	: COURT OF COMMON PLEAS
	CRIMINAL TRIAL DIVISION
COMMONWEALTH OF PENNSYLVANIA :	
VS.	: CP-51-CR-0006874-2009
MIKECHEL BROOKER	: CHARGES: MURDER

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FEROCK SMITH	: CHARGES: MURDER

MOTION TO DECLARE ACT 204 OF 2012 UNCONSTITUTIONAL

Mikechel Brooker, by Darryl A. Irwin, and Ferock Smith, by Bobby Hoof, and by amicus counsel Bradley S. Bridge, Karl Baker, Ellen T. Greenlee, Defender Association of Philadelphia, Marsha Levick, Emily Keller and Lauren Fine, Juvenile Law Center, and Sara Jacobson, Professor, Temple University, Beasley School of Law, hereby request that this Honorable Court declare Act 204 of 2012 unconstitutional and sentence them instead for third degree murder and unmerged lesser included offenses.

Mikechel Brooker and Ferock Smith were convicted of first degree murder following a jury trial on July 16, 2012 (N.T. 7/16/12, 13; 16). The issue here is what constitutional sentence may be imposed on them. Prior to June 25, 2012, Pennsylvania law mandated that this Court impose a life sentence without the possibility of parole irrespective of the age of the defendant. The United States Supreme Court in *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455 (2012) struck down as unconstitutional the mandatory imposition of a life sentence upon those under the age of eighteen at the time the crime was committed. While the Pennsylvania legislature attempted to "fix" the deficiency in Pennsylvania law following *Miller* by enacting Act 204 of 2012, it has only enacted yet another unconstitutional law.

I. Act 204 of 2012 is Unconstitutional Because the Original Purpose of the Bill Dramatically Changed During the Legislative Process in Violation of Article III, Section 1 of the Pennsylvania Constitution.

Senate Bill 850, which became Act 204 of 2012, violated Article III, section 1 of the Pennsylvania Constitution because the bill's original purpose changed dramatically during the legislative process. It began in 2011 as a bill seeking to protect children, specifically dealing with cyberbullying and sexting and establishing procedures for the expungement of juvenile records. However, its purpose radically changed in October of 2012, when it shifted its focus to defining a completely new sentencing scheme for youth convicted of murder in adult court.

Article III, Section 1 of the Pennsylvania Constitution provides that, during the legislative process, a bill shall not be altered or amended to change its original purpose:

> 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, Section 1.

To determine whether legislation violates Article III, Section 1, a court must conduct a two-part inquiry. *Marcavage v. Rendell*, 936 A.2d 188, 192 (Commw. Ct. 2007), *aff'd per curiam*, 597 Pa. 371 (2008). Relying upon *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (hereinafter "P.A.G.E."), *Marcavage* held that first the court "must consider 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." *Marcavage*, 936 A.2d at 192. Second, the court "must consider whether the title and contents of the legislation are deceptive in their final form." *Id.* The legislation in question "must survive both inquiries to pass constitutional muster." *Id.*

The first "comparison" prong of the inquiry requires that the challenged legislation must be viewed in reasonably broad terms. *P.A.G.E.*, 583 Pa. at 318. The Supreme Court imposed this limiting principle with the expectation that legislation will transform during the enactment process, and because of the Court's own wariness of 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.

At issue in *Marcavage* was whether a bill that began as one to deal with criminalizing crop destruction could permissibly become a bill dealing with ethnic intimidation. In support of the constitutionality of the bill, the Commonwealth argued that all amendments contained in the final version of H.B. 1493 "satisfy the reasonably broad original purpose of amending the Crimes Code." *Marcavage*, 936 A.2d at 193. In concluding that this was impermissible, the *Marcavage* Court held that it was insufficient that the legislature was acting to amend the Crimes Code as a "unifying justification for amendments to bills under the Crimes Code that contain no nexus to

the conduct to which the original legislation was directed." *Id.* The *Marcavage* Court rejected the Commonwealth's position, finding that although the original and final versions of the bill both fell under the broad heading of crime, each version regulated "vastly different activities." *Id.*

Here, Act 204 fails to satisfy the first requirement of the *P.A.G.E.* inquiry and thus violates Article III, Section 1 of the Pennsylvania Constitution. Even when viewed in reasonably broad terms, the original purpose of S.B. 850, the bill that became Act 204, was to amend the Crimes Code to protect child victims by establishing the new crime of cyberbullying by minors and to protect juvenile offenders from inappropriate placement and sentencing in the wake of the Luzerne County "Kids for Cash Scandal." See Senate Legislative Journal, October 19, 2011 at 1063-1065..

The final purpose of S.B. 850 drastically departed from this purpose and spirit of the initial bill. The primary purpose of the final version of the bill was to amend the Crimes Code to create an entirely new sentencing scheme for juveniles convicted as adults of first degree or second degree murder following *Miller v. Alabama. See* House Fiscal Notes to S.B. 850, P.N. 2475. The original bill focused exclusively on juveniles and the consequences of juvenile offending in juvenile court; the final bill, as relevant here, dealt with juveniles convicted in adult court of first or second degree murder. Though technically juveniles, this group of defendants were convicted as adults and sentenced as adults in an entirely separate criminal justice system

Additionally, S.B. 850 began as a cyberbullying initiative. Senator Greenleaf explains the bill's attempt to balance the need to prosecute juveniles who use the Internet to victimize other juveniles and the need to defer to parents to intervene to stop children

from using the Internet for immature activities, like sexting Senate Legislative Journal, October 19, 2011 at 1063-1065. Cyberbullying, however, has nothing to do with the sentencing of minors for first degree or second degree murder. As in *Marcavage*, while both versions of the bill seek to amend the Crimes Code, there is no logical nexus between establishing a new sentencing scheme for juveniles convicted of murder in adult court and establishing a new crime of cyberbullying/sexting in juvenile court.

In its final form, Act 204 did not even contain a single provision concerning the criminalization of cyberbullying. *See* S.B. 850, P.N. 2475. The Senate had first passed the original bill S.B. 850, P.N. 1691, 50-0 on October 19, 2011. The bill contained provisions on cyberbullying and did not contain any provisions dealing with the sentencing of juveniles convicted of homicide in criminal court. Nearly a year later the House completely gutted, S.B. 850 and provided for a new sentencing scheme for juveniles convicted in adult court of first or second degree murder; these provisions allowed the imposition in certain circumstances of life imprisonment without the possibility of parole or alternatively created a new scheme of substantial mandatory minimum sentences. *See* S.B. 850, P.N. 2418. After a second round of amendments, the House passed S.B. 850 on October 16, 2012; this bill eliminated any provision concerning cyberbullying. *See* S.B. 850, P.N. 2475. The original version of S.B. 850 became the vehicle for the House amendments adding in a sentencing scheme that sought to comply with *Miller* while eliminating the purpose of the original bill.

Because the original purpose of S.B. 850 changed so dramatically during the legislative process, Act 204 violated Article III, section 1 of the Pennsylvania

Constitution. This Honorable Court should declare Act 204 unconstitutional.

II. Act 204 of 2012 is Unconstitutional Because it Contains More Than One Subject in Violation of Article III, Section 3 of the Pennsylvania Constitution

As discussed above, Act 204 of 2012 made unprecedented changes to Pennsylvania's sentencing statutes in a single omnibus bill that had no connection to the bill's original, narrow purpose and text. Rather than beginning anew, lawmakers intentionally skirted the legislative process by crafting this statute as an amendment to an already existing bill, thereby ensuring that it would bypass the Senate Judiciary Committee. Act 204 includes provisions related to practices in the juvenile justice system but also completely rewrites portions of Pennsylvania's adult sentencing code dealing with homicide. It therefore addresses two entirely distinct subjects. Including such diverse topics in one piece of legislation violates both the text and spirit of Article III, Section 3 of the Pennsylvania Constitution which is intended to both safeguard against the legislature hiding the substance of a bill from the public or integrating an unpopular element into an otherwise supported piece of legislation, and generally to ensure the public is kept informed of legislative developments.

Article III, Section 3 of the Pennsylvania Constitution prohibits the passage of a bill that pertains to more than one subject. *See, e.g.*, *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 394 (Pa., 2005)("P.A.G.E."). Section 3 is explicit: "[n]o 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. Commonly referred to as the "single subject" requirement, this 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 v. Commonwealth*, 838 A.2d 566, 586 (Pa., 2003).

Our Supreme Court has explained that the purpose of the single-subject requirement is to curb "'[l]ast-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.'" *Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 53 A.3d 109, 113 (Pa. Cmwlth. Ct. 2012) (quoting *City of Philadelphia v. Commonwealth*, 838 A.2d at 589). The provision aims 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.* (emphasis in original).

While amendments to legislation are common and often permissible under Section 3, they must also be rationally related to the subject of the underlying bill, "assist in carrying out a bill's main objective or [be] otherwise 'germane' to the bill's subject." *City of Philadelphia v. Commonwealth*, 838 A.2d at 586 (citing *L .J. W. Realty Corp. v. Philadelphia*, 134 A.2d 878, 883 n.8 (1957). Pennsylvania law recognizes that amendments are an inevitable part of the legislative process, but also that there must be "some limits on germaneness, for otherwise virtually all legislation – no matter how diverse in substance – would meet the single-subject requirement, rendering the strictures of Section 3 nugatory." *P.A.G.E.* at 395. In recognition of the purpose for which the provision was enacted, Pennsylvania courts consistently strike down legislative enactments that take on more than one issue. *See, e.g., Sears v. Corbett*, 49 A.3d 463 (Pa. Cmwlth. 2012); *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Cmwlth. 2005).

Act 204 addressed a single set of issues when it was first introduced (cyberbullying and sexting) but when ultimately passed it took on the entirely different subject of adult sentencing. While the legislature properly sought to bring Pennsylvania into compliance with the Supreme Court's recent decision in *Miller*, it did so in such haste that it did not specifically and thoughtfully devise legislation to address that particular subject, which is precisely what Section 3 was designed to prevent.

An examination of the "Short Title" of Act 204 underscores the diversity of subjects it addresses:

> An Act amending Titles 18 (Crimes and Offenses), 42 (Judiciary and Judicial Procedure) and 61 (Prisons and Parole), of the Pennsylvania Consolidated Statutes, in authorized disposition of offenders, further providing for sentence for murder, murder of unborn child and murder of law enforcement officer and providing for sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a 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 sentencing for certain murders of infant persons and for sentences for second and subsequent offenses; in Pennsylvania Board of Probation and Parole, further providing for parole procedure.

This "short" description demonstrates that the legislation encompasses far-reaching changes to very different aspects of both the criminal and juvenile codes. This is inconsistent with the Pennsylvania Constitution and prevailing case law. *See, e.g.*, *Pennsylvania State Ass'n of Jury Comm'rs v. Commonwealth*, 53 A.3d 109, 114 (Pa. Cmwlth. 2012) (observing that the Supreme Court had invalidated a statute on the basis of its "'voluminous and varying

provisions'" which "'implicate[d] many of the concerns' underlying the adoption of [the] constitutional mandate" of Section 3).

Act 204 is precisely the kind of multi-subject legislation that Section 3 was enacted to prevent. It thwarts the constitutional aim of the provision, which was designed to foster a more thoughtful, deliberate, and transparent legislative process. This Court should declare Act 204 unconstitutional.

III. Act 204 of 2012 is Unconstitutional Because it Violates *Miller* And *Graham.*

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,* 567 U.S.___, 132 S. Ct. 2455, 2469 (2012), the 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.

Justice Kagan, writing for the majority in *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. The Court thus 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, *Graham* requires that states must provide children (other than those sentenced to life without parole) "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. 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. This 35-year mandatory minimum 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*, 132 S. Ct. at 2468. 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. *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." *Miller*, 132 S. Ct. at 2469. *Miller* notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id.* *Miller* creates a presumption *against* imposing juvenile life without parole sentences. Act 204 ignores this presumption and provides no safeguards to ensure that imposition of juvenile life without parole sentences will be "uncommon" or "rare." By establishing only two alternatives as relevant here - life without parole or a mandatory minimum sentence of thirty-five years to life - affording the sentencer 'discretion' only to impose a greater minimum period of confinement, -- Act 204 affords no relief at all. Therefore, Act 204 is unconstitutional pursuant to *Miller*.

IV. 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 punishments for the crime when the crime was committed. *See Commonwealth v. Story*, 497 Pa. 273, 300 (1981). At the time of Mr. Brooker's and Mr. Smith's offenses, no constitutional statutory sentencing scheme existed. *See Miller*, 132 S. Ct. 2455 (issued on June 25, 2012 and striking mandatory life without parole sentences for juveniles); *see also* Supplemental Brief for Pennsylvania District Attorneys Association as Amicus Curiae for Appellee at 6, *Commonwealth v. Batts*, 79 M.A.P. 2009 (conceding that resentencing for juveniles convicted of first degree murder was required pursuant to *Miller*). Because no other constitutional sentencing statute had been enacted, the only constitutional sentence available to Petitioners at the time of their crimes and convictions was the

sentence for the most serious lesser included offense, third degree murder. *See* Supplemental Brief for Appellant at 7-12, *Commonwealth v. Batts*, 79 M.A.P. 2009; Supplemental Reply Brief for Appellant at 2-10, *Commonwealth v. Batts*, 79 M.A.P. 2009; Brief for Appellant at 25-36, *Commonwealth v. Cunningham*, 38 E.A.P. 2012. Since Petitioners faced a maximum constitutional sentence of 40 years imprisonment for murder at the time of their conviction, Act 204's imposition of a minimum 35 years to life or life without parole constitutes an unconstitutional *ex post facto* law.

The Pennsylvania Supreme Court faced an analogous situation in *Commonwealth v. Story*, 497 Pa. 273, 440 A.2d 488 (1981). Story had been sentenced to death "pursuant to a death penalty statute that was declared unconstitutional while his appeal was pending." *Id.* at 274. By the time he faced retrial, the state legislature had passed a new death penalty statute to replace the unconstitutional sentencing scheme. *Id.* The Court, however, held that Story could not be sentenced under the new sentencing statute; instead he had to be sentenced pursuant to the statute available at the time of his conviction and therefore received a life sentence – the most serious homicide sentence available after the death penalty provision had been declared unconstitutional. *Id.* at 280-81. Similarly, Petitioners here must be sentenced pursuant to the statutes in place at the time of their offenses.[1] Because at that time, no constitutional sentence existed for juveniles convicted first degree murder, Petitioners face a maximum sentence of 40 years for their homicide convictions.

WHEREFORE, Mikechel Brooker and Ferock Smith, through counsel, respectfully

[1] Had Defendants been sentenced before Act 204 had passed, the only sentence available would have been a maximum 40-year sentence. Defendants should not be penalized for the fact that they were not sentenced until after Act 204 had been signed into law.

request that this Honorable Court declare Act 204 of 2012 unconstitutional and sentence them for third degree murder and any unmerged lesser included offenses.

Respectfully submitted,

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[2] Counsel wishes to thank Meredith Zeitzer, a third year law student at Temple University, Beasley School of Law, for her invaluable assistance in the preparation of this motion.

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PROOF OF SERVICE

Bradley S. Bridge, Assistant Defender, being sworn according to law does hereby state and aver that he has served by the method indicated below:

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