IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 2564 EDA 2012

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

MIKECHAL BROOKER,
Appellant

COMMONWEALTH'S BRIEF AS APPELLEE

Defense Appeal from the December 17, 2012 Judgments of Sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Imposed on Docket Number CP-51-CR-0006874-2009.

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

(Questions unanswered by the court below.) [1]

I. Where an eyewitness saw defendant's companion shoot the victim in the head and chest and then saw defendant shoot the victim in the head after he fell, was the evidence sufficient to prove specific intent for first-degree murder?

II. Did the trial court abuse its discretion by refusing a mistrial when the prosecutor asked a witness whether defendant sold drugs, where the question was unanswered, the court instructed the jury to disregard it, a witness had testified that defendant supplied her with drugs, and an eyewitness stated that that codefendant tried to sell her drugs just before defendant and his companions gunned down the victim, a rival dealer?

III. Is Act 204 of 2012, which includes penalties for juveniles convicted of murder, constitutional?

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[1] There is no trial court opinion. The judge retired and the Court of Common Pleas filed a "no opinion" letter.

COUNTER-STATEMENT OF THE CASE

This is defendant's appeal from judgments of sentence imposed by the Honorable Carolyn Engel Temin after a jury found him and two codefendants guilty of first-degree murder and related offenses for shooting and killing Barry Jacobs, Jr. on July 18, 2008.

The victim sold drugs in the Liddonfield housing project in northeast Philadelphia. On July 18, around 2:00 a.m., Antoinette Gray went to buy drugs from the victim, her regular dealer. Codefendant Alonzo Ellison approached Ms. Gray first, but she did not want "the garbage" he was selling. She instead bought a "dime bag"—$10 worth of crack cocaine—from the victim. Moments later, while Ms. Gray was only about 15 feet away from the victim, she saw defendant (nicknamed "Doughnut" or "AI"), together with codefendants Ellison ("Butter) and Ferock Smith ("Worm"), walk up to the victim. Ms. Gray recognized the three young men. They were friendly with her son; she had known them for years, and saw them nearly every day. Codefendant Smith pointed a .45-caliber gun at the unarmed victim and shot him several times in the head. The victim fell. Defendant, with a .32-caliber revolver, and codefendant Ellison, 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).

Ms. Gray went to her friend Eleanore Sampson's house and told her what she had seen. The next day, the three defendants went to Ms. Sampson's house. "They were high on weed and … they started talking about it." Defendants "were laughing about how he fell like a fat ass … they thought it was funny." Defendants still had their weapons, which they attempted to conceal in Ms. Sampson's house (N.T. 7/10/12, 127-29).

A few days later, Ms. Gray, although "scared," gave the police a statement describing in detail what she had seen. She told police that she saw that all three defendants had guns and that all three shot the victim. She identified each defendant's photograph. She told police about the events at Ms. Sampson's house, and which defendant had which gun: Defendant used a .32-caliber revolver, codefendant Ellison a 9-mm. weapon, and codefendant Smith a .45-caliber weapon. She signed every page of her statement and each of the photographs. She testified at a preliminary hearing, consistent with her statement, and identified all three defendants in court. At trial, however, she professed not to remember anything at all about the murder, defendants' appearance at Ms. Sampson's house the next day, her statement, the preliminary hearing, or even what she had done the morning that she testified at trial. She claimed not to recognize anyone in the courtroom. She did, however, identify her signatures on the photographs and on her verbatim

statement, with which she was confronted before the jury (N.T. 7/10/12, 115-44; 172; 7/11/12, 50-67, 75).

Jeffrey Gould witnessed some of the shooting from his living room window. He had just passed the victim, who was a friend of his and who was standing outside his home. A few minutes after entering his apartment, Mr. Gould heard gunshots. He ducked and went to a window to look out. He heard someone say, "go back and shoot him in the head," and saw codefendant Ellison stand over the victim and shoot him in the head. Although the witness identified Ellison in a statement to police, at trial he claimed, "I don't know who it was." He admitted that he knew Ellison from the neighborhood, and identified him in the courtroom; he also recognized and identified defendant and codefendant Smith. Mr. Gould told police, "Ferock [Smith] and Alonzo [Ellison] are like brothers. If you had a problem with Ferock, then you had a problem with Alonzo." Mr. Gould signed every page of his statement and the photographs of each defendant, as well as photographs of friends of theirs whom he named in the statement. At trial, Mr. Gould claimed to remember little of his statement, and was supposedly unable to recall identifying anyone. Although Mr. Gould testified that police came looking for him due to outstanding warrants, and took him from his home in handcuffs, other evidence established that this was untrue. The police encountered him during a routine neighborhood survey. He volunteered information, willingly went to the Homicide Unit, had only an out-

standing scofflaw warrant for traffic violations, and had no pending charges or bench warrants when police interviewed him (N.T. 7/11/12, 138-73, 206-07, 292-317; 7/12/12, 232-33).

Eleanore Sampson did not see the shooting. She heard the gunshots and came outside afterwards. She knew the victim and the three defendants as drug dealers; she bought from all of them. At trial, she claimed that codefendant Ellison was asleep at her house at the time of the murder and that all three defendants had been at her house earlier that day, before the murder; in her statement to police, however, she said that defendants came to her house after the murder. All three had guns, "and the three of them were talking. I got up and went into the kitchen, and that's when I heard Worm [codefendant Smith] say that he shot Barry. And then I heard [defendant] say, 'That's what he gets.'" Defendant and codefendant Smith left; before they departed, Ellison gave Smith his 9-mm. weapon. Ellison was still in Ms. Sampson's house when police arrived the following morning. When detectives knocked and announced their presence, Ellison quietly backed out through a rear door, only to be apprehended by a waiting officer who discovered 10 packets of crack cocaine, a bag of marijuana, and $822 in cash in Ellison's pockets. Police found defendant's gun, the .32-caliber revolver, under the right side of a sofa bed where he had been sitting the night before. The gun was unloaded, but in a cocked position; a live round was found nearby. Police also found five live rounds in a

bedroom; Ms. Sampson told police that defendant had gone into the bedroom and attempted to hide something in her closet. Ms. Sampson signed each page of her statement, and defendants' photographs, but at trial claimed to recall only "vaguely" what she told police (N.T. 7/11/12, 212-48, 267-76; 7/12/12, 15-24, 86-88, 94-96, 118).

An autopsy revealed that the victim suffered seven gunshot wounds, fired from a distance of 2-½ feet or more. Two of wounds—one to the chest and one to the face—would have been almost immediately fatal. The other wounds also could have caused death as a result of significant blood loss. Three bullets were recovered from the victim's body (N.T. 7/12/12, 37-54).

About a week after the murder, members of the Fugitive Task Force spotted defendant and codefendant Smith sitting on steps at a street corner. When the officers pulled up, defendants ran off in opposite directions, but were quickly apprehended. As codefendant Smith ran, his pants were falling down and he tripped. Police discovered a loaded 9-mm. gun tucked in his waistband (N.T. 7/12/12, 139-47, 156).

Crime scene investigators recovered six fired cartridge casings and two bullet fragments from the scene. Five of the casings were .380 caliber, bore unusual rectangular firing pin impressions, and were fired from the same weapon. The sixth fired cartridge casing was .45 caliber. The bullet fragments had a blood-like sub-

stance on them, were approximately .32 caliber, and were unsuitable for microscopic analysis. Two of the bullets found in the victim's body were .380 or 9-mm (the ballistics expert explained that this ammunition is the same size); one was .45-caliber. The .32-caliber revolver found in Ms. Sampson's apartment had gunshot residue in the barrel and all six chambers, indicating that it had recently been fired, and the hammer mechanism was jammed; the bullet fragments from the scene were consistent with this weapon. The 9-mm. semiautomatic found on codefendant Smith also had gunshot residue. The cartridge casings from the scene were not fired by this gun. Police did not recover any other weapons. None of the defendants was licensed to carry a firearm (N.T. 7/12/12, 198-220, 231).

On July 16, 2012, the jury convicted defendant and his codefendants of first-degree murder, criminal conspiracy, possession of an instrument of crime, and possession of a firearm without a license. With respect to defendant and codefendant Smith, both juveniles at the time of the murder, Judge Temin deferred sentencing in light of the recent United States Supreme Court decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), holding as unconstitutional mandatory life imprisonment without parole for juveniles. On December 17, 2012, the court sentenced defendant to 35 to 70 years imprisonment (N.T. 12/17/12, 61).[2] This appeal followed.

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[2] Not 35 to life, as misstated by defendant in his brief (Brief for Appellant, 5).

SUMMARY OF ARGUMENT

An eyewitness saw defendant stand over the victim and shoot him with a .32-caliber revolver. The witness's statement alone was sufficient to prove specific intent. It does not matter whether defendant personally succeeded in causing a fatal wound. By firing his weapon at the victim's head and chest, he clearly intended to do so. Moreover, he acted in concert with two conspirators, and all three assailants shot the victim in the head and chest and gleefully boasted of their crime.

Defendant is not entitled to a new trial based on the trial court's refusal to grant a mistrial following the prosecutor's unanswered question about defendants' drug dealing. The question was proper. The court nonetheless sustained defendants' objections and instructed the jury to disregard the question. Moreover, any error was harmless because another witness had already testified that defendant regularly supplied her with drugs.

Defendant's challenges to the constitutionality of Act 204, which included sentencing provisions for juveniles convicted of murder, fail. The act contained numerous juvenile justice provisions—that was it original and unchanged purpose, and its single subject. The new provisions replaced a statute mandating life without-parole sentences; the new scheme is consistent with the Eighth Amendment and, because it decreases rather than increases penalties, does not violate *ex post facto* clauses.

ARGUMENT

I. Evidence that defendant joined his coconspirators in shooting the victim repeatedly in vital parts of the body was sufficient to prove a specific intent to kill.

Defendant argues that the evidence was insufficient to prove that he specifically intended to kill the victim, and was therefore insufficient to prove first-degree murder (Brief for Appellant, 11). But an eyewitness saw defendant stand over the victim and shoot him with a .32-caliber revolver. The evidence further showed: defendant acted in concert with his codefendants, who also shot the victim in the head and chest; the three defendants gleefully admitted their crimes; defendant attempted to hide his gun; the presence of gunshot residue indicated that that weapon had recently been fired; the .32-caliber bullet fragments found at the scene were consistent with defendant's weapon; and defendant and one his codefendants fled from police. The eyewitness account alone was sufficient to prove defendant's guilt. *Commonwealth v. Thomas*, 717 A.2d 468, 479 (Pa. 1998) ("a positive, unqualified identification by one witness is sufficient for conviction"). When all the evidence together with the reasonable inferences therefrom is viewed in the light most favorable to the Commonwealth, *Commonwealth v. Eichinger*, 915 A.2d 1122, 1130 (Pa. 2007), defendant's specific intent was clearly established beyond a reasonable doubt.

"To establish the offense of first-degree murder, the Commonwealth must prove the fact of the killing and the defendant's involvement, and it must establish malice and specific intent to kill on the part of the defendant." *Commonwealth v. Sanchez*, 907 A.2d 477, 486 (Pa. 2006). "The Commonwealth can prove the specific intent to kill through circumstantial evidence." *Commonwealth v. Miller*, 819 A.2d 504, 509 (Pa. 2002). "[T]he law permits the fact finder to infer that one intends the natural and probable consequences of his acts." *Commonwealth v. Jackson*, 955 A.2d 441, 444 (Pa. Super. 2008). Thus, "[s]pecific intent to kill can be proven where the defendant knowingly applies deadly force to the person of another." *Miller*, 819 A.2d at 509; *Commonwealth v. Cruz*, 919 A.2d 279, 281 (Pa. Super. 2007) ("it is well-established in Pennsylvania that a fact finder may infer malice and a specific intent to kill from the use of a deadly weapon upon a vital part of the victim's body").

Here, all three defendants repeatedly fired deadly weapons at the victim's head and torso. The medical examiner testified that any of the gunshot wounds could have been fatal. Yet defendant claims that because the first shots that felled the victim were fired by codefendant Ellison, his use of gun to shoot the victim simultaneously with codefendant Smith somehow did not amount to murder, but instead showed his "mere presence" (Brief for Appellant, 13). He bases this conclusion on the lack of physical evidence definitively proving that he personally

inflicted a fatal wound. But the evidence proved that defendant willingly participated in the murder. He fired his gun at the victim—Ms. Gray saw him do so and saw the flashes from his gun. Further, he and his cohorts admitted their crime and shared motive. According to defendant, "That's what he gets." Defendant concealed his .32-caliber weapon under a sofa bed at Ms. Sampson's home; the gun had been recently fired, and multiple bullet fragments consistent with this weapon were found at the scene. Defendant's present claim that there is no evidence that he acted intentionally understandably (but improperly) avoids mention of the actual evidence.

Even if it were true, as defendant suggests, that only his codefendant fired the fatal shots (and the medical examiner's testimony, ballistics evidence, and eyewitness accounts disprove this), defendant would remain responsible for the murder, because the evidence showed that he shot at the victim, acting in concert with his codefendants. It is irrelevant whether defendant personally succeeded in inflicting a fatal wound. *See Commonwealth v. Soto*, 693 A.2d 226, 229 (Pa. Super. 1997) (where, when appellant shot him, victim was close to death as a result of gunshot wounds previously inflicted by appellant's cousin, appellant's argument that his actions were not a substantial factor because "the victim was doomed to death . . . is specious and outlandish"; appellant and cousin were both accountable).

Moreover, had defendant not fired a shot at all (and Ms. Gray's observations contradict this), he was not "merely present." He had a gun, he surrounded the victim, he fled with his coconspirators, and he articulated the shared motive for the shooting: "That's what he gets." He clearly acted in concert with his codefendants, and was guilty of first-degree murder as a co-conspirator. *See Commonwealth v. Lambert*, 795 A.2d 1010, 1016 (Pa. Super. 2002) ("Once there is evidence of the presence of a conspiracy, conspirators are liable for acts of co-conspirators committed in furtherance of the conspiracy"); *Commonwealth v. Galindes*, 786 A.2d 1004, 1012 (Pa. Super. 2001) (each member of the conspiracy may be held criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy).[3]

II. The trial court did not abuse its discretion by refusing a mistrial based on the prosecutor's single unanswered question about defendants' drug dealing.

Defendant claims that the trial court should have granted a mistrial when the prosecutor asked a detective, "Based on information you received from witnesses—were the three defendants also actively dealing in the same area?" (N.T. 7/12/12, 131). The prosecutor had just asked the same question about the victim, and the witness answered yes. But the defense objected to the question about the

[3] Defendant does not challenge the sufficiency of the evidence proving conspiracy.

defendants. The court sustained the objection, told the jury to disregard the question, and the witness did not answer it. The court subsequently denied defendants' request for a mistrial. This was not error, as mistrial was unwarranted. Further, Ms. Sampson had told the jury the day before that she knew each of three defendants to be a drug dealer; hence, any error was harmless beyond a reasonable doubt.

The decision whether or not to grant a mistrial is within the trial court's discretion and will not be reversed on appeal absent abuse of that discretion; review is limited to whether the trial court abused its discretion. *Commonwealth v. Simmons*, 662 A.2d 621, 634-35 (Pa. 1995); *Commonwealth v. Sattazahn*, 631 A.2d 597, 607 (Pa. Super. 1993). A reviewing court must determine whether defendant was deprived of a fair trial, not a perfect one. *Commonwealth v. LaCava*, 666 A.2d 221, 231 (Pa. 1995). "On appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Commonwealth v. Tejeda*, 834 A.2d 619, 623 (Pa. Super. 2003).

Because mistrial is "an extreme remedy," it is granted only when the alleged prejudicial event is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial. *Commonwealth v. Boczkowski*, 846 A.2d 75, 94 (Pa. 2004); *Commonwealth v. Begley*, 780 A.2d 605, 624 (Pa. 2001); *Commonwealth v. Johnson*, 668 A.2d 97, 103 (Pa. 1995). A mistrial is not necessary where cautionary in-

structions are adequate to overcome any possible prejudice. *Begley*, 780 A.2d at 624; *Commonwealth v. Spotz*, 716 A.2d 580, 593 (Pa. 1998).

As a preliminary matter, there was nothing improper about the prosecutor's question, and the relief granted was already more than defendants were entitled to. The question was asked during the prosecutor's redirect examination of the assigned homicide detective. Codefendant Ellison's counsel had asked the detective, "And you knew from your investigation that [the victim] was actively dealing drugs at that location; is that correct, sir?" (N.T. 7/12/12, 117). After the witness responded in the affirmative, counsel asked about an argument that the victim had reportedly been having about $1500 with someone on the telephone just before he was shot. Codefendant Smith's counsel followed up: "understanding that [the victim] was a drug dealer, and understanding that he was involved with an argument on the phone about $1,500, was one of the scenarios that you heard was that he was killed over the $1,500?" (N.T. 7/12/12, 119). There was nothing wrong with these questions; defendants were entitled to ask about the police investigation into possible motives since evidence of motive "is always admissible." *Commonwealth v. Costanzo,* 410 A.2d 324, 327 (Pa. Super. 1979); *see Commonwealth v. Ramos*, 532 A.2d 22, 23 (Pa. Super. 1987) (evidence of defendant's drug dealing properly admitted where it supplied motive for murder).

The prosecutor was entitled to do the same. The prosecutor permissibly responded to the defense cross-examination with a question that also pointed to drug dealing by defendants as a possible motive. *Commonwealth v. Hall*, 565 A.2d 144, 149 (Pa. 1989) (no abuse of discretion in allowing evidence of Hall's drug dealing and evidence that victims recently cheated him in drug deal, because it was relevant to motive for murders). This question was grounded in the evidence—Ms. Gray testified the day before that she had rejected Ellison's offer to sell her drugs, and Ms. Sampson testified that all three defendants regularly supplied her with drugs—and was an appropriate response to the issue raised on cross-examination. *Commonwealth v. Gelber*, 594 A.2d 672, 680 (Pa. Super. 1991) (evidence of defendant's drug dealing properly admitted to rebut defense theory of case and to show motive for killing); *Commonwealth v. Stern*, 573 A.2d 1132, 1137 (Pa. Super. 1990) (prosecutor's comments as to drug-related violence permissible where evidence had been presented that drugs supplied motive for the killing). *See Commonwealth v. Murphy*, 657 A.2d 927, 933 n. 3 (Pa. 1995) (on redirect, Commonwealth entitled to rebut inference raised by defense on cross-examination); *Commonwealth v. Fransen*, 42 A.3d 1100, 1117 (Pa. Super. 2012) ("when a party raises an issue on cross-examination, it will be no abuse of discretion for the court to permit re-direct on that issue in order to dispel any unfair inferences").

In any event, even if the single question posed by the prosecutor had been improper, it did not warrant aborting the trial. A prosecutor's questions are, of course, not evidence, and the witness did not answer the question; thus, any conceivable prejudice was necessarily minimal and fleeting. *Commonwealth v. Brawner*, 553 A.2d 458, 463 (Pa. Super. 1989) (improper question not prejudicial where objection sustained before witness answered and jury instructed to disregard question). For this reason, the courts of this Commonwealth routinely reject requests for new trials based on mere unanswered questions. *See e.g., Commonwealth v. Bridges*, 757 A.2d 859, 879 (Pa. 2000) ("we fail to see how the unanswered hypothetical questions prejudiced Appellant so that he would be entitled to relief"); *Commonwealth v. Tilley*, 595 A.2d 575, 580 (Pa. 1991) (where trial court sustained objection and witness did not answer question, Tilley not prejudiced and not entitled to mistrial); *Commonwealth v. Williams*, 570 A.2d 75, 81 (Pa. 1990) (where witness did not answer question, Williams not prejudiced and not entitled to new trial); *Commonwealth v. Garcia*, 479 A.2d 473, 479-80 (Pa. 1984) (prosecutor's question could not have prejudiced Garcia where witness did not answer it); *Commonwealth v. Shotwell*, 717 A.2d 1039, 1044 (Pa. Super. 1998) (where witness did not answer questions, right to remain silent not implicated and new trial not warranted); *Commonwealth v. Fielder*, 612 A.2d 1028, 1036 (Pa. Super. 1992) (prosecutor's repeated questions not prejudicial where objections were

sustained and questions remained unanswered, even though prosecutor's persistence led court to warn that his actions were disrespectful to the court and he therefore was coming close to mistrial); *Commonwealth v. Lowry*, 560 A.2d 781, 785 (Pa. Super. 1989) (where witness did not answer question, Lowry not prejudiced and mistrial properly refused); *Commonwealth v. Hoffman*, 447 A.2d 983, 986 (Pa. Super. 1982) (where witness did not answer question, mistrial properly refused); *Commonwealth v. Waters*, 417 A.2d 226, 228 (Pa. Super. 1979) (same). Indeed, defendant fails to furnish this Court with a single case where, contrary to this long-standing authority, a defendant obtained a new trial solely on the basis of an unanswered question.

In addition, the trial court instructed the jury to disregard the question. The trial court's prompt and direct instruction cured any conceivable prejudice to defendant. *See Commonwealth v. Hall*, 701 A.2d 190, 199 (Pa. 1997) (prosecutor's reference to Hall's post-arrest silence cured by trial court's instructions to jury); *Commonwealth v. Melvin*, 548 A.2d 275, 278 (Pa. Super. 1988) (trial court's cautionary instruction effectively minimized prejudice). A jury is presumed to have followed the trial court's instructions. *Commonwealth v. DeJesus*, 860 A.2d 102, 110-11 (Pa. 2004); *Commonwealth v. Speight*, 854 A.2d 450, 458 (Pa. 2004). There is no evidence that defendant's jury was uniquely incapable of following instructions.

Moreover, any error was harmless since the jury had already heard that defendants were drug dealers. The day before, Ms. Sampson testified, without objection, that all three defendants supplied her with drugs:

Q. [By the prosecutor] How did you know Butter [codefendant Ellison]?

A. Through drug activity.

Q. What do you mean?

A. I would get drugs from him.

Q. And would you also get drugs from him inside the projects?

A. No. Mostly I would have him come to my house.

Q. Did you know someone by the name of AI or Doughnut [defendant]?

A. Yes.

Q. Do you see that person in the courtroom today?

A. I think this one on the end in the blue shirt.

> [Prosecutor]: Your Honor, for the record, identifying the defendant, Mikechel Brooker.

Q .How did you know Doughnut or AI?

A. For the same thing, for the same reasons, drugs.

Q. Would you get drugs from Doughnut?

A. Yes.

Q. Did you also know somebody by the name or that you called Worm [codefendant Smith]?

A. Yes.

Q. Do you see Worm in the courtroom today?

A. Yes, the one with purple.

> [Prosecutor]: Your Honor, identifying the defendant, Ferock Smith, by point of finger and description of clothing.

Q. And how did you know Worm?

A. Through the same reasons. For the same reasons.

(N.T. 7/11/12, 213-15).

Under these circumstances, the court's ruling refusing a mistrial based on a question that restated already-introduced evidence, even if error, was harmless beyond a reasonable doubt. *See Commonwealth v. Watson*, 945 A.2d 174, 177 (Pa. Super. 2008) (where "the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence," error is harmless) (quoting *Commonwealth v. Passmore,* 857 A.2d 697, 711 (Pa. Super. 2004)); *Commonwealth v. West*, 834 A.2d 625, 634 (Pa. Super. 2003) ("Not all errors at trial, however, entitle an appellant to a new trial, and [t]he harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial"). Defendant is not entitled to relief.

III. Act 204 of 2012 is constitutional.

On October 23, 2012, the General Assembly adopted new sentencing provisions for juveniles convicted of first- or second-degree murder. Instead of the prior mandatory life-without-parole sentence, juveniles convicted of first-degree murder

who are under age 15 at the time of the offense will be sentenced to at least 25 years imprisonment, while those 15 and older, will be subject to a 35-year minimum. This new sentencing scheme, codified at 18 Pa.C.S. § 1102.1, was part of comprehensive juvenile justice legislation, Act 204 of 2012, which defendant challenges as unconstitutional for several reasons. He alleges: that when the legislature added the sentencing provisions, it violated the "original purpose" and "single subject" rules; that the Act violates the Eighth Amendment ban on cruel and unusual punishment; and that the new, reduced sentences for juveniles violate the *ex post facto* clauses of the state and federal constitutions. None of these challenges is meritorious.

In claiming that Act 204 is unconstitutional on its face defendant shoulders an imposing burden. *Pennsylvania School Boards Ass'n, Inc. v. Commonwealth Ass'n of School Administrators,* 805 A.2d 476, 479 (Pa. 2002) (because all doubts are resolved in favor of sustaining a statute, party challenging a constitutionality bears a heavy burden of persuasion). "A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid." *Clifton v. Allegheny County*, 969 A.2d 1197, 1222 (Pa. 2009); *DePaul v. Commonwealth*, 969 A.2d 536, 553 (Pa. 2009). Further, "acts passed by the General Assembly are strongly presumed to be constitutional, including the manner in which they were passed." *Pennsylvania State Ass'n of Jury Comm'rs v. Common-*

wealth, 64 A.3d 611, 618 (Pa. 2013). An Act of the General Assembly "cannot be deemed unconstitutional unless ... it clearly, palpably, and plainly violates the Constitution." *Stilp v. Commonwealth*, 905 A.2d 918, 953 (Pa. 2006); *Commonwealth v. Swinehart*, 664 A.2d 957, 961 (Pa. 1995). This standard is to be applied with due regard for the principle of separation of powers, in that "the legislative power of the Commonwealth," *i.e.*, the power "to make, alter and repeal laws," is "vested in the General Assembly." *Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008) (citations omitted).

A. Improving juvenile justice was the "original purpose" and remains the unchanged current purpose of Act 204 under Article III Section 1 of the Pennsylvania Constitution.

Defendant first argues that the original purpose of Senate Bill 850, which upon passage became Act 204 of 2012, "radically shifted" (Brief for Appellant, 18) before passage, and so violates Article III, Section 1 of the state Constitution, which prohibits a bill from being "altered or amended to change its original purpose." Because the original and unchanged purpose of SB 850 was to regulate juvenile justice, this claim fails.

Where an Article III, Section 1 challenge is raised, the reviewing court compares the initial and final versions of the bill to determine if its original purpose has changed. In addition to the deference demanded by the standard of review applicable where any law is claimed to be unconstitutional on its face, a reviewing court is

additionally obliged to recognize the "realities of the legislative process which can involve significant changes to legislation in the hopes of consensus," as well as the expectation that legislation routinely "will be transformed during the enactment process." *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth* [herein, *PAGE*], 877 A.2d 383, 409 (Pa. 2005). Because a reviewing court should be "loathe" to "substitute [its] judgment for that of the legislative branch," the original purpose of the legislation "must be viewed in reasonably broad terms." *Id.* (citations omitted). In further deference to the General Assembly, determining this "reasonably broad original purpose" requires the reviewing court "to hypothesize" such a purpose "based upon the text of the statute." *Id.*; *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 588 (Pa. 2003) ("We believe that exercising deference by hypothesizing reasonably broad topics in this manner is appropriate to some degree, because it helps ensure that Article III does not become a license for the judiciary to exercise a pedantic tyranny over the efforts of the Legislature") (citation and internal quotation marks omitted); *Marcavage v. Rendell*, 936 A.2d 188, 192 (Pa. Commw. 2007) (*en banc*) ("the reviewing court should hypothesize, based on the text of the statute, as to a reasonably broad original purpose"), *aff'd and adopted,* 951 A.2d 345 (Pa. 2008); *DeWeese v. Weaver*, 824 A.2d 364, 369 (Pa. Commw. 2003) (challenger's "burden is particularly weighty where, as here, the challenge is not to the substance of the law but to the procedure by which it

fense (cyberbullying and sexting) "by minors," providing for juvenile record expungement, and proposing changes to the Juvenile Act.[5] Specifically, the bill called for:

- Amending the Crimes Code to include a new statute, Title 18 § 6321, defining "cyberbullying and sexting by minors;"
- Amending the Crimes Code, Title 18 § 1922 and § 1923, to modify the process for expunging records of offenses related to underage drinking and of summary offenses committed by minors;
- Amending the Juvenile Act, Title 42 § 6301, to require "evidence-based practices" in juvenile court and to restrict the use of confinement as a sanction for juvenile offenders;
- Amending the Juvenile Act, Title 42 § 6303, to exclude the public from hearings regarding summary offenses by minors;
- Amending the Juvenile Act, Title 42 § 6336, to provide for referral to adjudication alternative programs for minors charged with summary offenses; and
- Amending the Juvenile Act, Title 42 § 6337 to create a presumption of indigency for minors in juvenile court proceedings.

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[5] The documents are available at http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=S&type=B&BN=0850.

SB 850, printer's number 868, was titled, "An Act Amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in minors, providing for the offense of cyberbullying and sexting by minors; in criminal history record information, further providing for expungement and for juvenile records; and, in relation to summary offenses, further providing for short title and purpose of chapter, for the scope of the Juvenile Act, for inspection of court files and records, for conduct of hearings and for right to counsel."

During the amendment process, the United States Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012), holding as unconstitutional mandatory life imprisonment without parole for minors absent individualized sentencing consideration. As *Miller* impacted the administration of juvenile justice, addressing it in SB 850 did not change the bill's original purpose. The final version continued to address the administration of juvenile justice, both in its title and in its substance.[6] Specifically, the final bill:

- Amends the Crimes Code, Title 18 § 1102 and creates a new § 1102.1 to provide for reduced sentencing options for minors convicted of first- and second-degree murder;
- Amends the Crimes Code, Title 18 § 1922 and § 1923, to modify the process for expunging records of offenses related to underage drinking and of summary offenses committed by minors;
- Amends the Crimes Code, Title 18, to create a new chapter 94, creating an "Office of the Victim Advocate" to advocate for, *inter alia*, juvenile crime victims;

[6] The final version, SB 850, printer's number 2475, was titled "An Act Amending Titles 18 (Crimes and Offenses), 42 (Judiciary and Judicial Procedure) and 61 (Prisons and Parole), of the Pennsylvania Consolidated Statutes, [strikeouts omitted] in authorized disposition of offenders, further providing for sentence for murder, for murder of unborn child and murder of law enforcement officer; in criminal history record information, further providing for expungement and for juvenile records; and providing for crime victims; in juvenile matters, further providing for short title and purposes of chapter, for definitions, for scope, for inspection of court files and records and for conduct of hearings; in sentencing, providing for sentences for second and subsequent offenses; in Pennsylvania board of probation and parole, further providing for parole procedure."

- Amends the Juvenile Act, Title 42 § 6301, to require "evidence-based practices" in juvenile court and to limit the use of confinement as a sanction for juvenile offenders;
- Amends the Juvenile Act, Title 42 § 6302 to eliminate summary offenses by the juvenile as a basis for finding the minor dependent;
- Amends the Juvenile Act, Title 42 § 6303 to exclude the public from hearings regarding summary offenses by minors;
- Amends the Juvenile Act, Title 42 § 6336 to provide for referral to adjudication alternative programs for minors charged with summary offenses;
- Amends the Judicial Code, Title 42 § 9711.1, to require a sentencing enhancement where a murder victim was a minor less than 13 years old, requiring the sentence to be consecutive to any other sentence then being served or imposed; and
- Amends Title 61 (prisons and parole) § 6139 to require a five year interval following a denial for filing new parole applications under the new Crimes Code section (§ 1102.1) for sentencing juveniles convicted of first- and second-degree murder.

Here, therefore, as in *PAGE*, "recognizing that a statute must be upheld unless it clearly, palpably, and plainly violates the Constitution," it follows "that the process by which [SB 850] became law did not violate Article III, Section 1's prohibition on alteration of amendment so as to change the original purpose of the bill." 877 A.2d at 409-410.

Defendant compares this case to *Marcavage*, in which the solitary purpose of the original bill was to "criminalize crop destruction," while the exclusive function of the final bill was to "expand[] the classification of persons protected under the offense of ethnic intimidation." The later-asserted connection between the original and final measures was that they both involved changes to the Crimes

Code. The Court found this assertion tenuous and insufficient to serve as a unifying justification for amendments to the original bill. 936 A.2d at 193. Here, in contrast, the purpose of administration of juvenile justice was plain from the text of the original bill and remained consistent in the final bill. It was not, as in *Marcavage*, a purpose conceived in hindsight to refute a constitutional challenge. The legislature is not restricted to pursuing only narrow objectives or addressing problem areas by changing one statute at a time. The Constitution does not restrict the *scope* of the original purpose, but only requires it to be maintained throughout the amendment process, which clearly occurred here.

The text of the bill contradicts defendants' claim that SB 850 "began as a cyberbullying initiative" (Brief for Appellant, 21). A "cyberbullying initiative" would have addressed only that, just as the original bill in *Marcavage* concerned only crop destruction. Here, in contrast, the original bill addressed multiple aspects of the administration of juvenile justice, such as juvenile expungement, juvenile records, hearings under the Juvenile Act, and inspection of juvenile court files and records. It was not, therefore, a "cyberbullying initiative," but a juvenile justice initiative.

Defendant also cites the Senate Legislative Journal of October 19, 2011, 1063-65, suggesting that a reference to sexting by Senator Greenleaf , the prime sponsor of the bill, meant that cyberbullying was the sole purpose of the legislation

(Brief for Appellant, 21). That reference, however, was in response to a specific question concerning that one provision of the bill and was not the only topic discussed. Senator Greenleaf and Senator Baker, for example, remarked on the need to respond to juvenile justice events in Luzerne County and to the recommendations of the Interbranch Commission on Juvenile Justice. Thus, in discussing SB 850 on the senate floor Senator Baker—the Senator *from* Luzerne County—thanked Senator Greenleaf for his leadership "in this difficult process of revamping the juvenile justice system." *Id.*, 1063. Neither he nor any other senator voiced any disagreement with Senator Baker's observation that the point of the bill was "revamping the juvenile justice system."

Defendant considers it significant that cyberbullying and sexting provisions were dropped from the final version, but that was in no way inconsistent with the broad purpose of improving juvenile justice. The legislature was entitled to decide that this purpose was better served by not creating new crimes. The new sentencing provisions in response to *Miller* and cyberbullying by minors both concern juvenile justice. Likewise, defendant complains that the original bill made changes to "juvenile court" while the final version extends to "juveniles convicted in adult court" (Brief for Appellant, 21). This objection makes no sense: juvenile justice concerns are obviously not restricted to events in juvenile court, because (as provided in the Juvenile Act itself) minors are sometimes tried in criminal court. The original and

final bills involve changes to the Crimes Code as well as the Juvenile Act because both areas (among others) impact juvenile justice. Defendant's further comment that the amendment process "gutted" the original bill (Brief for Appellant, 18) also makes no sense. While some provisions were dropped and others were added, all of the amendments concern juvenile justice, and in fact many of the original proposals (*e.g.*, new expungement practices, minimizing the use of confinement as a sanction, adjudication alternative programs) were retained. But in any event, there is no requirement that nothing in the bill may change; the requirement is only that the original purpose not be changed. Here it was not.

Defendant has failed to overcome the strong presumption of constitutionality or to show that amendments to SB 850 acted "to change its original purpose," *PAGE*, 877 A.2d at 409. The original purpose as stated by Senator Baker in 2011, "revamping the juvenile justice system," remains unchanged, and his claim fails.

B. Improving juvenile justice was the "single subject" of Act 204 under Article III Section 3 of the Pennsylvania Constitution.

Defendant alternately argues that Act 204 facially violates Article III, Section 3 of the Consitution, which states that "[n]o bill shall be passed containing more than one subject[.]" But the reality is that the actual subject of SB 850—again, as demonstrated by its plain text—was juvenile justice. The proposals on cyberbullying and sexting by minors were aspects of this single, broader subject. Again, the standard of review under Article III, Section 3 is highly deferential to

the General Assembly. It is understood that "bills are frequently subject to amendments as they proceed through the legislative process and not every supplementation of new material is violative of the Constitution." *PAGE*, 877 A.2d at 395. Far from discouraging amendments, the law recognizes that where "provisions added during the legislative process assist in carrying out a bill's main objective or are otherwise germane to the bill's subject as reflected in its title, the requirements of Article III, Section 3 are met." *Id.*

The single subject requirement must be applied with the understanding that "few bills are so elementary in character that they may not be subdivided under several heads." 877 A.2d at 396 (citations and internal quotation marks omitted). Thus, "a single subject may encompass many subtopics." *Washington v. Dep't of Pub. Welfare*, 71 A.3d 1070, 1082-83 (Pa. Commw. 2013), *aff'd*, 76 A.3d 536 (Pa. 2013). It is sufficient that differing subtopics within the bill are "germane to each other." *Commonwealth v. Neiman*, 84 A.3d 603, 612 (Pa. 2013). Given the deference owed to the General Assembly, "germaneness" must be broadly construed, and "it is appropriate for a reviewing court to hypothesize a reasonably broad topic which would unify the various provisions of a final bill as enacted." *Id.* (citation omitted).

As already established, SB 850 had one overarching purpose, to improve the administration of juvenile justice. In *PAGE*, the legislation at issue satisfied the

single subject rule because, although it related to such diverse topics as horse racing, game licensing, operation and instillation of slot machines, and Supreme Court jurisdiction, the Court recognized that all of these diverse measures related to the broader object of "administration and enforcement of the gaming law." 877 A.2d at 396. This case is the same. The single subject rule does not preclude making numerous or diverse legislative changes so long as they serve a single unifying purpose.

Contrast this with the legislation at issue in *Neiman.* The original Senate bill amended the Judicial Code by setting a six-month limitation on petitions for redetermination of fair market value in sheriff sales and amending a related statute governing deficiency judgments. On final consideration, the House added a provision dealing with landlord-tenant eviction procedures and the jurisdiction of park police in counties of the third class. The Senate struck the landlord-tenant chapter, and added a two-year statute of limitations for asbestos actions. It also added extensive amendments to the Sentencing and Crimes Codes relating to the registration of sexual offenders, known as "Megan's Law."[7] The legislation, passed as Act

[7] These included: amending the Crimes Code to include criminal offenses for individuals who fail to comply with sexual offender registration; amending Sentencing Code provisions governing registration of sexual offenders; adding two offenses those that require a 10–year period of registration; establishing notification procedures for out-of state sexual offenders who move to Pennsylvania; directing creation of a searchable database of registered sexual offenders, and allowing a
(footnote continues on next page)

152 of 2004, was later challenged as violative of the single-subject rule. While proponents of Act 152 contended that all of its provisions related to "civil remedies" or "judicial remedies," the Supreme Court concluded that the proposed unifying subjects "are far too expansive to satisfy Article III, Section 3." 84 A.3d at 613. The jurisdiction of county park police in third-class counties, for example, had no nexus to statutes of limitations for asbestos actions, a subject that, in turn, had no nexus to Megan's Law.

This case is far different, as all of the provisions of Act 204 are directed at the juvenile justice system. Indeed, defendant's contrary argument is identical to the one the Supreme Court rejected in *PAGE*. He contends that Act 204 amended "multiple and vastly different aspects of the criminal and juvenile justice systems" (Brief for Appellant, 28). This argument confuses the single broad task of "revamping the juvenile justice system" with the tools—amendment or creation of various statutory provisions—needed to accomplish that purpose. The legislature is not barred from changing or creating many individual laws when it wishes to ad-

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(footnote continued from previous page)
sentencing court to certain offenders from inclusion in the database; amending duties of the Sexual Offenders Assessment Board; establishing various mandatory registration and community notification procedures for sexually violent predators; requiring sex offenders to be fingerprinted and photographed when registering at approved registration sites, and directing the state police to publish a list of approved registration sites; and mandating the Attorney General to conduct annual performance audits of agencies who administer of Megan's Law.

dress a broad subject. In *PAGE*, the legislation approved by the Supreme Court against a similar challenge changed or created a great variety of new statutory provisions, but did so in service of the single subject of "administration and enforcement of the gaming law." Here, Act 204 impacts a variety of statutes in service of the single subject of improving juvenile justice. Defendant's argument falls far short of meeting his burden of demonstrating that the Act "clearly, palpably, and plainly violates the Constitution." *Stilp*, 905 A.2d at 953.

C. Act 204 does not facially violate the Eighth Amendment prohibition of cruel and unusual punishment under *Miller* and *Graham.*

Miller v. Alabama held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. Previously, *Graham v. Florida*, 130 S. Ct. 2011, 2017-18 (2010) held that one who was a minor at the time of the offense may not be "sentenced to life in prison without parole for a nonhomicide crime." Defendant argues that the Act "runs afoul" of these decisions Brief for Appellant, 32).

This argument makes little sense. The Act does not permit a mandatory sentence of life imprisonment without parole for any offense, nor does it allow life without parole for a nonhomicide offense. For juvenile offenders the Act *abolishes* life without parole as a penalty for second-degree murder. It permits life without

parole for first degree murder only upon consideration of a fourteen-part list of factors that relate to the individual characteristics of the offender, and where parole is possible it imposes minimum terms of between 20 and 35 years depending on the age of the offender and the type of offense.[8]

The Supreme Court's holding in *Miller* was "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." 132 S.Ct. at 2469 (emphasis added). That *Miller* did not preclude *discretionary* life without parole is confirmed by the Court's explanation of its holding, that precluding consideration of a juvenile offender's individual characteristics "poses too great a risk of disproportionate punishment," and that "[b]ecause that holding is enough to decide these cases," it would not consider a categorical ban on life without parole for juveniles. *Id.* Although this explanation included dicta apparently intended to discourage discretionary life without parole sentences—"we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"—the Court plainly stated that "we do not

[8] Under 18 Pa.C.S. § 1102.1 and § 1102(a)(1) and (b), an offender under age 18 may be sentenced to life without the possibility of parole for first-degree murder as a matter of discretion. When being sentenced to life with the possibility of parole, an offender under 18 but older than 14 would be subject to a mandatory minimum prison term of 35 years for first-degree murder, and 25 years for second-degree murder, while one under age 15 would be subject to a mandatory minimum term of 30 years for first-degree murder and 20 years for second-degree murder. In all cases the maximum term for first- or second-degree murder is life imprisonment.

foreclose a sentencer's ability to make that judgment in homicide cases," but would only require the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

Here, the Act obviously complies with *Miller* because it does not permit a sentence of life without parole except upon taking account of the offender's characteristics as a minor and how these factors "counsel against sentencing them to a lifetime in prison." *Id.* Defendant nevertheless argues that Act 204 violates *Miller* by requiring a sentence that is "virtually equivalent to life," because an offender who was over the age of 14 but under the age of 19 is subject to a mandatory minimum term of 35 years for first-degree murder (Brief for Appellant, 32-33). But of course, while undoubtedly severe—as any sentence should be for maliciously and deliberately taking a life—a minimum term of 35 years obviously is not "equivalent" to life in prison. Defendants' reliance on the current *U.S. Sentencing Commission Preliminary Quarterly Data Report*, which treats a federal life sentence as if lasting 470 months (39.16 years) based on life expectancy, is misplaced because that Report does not state the ages of federal life prisoners (and defendant is not a life-sentenced federal prisoner). While a middle-aged offender sentenced to die in prison might be expected to have a given life span, offenders governed by *Miller*, by definition, were 18 or less at the time they murdered their

victims. *Miller*, moreover, is not predicated on calculating "virtual" life expectancy, and does not discuss or restrict possible minimum terms, but requires the sentencing process to take into account a youthful offender's "immaturity, impetuosity, and failure to appreciate risks and consequences." 132 S. Ct. at 2468. The instant law does that by (*inter alia*) reducing the mandatory minimum term for such offenders convicted of first-degree murder from life imprisonment to 35 years. By definition, an individual convicted of first-degree murder has been found beyond a reasonable doubt to have acted with malice and the specific intent to kill. Indeed, these defendants got together after the murder to laugh and mock the man they killed (N.T. 7/10/12, 127-128). While *Miller* does not address this issue, the nature of the crime warrants a high minimum sentence.

Nothing in the holding of *Miller*, which specifically authorizes an actual, not a virtual, sentence of life without parole provided "a certain process" is afforded, 132 S. Ct. at 2471, prohibits a substantial mandatory minimum sentence. For the same reason, defendant misrepresents *Miller* in claiming that it "creates a presumption against" juvenile life without parole (Brief for Appellant, 34). *Miller* does not purport to create any legal presumption, but only requires a process for individualized consideration which the current Act effectuates. That said, defendant's prediction that the Act will result in frequent life-without-parole sentences is sheer speculation. An Act can be facially unconstitutional only if "no set of circum-

stances exist[s] under which the statute would be valid." *Clifton*, 969 A.2d at 1222. Because defendant's claim ignores that he was actually sentenced to less than life without parole, even if the Act defines no "presumption" against it, his claim necessarily fails.

D. Act 204 is not an *ex post facto* law.

Finally, defendant claims that Act 204 is unconstitutional as a supposed *ex post facto* law. This claim is frivolous. The *ex post facto* clause bars a law "that changes punishment, and inflicts a greater punishment than the law annexes to the crime, when committed ..." *Calder v. Bull*, 1 L.Ed. 648 (U.S. 1798). "To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (internal citations and quotations omitted). Act 204, however, did not redefine the crime or increase statutory penalty for first-degree murder. To the contrary, it *reduced* the potential punishment.[9]

Before the Act was passed, the maximum penalty for first-degree murder committed by a minor was life imprisonment under 18 Pa.C.S. § 1102, and parole

[9] By its express terms, Act 204 applies to defendants convicted after June 24, 2012. Defendant was convicted on July 13, 2012.

was prohibited for terms of life imprisonment under 61 Pa.C.S. § 6137(a). The latter provision prohibiting parole is no longer in effect for offenders who were minors at the time of the offense as a result of *Miller*, while the new Crimes Code provision, § 1102.1, prescribes new minimum terms of up to 35 years for offenders who were minors at the time of the offense and are not sentenced to life without parole. The maximum possible penalty in all cases, then and now, remains life without parole. Since the Act does not increase the penalty, it cannot, and does not, contravene the *ex post facto* prohibition. *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (*ex post facto* law creates a "risk of increasing the measure of punishment attached to the covered crimes"); *Cimaszewski v. Pa. Bd. of Prob. & Parole*, 868 A.2d 416, 425 (Pa. 2005) ("controlling inquiry" in an *ex post facto* claim is whether the new law risks "increasing the measure of punishment attached to the covered crimes"); *Lehman v. Pa. State Police*, 839 A.2d 265, 269 (Pa. 2003) (*ex post facto* law is one that "inflicts a greater punishment, than the law annexed to the crime, when committed"); *Commonwealth v. Wharton*, 665 A.2d 458, 460 (Pa. 1995) (that prior law required appellate court to either affirm death sentence or remand for imposition of life sentence, while new law allowed remanding for resentencing and possible new death sentence, did not

increase the punishment, and was not *ex post facto*); *Commonwealth v. Young*, 637 A.2d 1313, 1317 (Pa. 1993) (same).[10]

To pursue his *ex post facto* claim defendant resort s to sophistry, contending that, at the time of the offense, when it came to juvenile offenders, first-degree murder was a crime without any penalty (Brief for Appellant, 35). In fact, at the time of the instant murder—July 18, 2008—the maximum penalty for first-degree murder by a minor was imprisonment for life without possibility of parole. 18 Pa.C.S. §1102(a)(1) ("A person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment"). Under the instant Act the maximum penalty remains the same, imprisonment for life without possibility of parole. While defendant argues that this penalty was held to be unconstitutional by *Miller*, what *Miller* in fact held to be unconstitutional on June 26, 2012 (four years after the instant murder) was not a penalty but a process: automatic exclusion of

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[10] Defendant does not discuss these, or any of the numerous other cases governing *ex post facto* claims. He instead cites *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981), which states no holding at all on any *ex post facto* issue, instead concluding that the statute there could not be retroactively applied as a matter of statutory construction. 440 A.2d at 489-90. He also does not discuss *Commonwealth v. Batts*, 66 A.3d 286, 296 (Pa. 2013), where the defendant (represented by the same counsel as the instant defendant) presented identical "authority," which the Supreme Court found "simply inapplicable." Curiously, he instead cites only the defense briefs filed in *Batts* (Brief for Appellant, 35), notwithstanding the fact that the Supreme Court unanimously rejected the arguments raised therein.

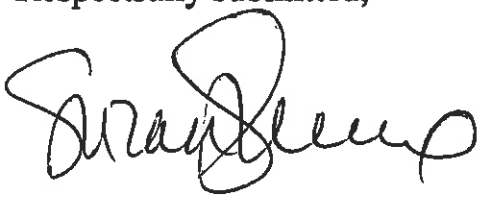
the possibility of parole without individualized consideration for juvenile murder offenders sentenced to life; not life without parole. *See Batts*, 66 A.3d at 296 (*Miller* did not bar "imposition of a life-without-parole sentence on a juvenile categorically ... [r]ather, *Miller* requires only that there be judicial consideration of the appropriate age-related factor"). The former maximum penalty, as such, was never rendered unconstitutional, and it has not increased. The *ex post facto* claim therefore fails.[11]

[11] Defendant's related claim, that because there supposedly was no penalty for the crime of first-degree murder, and he therefore should have been sentenced as if he committed a third-degree murder was unanimously rejected by our Supreme Court in *Batts*, 66 A.3d at 296.

CONCLUSION

For the foregoing reasons, and those set forth in the trial court opinion, the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,



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IN THE

SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	
Appellee,	
V.	**96 EDA 2013**
MIKECHAL BROOKER,	
Defendant-Appellant	

PRAECIPE OF APPEARANCE

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Please enter my appearance as attorney for the Commonwealth of Pennsylvania as appellee.

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IN THE
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PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

V.

MIKECHAL BROOKER,

Defendant-Appellant

96 EDA 2013

PROOF OF SERVICE

I hereby certify that I am on this day serving the attached document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

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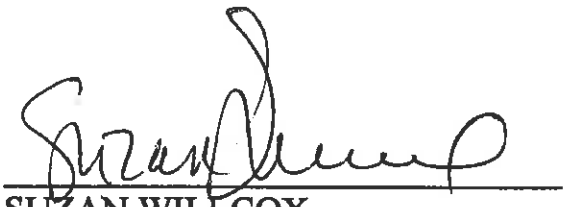
Date: May 6, 2014



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