ALLOWANCE OF APPEAL FROM  
THE SUPERIOR TO THE SUPREME COURT

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Petition To Allow An Appeal From The September 23, 2014  
Judgment Of The Superior Court Of Pennsylvania (No. 96 EDA 2013)  
Affirming The December 17, 2012 Judgment Of Sentence of the  
Philadelphia County, Court Of Common Pleas, Criminal Trial Division,  
at CP-51-CR-0006874-2009.

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October, 2014

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TO THE HONORABLE, THE CHIEF JUSTICE AND JUSTICES OF THE  
SUPREME COURT:

Mikechel Brooker, by his court appointed counsel, John P. Cotter (verified statement attached) and co-counsel, Bradley S. Bridge, Assistant Defender, Karl Baker, Assistant Defender, Chief, Appeals Division, Ellen T. Greenlee, Defender, and Marsha L. Levick, Juvenile Law Center, requests the allowance of an appeal in the captioned matter and respectfully represents:

1. This is a Petition for Allowance of Appeal from the yet unpublished, Superior Court decision of September 23, 2014, in which a panel of that Court affirmed the judgment of sentence. The Superior Court's Opinion is attached hereto as Exhibit "A." As the trial judge had retired, there was no Rule 1925 opinion. A

letter from the Supervisor of the Post-Trial Unit of the Philadelphia Court of Common Pleas indicating that fact is attached hereto as Exhibit "B."

This Court should grant the instant Petition for Allowance of Appeal to resolve a vital question of first impression. After the United States Supreme Court in Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455 (2012), rendered unconstitutional the Pennsylvania mandatory sentencing scheme for juveniles convicted of first or second degree murder, the Pennsylvania legislature hastily passed a new statute to replace the unconstitutional one. At issue here is whether this new legislation was similarly unconstitutional: did it violate the constitutional requirements of "original purpose" and "single subject matter" as well as the constitutional prohibition against cruel and unusual punishment and the bar against ex post facto legislation? This question is too important to leave to the Superior Court to have the first and final word.

2. The four questions presented by the instant Petition For Allowance Of Appeal are:

1. Was not the law under which Mikechel Brooker was sentenced unconstitutional in violation of Article III, Section 1 of the Pennsylvania Constitution because its original purpose was lost because the bill's provisions dramatically changed during the legislative process?

2. Was not the law under which Mikechel Brooker was sentenced unconstitutional in violation of Article III, Section 3 of the Pennsylvania Constitution because it contains more than one subject?

3. Was not the law under which the Mikechel Brooker was sentenced unconstitutional because it violates the United States and Pennsylvania constitutional bans on cruel and unusual punishment?

4. Was not the law under which the Mikechel Brooker was sentenced unconstitutional because it violates the ex post facto clauses of the United States and Pennsylvania Constitutions?

3. The facts giving rise to the instant Petition For Allowance of Appeal:

A jury found Mikechel Brooker guilty of murder in the first degree. He was fifteen (15) years old at the time of the incident. The case against him and his two co-defendants was based upon the inconsistent, repudiated statements of three witnesses. Antoinette Gray gave a statement to police. At trial Ms. Gray stated that she did not remember the shooting. Her statement was admitted into evidence in which she stated that Mikechel Brooker, Alonzo Elison, and Ferock Smith shot Barry Jacobs (N.T. 7/10/12, 110-158). A second witness, Jeffrey Gould, identified Alonzo Elison as the shooter who stood over Jacobs and shot him in the head (N.T. 7/11/12, 138-180). A third witness, Eleanore Sampson, testified that she did not remember the events after the shooting and her statement to police was admitted into evidence: she

said that she let Brooker, Elison and Smith into her apartment because they gave her drugs; she overheard their conversation in which Elison said that he shot the victim, Barry Jacobs. Brooker and Smith had handguns (N.T. 7/11/12, 212-263). All three Commonwealth witnesses recanted their statements at trial and there was no physical evidence linking Mikechel Brooker to the homicide.

Prior to his sentencing, Mikechel Brooker filed a motion challenging the constitutionality of the Act 204 of 2012. That statute was hastily passed in light of the United States Supreme Court's decision in Miller because Miller had invalidated the prior statute that imposed a mandatory life sentence for juveniles convicted of first degree murder. The trial court found the Act to be constitutional and imposed the mandatory minimum sentence of thirty-five years as required under the new law (N.T. 12/17/12, 16, 61). Act 204 was passed after the date of the incident for which Mikechel Brooker was convicted.

#### 4. Reasons for granting this Allowance Of Appeal.

### **1. ACT 204 OF 2012 VIOLATES ARTICLE III, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION BECAUSE THE ORIGINAL PURPOSE OF THE BILL WAS LOST BECAUSE OF DRAMATIC CHANGES DURING THE LEGISLATIVE PROCESS.**

Senate Bill 850, which became Act 204 of 2012, violated Article III, Section

1 of the Pennsylvania Constitution because the bill's original purpose was lost because of dramatic alterations it underwent during the legislative process. Initially introduced in 2011, the original purpose of S.B. 850 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. S.B. 850, P.N. 868 (March 16, 2011). However, its purpose radically shifted in September of 2012, when the legislature gutted the provisions dealing with juvenile cyberbullying, sexting and right to counsel --- and added completely new, unrelated provisions dealing with sentencing penalties in adult court for juveniles convicted of first or second degree murder, amendments to the parole statute and provisions regarding the Office of the Victim Advocate.

Article III, Section 1 of the Pennsylvania Constitution provides:

No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.

Pa. Const., Art III, § 1.

To determine whether legislation violates Article III, Section 1, the Court must conduct a two-part inquiry. Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383 (2005) (hereinafter “P.A.G.E.”). First, the Court must compare the legislation's original purpose and compare it to the final



purpose to determine whether there has been an alteration or amendment that changed the original purpose. Second, the Court must determine whether the title of the legislation in its final form is deceptive.

The “comparison” prong requires that the challenged legislation must be viewed in reasonably broad terms. P.A.G.E., 583 Pa. at 318. This Court imposed this limiting principle because of the expectation that legislation will transform during the enactment process, and because of this Court's wariness in substituting its judgment for that of the legislature. *Id.* In determining a bill's reasonably broad original purpose, the reviewing court should “hypothesize, based on the text of the initial bill . . .” *Id.* at 409.

Here, S. B. 850 fails to satisfy the first requirement of the P.A.G.E. inquiry. Even when viewed in reasonably broad terms, the original purpose of S.B. 850 was to amend the Crimes Code only to criminalize certain behavior by juveniles as well as to better provide for the well being of juvenile offenders. *See* S.B. 850, P.N. 868. Specifically, the original bill's primary purposes were to criminalize cyberbullying by minors and protect juvenile offenders from inappropriate placement and sentencing.

The final version of S.B. 850 abandoned the bill's initial purpose. With the cyberbullying, sexting and right to counsel provisions deleted entirely, *see* S.B. 850, P.N. 2475 (October 15, 2012), the bill's final version instead aimed at amending the

Crimes Code in light of Miller v. Alabama to create an entirely new sentencing scheme in adult court for juveniles convicted of first or second degree murder, amending the parole statute to extend the time between reviews for juveniles coming before the adult Parole Board, and amending provisions regarding the Office of the Victim Advocate. The original bill dealt only with juveniles in juvenile court; the final bill deleted these provisions and focused on adult sentencing and parole procedures in adult court for juveniles convicted of first or second degree murder.

While the Superior Court recognized the problems with the legislature's actions, it concluded that this was permitted because the original and final bills had each dealt with the original purpose of "regulating delinquency of juveniles." Commonwealth v. Brooker, \_\_\_ A.3d \_\_\_, 2014 WL 4696227, slip opinion at 18 (Pa. Super., 2014). However, this formulation by the Superior Court demonstrates precisely why it got it wrong. The original bill dealt with juvenile delinquency and its regulation by establishing crimes dealing with cyberbullying, sexting and appointment of counsel in juvenile court. Contrary to the Superior Court's declaration, the final bill did not deal with "regulating delinquency of juveniles" at all, but instead dealt with sentencing in adult court for juveniles convicted of first or second degree murder. A juvenile convicted in adult court of first or second degree

murder is not considered a juvenile delinquent, but instead is considered an adult criminal and is, accordingly, sentenced to adult punishment.

Whether there had been a violation of the “original purpose” requirement is an appropriate one for this Court’s consideration. The constitutional prohibition against gutting a bill and substituting something new was violated here. Act 204 violated Article III, section 1 of the Pennsylvania Constitution.

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

Act 204 of 2012 made extraordinary changes to Pennsylvania's sentencing statutes in a single omnibus bill that had no connection to the bill's original, narrow focused purpose. Rather than starting fresh with a new bill, House lawmakers intentionally crafted this sentencing statute as an amendment to an already existing bill, allowing them to skirt the legislative process and, thereby, bypass the Senate Judiciary Committee. Moreover, while Act 204 as finally enacted includes some provisions related to practices in the juvenile justice system, it also includes entirely new sentencing provisions for certain homicide crimes committed by juveniles who are not prosecuted in the juvenile system, but who are prosecuted and convicted in the adult criminal justice system. It, therefore, addresses two entirely distinct subjects.

Including such diverse and distinct topics in one piece of legislation violates Article III, Section 3 of the Pennsylvania Constitution which, as this Court has recently explained, was adopted to effectuate “the electorate’s overall goal of curtailing legislative practices that it viewed with suspicion.” Commonwealth of Pennsylvania v. Neiman, 84 A.3d 603, 611 (Pa., 2013) (quoting City of Philadelphia v. Commonwealth, 838 A.2d 566, 586 (Pa., 2003)).

As this Court has observed, the purpose of this constitutional requirement is to prevent, “Last-minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions to bills in the amendment process.”. City of Philadelphia v. Commonwealth, 838 A.2d at 589.

Section 3 is explicit:

No bill shall be passed containing more than one subject which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.

Pa.Const., Art. III, Section 3.

This “single subject” provision expressly limits the mechanisms through which the legislature can pass laws as a means to safeguard the transparency of the

deliberative process. *See, e.g. City of Philadelphia, supra* at 586. The constitutional mandates' goal is to provide for "a more open and deliberative state legislative process, one that addresses the merits of legislative proposals in an orderly and rational manner." *Id.* at 589.

Additionally – and of particular relevance here – “[t]he requirement that each piece of legislation pertain to only one subject creates a greater likelihood that it will receive a more considered and thorough review by legislators than if it is aggregated with other pieces of legislation pertaining to different topics into a single ‘omnibus bill,’ thereby creating a ‘jumbling together of incongruous subjects.’” *Neiman, supra* at 612 (quoting *Commonwealth v. Barnett*, 48 A. 976, 977 (Pa. 1901)).

The original version of S.B. 850, P. N. 868 (March 16, 2011) created the new juvenile offenses of cyberbullying and sexting as well as amended Title 42 to, *inter alia*, address the prosecution of summary offenses, right to counsel and a presumption of indigency for juvenile defendants. Throughout 2011, only relatively minor changes to these key substantive provisions were made (*See* P.N. 1043, P.N. 1582 and P.N. 1691). For the first time on September 25, 2012, the bill was amended to include entirely new sentencing provisions for juveniles convicted of homicide as well as amendments to the parole statute (P. N. 2418); on October 15, 2012, all of the cyberbullying provisions were deleted, the right to counsel provisions were deleted,

and new provisions regarding victims were added to the new sentencing and parole revisions (P. N. 2475). The bill was voted on this same day and enacted into law. Plainly, the enactment of Act 204's sentencing provisions with such haste runs afoul of this Court's further admonition that:

the single subject requirement proscribe[s] the inclusion of provisions into legislation without allowing for 'fair notice to the public and to legislators of the existence of the same.' (citation omitted). It thus provides a vital assurance to residents of this Commonwealth that they will be able to make their views and wishes regarding a particular piece of legislation known to their duly elected representatives *before* its final passage, and it concomitantly ensures that those representatives will be adequately apprised of the full scope and impact of a legislative measure before being required to cast a vote on it.

Neiman, *supra* at 612. (emphasis in original).

The Superior Court rejected the argument "that the Single Subject Clause inherently requires the General Assembly to change the juvenile division and criminal division in different legislation when each pertains to minors." Commonwealth v. Brooker, slip opinion at 23. However, adding provisions to the adult criminal system to deal with first and second degree murder sentencing for crimes committed by a juvenile is a completely different subject than how to treat juveniles in the juvenile system. Each system has different operating premises and lumping them together as the legislature did here, while arguably expedient, violates the single subject rule.

The decision of the United States Supreme Court in Miller created a need for the legislature to devise a new sentencing scheme for those juveniles convicted in adult court of first or second degree murder. However, taking a bill already in place that dealt with issues relating to juveniles in juvenile court and then removing some of those juvenile issues and adding provisions dealing with sentencing in adult court of juveniles convicted of murder is not a constitutional response. No “reasonable” common purpose can be assigned to the final bill; no proper amount of time was afforded for true notice and deliberation. These factors render Act 204 unconstitutional.

**3. 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.**

Recent United States Supreme Court precedent has established that children convicted of crimes – even serious and violent offenses – are categorically less culpable than adults and less deserving of society’s harshest punishments. In Miller v. Alabama, 567 U.S. \_\_\_, 132 S. Ct. 2455, 2469 (2012), the United States Supreme Court held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.” Acknowledging

the unique status of juveniles and reaffirming its recent holdings in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. \_\_\_, 130 S. Ct. 2011 (2010), and J.D.B. v. North Carolina, 564 U.S. \_\_\_, 131 S. Ct. 2394 (2011), the Court in Miller held that “children are constitutionally different from adults for purposes of sentencing,” *id.* at 2464, and therefore the “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Id.* at 2466.

Miller was explicit in articulating the Court’s rationale for its holding: the mandatory imposition of sentences of life without parole “prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change,’ Graham v. Florida, 130 S. Ct. 2011, 2026–27, 2029–30 (2010), and runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” Miller at 2460. The Court grounded its holding “not only on common sense . . . but on science and social science as well,” *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted “that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’” *Id.* at 2464-65 (quoting Graham, 130 S. Ct., at



2027, Roper, 543 U.S., at 570)). Importantly, the Court specifically found that none of what Graham “said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific.” *Id.* at 2465. Accordingly, the Court emphasized “that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Id.*

Relying on Graham, Roper, and other decisions on individualized sentencing, the Court found “that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” *Id.* at 2468. Mandatory life without parole sentences are unconstitutional as applied to juveniles because “[b]y making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.* at 2469. Moreover, in the non-homicide context, Graham requires that states must provide children “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” 130 S. Ct. at 2030.

Act 204, while eliminating *mandatory life without parole* sentences for children convicted of murder, still runs afoul of Miller’s requirement of individualized sentencing and Graham’s requirement that children have a meaningful opportunity for release. Under Act 204, children 15 and older who are convicted of

first degree murder face a mandatory *minimum* sentence of 35 years to life. The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See, e.g., United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir., 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (Through June 30, 2012) at A-8, *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2012\\_3rd\\_Quarter\\_Report.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf). Act 204's mandatory minimum sentence of 35 years is virtually equivalent to a life without parole sentence and, therefore, neither provides a meaningful alternative to life without parole nor complies with the requirements of Miller that sentences be tailored to a child's individual level of culpability.

By establishing a mandatory minimum, the statute unconstitutionally prevents the sentencer from fashioning an appropriate sentence based on a child's individual level of culpability and "disregards the possibility of rehabilitation even when the circumstances most suggest it." *See Miller, Id.* at 2468. Moreover, because Act 204 precludes juveniles sentenced under this new scheme from petitioning the parole board for release sooner than five years after they have been denied parole, the sentence will easily become a life sentence for most juveniles. Further, because children age 15 and older face their *earliest* possible parole eligibility just four years

before their average prison life expectancy, Act 204 does not provide a “*meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation” as Graham requires. Graham, *Id.* at 2030 (emphasis added).

Finally, Act 204 disregards Miller’s finding that “appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon” or “rare.” Miller, *supra* at 2469. Miller creates a presumption *against* imposing juvenile life without parole sentences. Act 204 ignores this presumption and provides no safeguards or guidelines to ensure that imposition of juvenile life without parole sentences will be “uncommon” or “rare.”

In rejecting this argument, the Superior Court relied upon its own decision in Commonwealth v. Lawrence, \_\_\_ A.3d \_\_\_ (2014), *allocatur pending*, 478 E.A.L. 2014 but here there are two “cruel and unusual” punishment questions worthy of consideration by this Court. Do Miller, Graham and Roper taken together bar mandatory sentencing for juveniles convicted of murder because mandatory sentences preclude consideration of mitigating factors in the juvenile’s background? Even if mandatory sentences were permitted, is a 35 year mandatory minimum unconstitutionally excessive? The Superior Court said it was unwilling to read such conclusions into the decisions of the United States Supreme Court. This Court should.

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

Both the United States and Pennsylvania Constitutions prohibit *ex post facto* laws. *See* U.S. Const. Art. I, Section 10; Pa.Const. Art. 9, Section 17. The Ex Post Facto Clauses prohibit subsequent laws from inflicting greater punishments than the punishment available for the crime at the time it was committed. *See Commonwealth v. Story*, 497 Pa. 273, 300 (1981). At the time of Mikechel Brooker's offenses and subsequent convictions on July 17, 2012, no constitutional statutory sentence existed for him. *See Miller*, 132 S. Ct. 2455 (issued on June 25, 2012 and striking mandatory life without parole sentences for juveniles). Because no other constitutional sentencing statute had been enacted, the only constitutional sentence available to Mikechel Brooker at the time of his crime and conviction was the sentence for the most serious lesser included offense, which in this case was the sentence for third degree murder, punishable by imprisonment for up to forty years. Hence Act 204's imposition of a minimum 35 years to life or life without parole constitutes an unconstitutional *ex post facto* law.

This Court should grant review to determine whether Mikechel Brooker's sentence must be vacated and the matter remanded for a new sentencing hearing.<sup>1</sup>

WHEREFORE, for all of the foregoing reasons, this Court should grant the instant Petition for Allowance of Appeal and reverse the order of the Superior Court.

Respectfully submitted,

/S/

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<sup>1</sup> Had Mikechel Brooker been sentenced before Act 204 had passed, the only sentence available would have been a maximum 40-year sentence for third degree murder. He should not be penalized because his sentencing occurred after Act 204 had been signed into law.