

**IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 3339 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE,
v.

JAMES HENRY COBBS,
APPELLANT.

BRIEF FOR APPELLEE

APPEAL FROM THE DENIAL OF POST-CONVICTION RELIEF BY THE HONORABLE
CAROLYN T. CARLUCCIO, J., ON OCTOBER 23, 2018, IN THE COURT OF COMMON
PLEAS OF MONTGOMERY COUNTY, CRIMINAL DIVISION, AT
No. CP-46-CR-0000287-1979.

ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY

KEVIN R. STEELE
DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY
MONTGOMERY COUNTY COURTHOUSE
NORRISTOWN, PA 19404

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Whether the trial court properly denied relief on defendant's PCRA petition where the petition was facially untimely and defendant failed to establish a statutory exception and, in any event, he raised a non-cognizable, meritless claim?

(Answered in the affirmative by the court below.)

COUNTERSTATEMENT OF THE CASE

James Cobbs (“defendant”) appeals the order of the Honorable Carolyn T. Carluccio, dismissing his petition under the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S. § 9541, *et seq.*, without a hearing.

In December 1978, when he was 25 years old and serving a life sentence¹ at SCI Graterford, defendant assaulted another inmate, stabbing him in the forehead with a knife. When a guard intervened and restrained the victim, defendant continued his attack on the victim, stabbing him again in the forehead (N.T. Trial, 5/29/79, at 4-12).

A Montgomery County jury convicted defendant of assault by life prisoner, 18 Pa. C.S. § 2704; on August 17, 1979, the court sentenced him to life without parole, as was required under Section 2704, to be served concurrently with his Allegheny County sentence (N.T. Sentencing, 8/17/79, at 6-7).

¹ Defendant’s life sentence stemmed from a murder he and a cohort committed in Allegheny County, Pennsylvania, in 1970, when he was 17 years old. After a jury convicted him of first-degree murder, the Allegheny County court sentenced him in 1972 to life imprisonment without the possibility of parole. *See Defendant’s Amended PCRA and Brief Seeking Relief from Illegal Sentence (“Second Amended Petition”),* at 1-2.

This Court affirmed his judgment of sentence on June 19, 1981, *Commonwealth v. Cobbs*, 431 A.2d 335, 337 (Pa. Super. 1981); and, the Pennsylvania Supreme Court denied his petition for allowance of appeal on June 4, 1982. *Commonwealth v. Cobbs*, No. 181 E.D. Alloc. Docket 1982. Accordingly, for purposes of the Post-Conviction Relief Act (“PCRA”), his judgment of sentence became final on September 3, 1982. *See* 42 Pa. C.S.A. § 9545(b)(3) (providing that for purposes of the PCRA, “a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review”).

Almost three decades later, on August 20, 2012, defendant filed a *pro se* PCRA petition in the Montgomery County Court of Common Pleas, seeking a new sentencing hearing for his assault by life prisoner conviction in light of the United States Supreme Court’s then-recent holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that “mandatory life without parole for those under the age of eighteen at the time of their crimes violated the

Eighth Amendment's prohibition on 'cruel and unusual punishments.'"²

Id. at 2460 (emphasis added).

Court-appointed counsel later filed an amended PCRA petition, reiterating defendant's request for a re-sentencing hearing in light of *Miller*, and also relying on the then-recent United States Supreme Court decision of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which held that *Miller* applies retroactively on collateral review. *Id.* at 736-737. Defendant acknowledged the facial untimeliness of his petition, but he claimed that he met the newly-recognized constitutional right exception, 42 Pa. C.S. § 9545(b)(1)(iii). See *Amended Petition for Post-Conviction Relief*, at ¶ 23.

Defendant had also filed a PCRA petition in his Allegheny County case, challenging, pursuant to *Miller* and *Montgomery*, the life without parole sentence that was imposed for the first-degree murder he committed as a juvenile. Relief was granted by agreement of the parties in that case because defendant fell within the scope of *Miller* and *Montgomery*. That is, defendant was a juvenile when he committed the murder in Allegheny

² Defendant had filed an earlier PCRA petition in May 1986, raising various allegations of ineffective assistance of counsel. The trial court denied that petition following an evidentiary hearing, and this Court affirmed the PCRA denial. See *Commonwealth v. Cobbs*, 528 A.2d 255 (Pa. Super. 1987) (Table).

County, and he was serving a mandatory sentence of life without parole as a result of his conviction for that crime. Upon re-sentencing, the Allegheny County Court sentenced defendant to 40 years to life imprisonment. *See Second Amended Petition, Exhibit A, at 42-43.*

Following his re-sentencing in Allegheny County, defendant filed another amended PCRA petition in this case. In it, he reiterated that his sentence is illegal in light of *Miller* and *Montgomery*, and further asserted that he was not a life prisoner within the meaning of the assault by life prisoner statute in light of his new 40-year-to life sentence in Allegheny County. *See Second Amended Petition, at 6-13.* In addition, he once again asserted that his petition was timely in light of the newly recognized constitutional right exception. *Id.* at 3 (citing 42 Pa. C.S. § 9545(b)(1)(iii)).

The trial court denied PCRA relief on the basis on the basis of untimeliness. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly dismissed defendant's PCRA petition without a hearing. Defendant's petition is time-barred since he filed it nearly three decades after his judgment of sentence became final, and he failed to establish a statutorily-enumerated exception to the PCRA time-bar.

To the extent that defendant relies on the newly-recognized constitutional right exception, his reliance on that exception is misplaced. Neither *Miller v. Alabama* nor *Montgomery v. Louisiana* has any application to his case. *Miller* held that mandatory life without parole *for those under the age of eighteen at the time of their crimes* violated the Eighth Amendment's prohibition on cruel and unusual punishments; *Montgomery* held that *Miller* applies retroactively on collateral review. Defendant was not a juvenile when he committed the crime of assault by life prisoner; he was 25 years old. His petition, therefore, remains time-barred.

Notwithstanding the jurisdictional time-bar, defendant raises a non-cognizable sufficiency of the evidence claim. In any event, his claim fails on the merits. Defendant was serving a sentence of life imprisonment that had not been commuted at the time he committed the offense of assault by

life prisoner. The fact that his predicate life sentence was vacated decades later in no way undermines his current conviction and sentence. No relief is due.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED RELIEF ON DEFENDANT’S UNTIMELY PCRA PETITION.

Defendant’s PCRA petition is time-barred. His time for seeking PCRA review expired decades ago, and he failed to establish the applicability of any of the statutorily-enumerated exceptions to the jurisdictional time bar. He is, therefore, time-bared under 42 Pa. C.S. § 9545(b), and the trial court properly dismissed his petition without an evidentiary hearing. *See Commonwealth v. Burton*, 936 A.2d 521, 527 (Pa. Super. 2007) (holding that Pa. R.Crim.P. 907 gives a PCRA court authority to dismiss a petition *without a hearing* if the petitioner has not met the time-bar’s jurisdictional requirements).

A. DEFENDANT’S PETITION IS TIME-BARRED.

In reviewing the propriety of a trial court’s denial of PCRA relief, this Court is “limited to determining whether the court’s findings are supported by the record and whether the order in question is free of legal error.” *Commonwealth v. Grant*, 992 A.2d 152, 156 (Pa. Super. 2010) (citing *Commonwealth v. Greer*, 936 A.2d 1075, 1077 (Pa. Super. 2007)). Where, as here, the PCRA court found that it lacked jurisdiction to entertain the

merits of a defendant's petition, this Court will only review for error relating to that determination. *Commonwealth v. Williams*, 35 A.3d 44, 52 (Pa. Super. 2011).

Under the PCRA, all petitions must be filed within one year of the date on which judgment becomes final unless one of the three statutory exceptions set forth in 42 Pa. C.S. § 9545(b)(1) applies. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999). The one-year period in which to file a petition for post-conviction relief begins to run at the conclusion of direct review or at the expiration of time for seeking such review. 42 Pa. C.S. § 9545(b)(3).

The PCRA timeliness requirements are jurisdictional in nature and must be strictly construed; thus, neither the trial court nor the appellate courts in this Commonwealth have jurisdiction to review the merits of an untimely PCRA petition. *Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 (Pa. 2010); see *Commonwealth v. Murray*, 753 A.2d 200, 203 (Pa. 2000) (courts cannot ignore the mandatory and jurisdictional nature of the PCRA's timeliness requirements, which apply to all PCRA petitions, regardless of the nature of the claims); *Commonwealth v. Lambert*, 765 A.2d 306, 318 (Pa. Super. 2000) (noting that the timeliness provisions of the PCRA are

mandatory and must be interpreted literally). Thus, unless a defendant seeking collateral relief pleads and proves that an exception to the PCRA time-bar applies, the courts of this Commonwealth are without jurisdiction to consider the claims presented in an untimely petition. *See Commonwealth v. Whitney*, 87 A.2d 473, 475-78 (Pa. 2003).

Importantly, moreover, the timeliness requirements may not be altered or disregarded to reach the merits of the claims raised in a petition. *See Williams v. Erie County District Attorney's Office*, 848 A.2d 967, 969 (Pa. Super. 2004) (timeliness requirements do not depend on the nature of the violations alleged); *Commonwealth v. Capello*, 823 A.2d 936 (Pa. Super. 2003) (holding that the trial court cannot disregard the timeliness requirements of the PCRA in order to address the merits of the claims raised therein); *Commonwealth v. Owens*, 718 A.2d 330 (Pa. Super. 1998) (noting that, under the plain language of 42 Pa. C.S. § 9545, the substance of a PCRA petition is irrelevant to its timeliness). Indeed, as noted by the Pennsylvania Supreme Court, “[w]ithout jurisdiction, we simply do not have the legal authority to address the substantive claims.” *Albrecht*, 994 A.2d at 1093 (quoting *Commonwealth v. Chester*, 895 A.2d 520, 522 (Pa. 2006)). This is so even where the underlying claim involves the legality of the sentence. To be

sure, as this Court has expressly stated, “a court may only entertain a challenge to the legality of the sentence so long as the court has jurisdiction to hear the claim. In the PCRA context, jurisdiction is tied to the filing of a timely PCRA petition.” *Commonwealth v. Fowler*, 930 A.2d 586, 592 (Pa. Super. 2007) (citing *Commonwealth v. Berry*, 877 A.2d 479, 482 (Pa. Super. 2005) (*en banc*)). Thus, “although the legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA’s time limits or one of the exceptions thereto.” *Fowler, supra* at 592 (quoting *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999))(emphasis added).

Furthermore, because the time limit is jurisdictional, a court must address timeliness first, and may not consider the merits of an untimely petition. *Commonwealth v. Peterkin*, 722 A.2d 638, 641 (Pa. 1998). The PCRA’s timeliness requirements, moreover, are not subject to the doctrine of equitable tolling. *Commonwealth v. Lewis*, 63 A.2d 1274, 1279 (Pa. Super. 2013). Accordingly, “when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner’s PCRA claims.”

Commonwealth v. Robinson, 12 A.3d 477, 479 (Pa. Super. 2011) (citation omitted).

Defendant's judgment of sentence became final on September 2, 1982, when his time for seeking *certiorari* to the United States Supreme Court expired. See 42 Pa. C.S. § 9545(b)(3) (providing that for purposes of the PCRA, "a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review"); see also U.S. Sup. Ct. Rule 13 (allowing 90 days to file for *certiorari* following denial of relief in state supreme court). He had one year from that date (September 3, 1983) to file a timely PCRA petition. See 42 Pa. C.S.A. § 9545(b). He did not file the instant petition until 2012—almost three decades later. The petition is thus facially untimely pursuant to 42 Pa. C.S. § 9545(b). See *Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000) (courts cannot ignore the mandatory and jurisdictional nature of the PCRA's timeliness requirements, which apply to all PCRA petitions, regardless of the nature of the claims raised in the petition).

The exceptions to the PCRA's time-bar provision excuse a petitioner's failure to file a PCRA petition within a year of the date his judgment becomes final only where:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1).

A defendant must plead and prove the applicability of one of the three statutorily-enumerated exceptions to the time-bar in order to overcome the untimeliness of his petition. *Commonwealth v. Dickerson*, 900 A.2d 407, 410 (Pa. Super. 2006). Unless a defendant pleads and proves that he satisfies one of these exceptions, his petition remains untimely, and a reviewing court is without jurisdiction to consider his claims.

Commonwealth v. Beasley, 741 A.2d 1258, 1261 (Pa. 1999); see *Commonwealth v. Edmiston*, 65 A.3d 339, 346 (Pa. 2013) (“We have repeatedly stated it is the [petitioner’s] burden to allege and prove that one of the timeliness exceptions applied. Whether [the petitioner] has carried his burden is a threshold inquiry prior to considering the merits of any claim.”). In addition, the petition must be filed “within 60 days of the date the claim could have been presented.” 42 Pa. C.S. § 9545(b)(2); *Commonwealth v. Yarris*, 731 A.2d 581, 590 (Pa. 1999).

Defendant alleges that he meets the newly-recognized constitutional right exception to the jurisdictional time-bar based on *Miller* and *Montgomery*.³ He is mistaken.

³ Defendant also alleges – for the first time in his appellate brief – that he meets the newly-discovered fact exception, too. This claim is waived, however, because he did not present this theory in the court below. See *Commonwealth v. Cline*, 177 A.3d 922, 927 (Pa. Super. 2017) (stating that “issues . . . are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal.”); *Commonwealth v. Phillips*, 141 A.3d 512, 522 (Pa. Super. 2016) (stating that an appellant is barred “from raising a new and different theory of relief for the first time on appeal”); *Whitney*, 817 A.2d at 475-478 (noting that a trial court is without jurisdiction under the PCRA unless a defendant seeking collateral relief *pleads and proves* that an exception applies); see generally Pa. R.A.P. 302(a) (“[i]ssues not raised in the [trial] court are waived and cannot be raised for the first time on appeal”).

While *Montgomery* did make *Miller* retroactively applicable to defendants on collateral review, *see Montgomery*, 136 S. Ct. at 732, this line of cases does not apply to defendant because he was not a juvenile at the time he committed his assault in Montgomery County. As previously noted, *Miller* held that “mandatory life without parole *for those under the age of eighteen at the time of their crimes* violated the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” *Id.*, 132 S. Ct. at 2460 (emphasis added). The Court’s express language makes clear that its holding only applies to juvenile offenders. While defendant was a juvenile at the time he committed the murder in Allegheny County, he was an *adult* when he committed the assault in Montgomery County. The *Miller* and *Montgomery* line of cases, accordingly, does not apply to him. *See Commonwealth v. Lawson*, 90 A.3d 1, 14 (Pa. Super. 2014) (holding that a prior sentence for a juvenile cannot be used to implicate *Miller* for an adult sentence of life imprisonment without parole). He cannot, therefore, satisfy the “newly-recognized constitutional right” exception, and his petition remains untimely. The trial court, accordingly, lacked jurisdiction to consider the merits of his petition. *See Albrecht*, 994 A.2d at 1093 (“[w]ithout jurisdiction, we simply do not have the legal authority to

address the substantive claims”). It properly dismissed the untimely petition without a hearing. *See Burton*, 936 A.2d at 527 (noting that a PCRA court may dismiss an untimely PCRA petition without an evidentiary hearing).

B. EVEN IF THE COURT HAD JURISDICTION, DEFENDANT FAILED TO RAISE A COGNIZABLE PCRA CLAIM.

Assuming *arguendo* that defendant’s petition is timely (it is not), he, nonetheless, fails to raise a cognizable PCRA claim. To this end, defendant purports to challenge the legality of the sentence imposed following his assault by life prisoner conviction, claiming that it is “wrongful” and “unconstitutional” because his underlying mandatory life without parole sentence was invalidated following *Miller*. *Defendant’s Brief*, at 13-14. A review of both defendant’s PCRA petitions and his appellate brief, however, makes clear that he is not actually challenging the sentence imposed, but rather the sufficiency of the evidence supporting his conviction.⁴ This is not a cognizable PCRA claim.

⁴ In any event, even if defendant was raising a true challenge to the legality of his sentence his claim would fail. This Court has already upheld the constitutionality of a mandatory life sentence under the assault by life prisoner statute. *See, e.g., Commonwealth v. Dessus*, 396 A.2d 1254, 1257 (Pa. Super. 1978).

At the time of the offense, the assault by life prisoner statute provided, in relevant part, as follows:

Every person *who has been sentenced to death or life imprisonment* in any penal institution located in this Commonwealth, and whose sentence has not been commuted, who commits an aggravated assault with a deadly weapon or instrument upon another, or by any means of force likely to produce serious bodily injury, is guilty of a crime, the penalty for which shall be the same as the penalty for murder of the second degree. . . .

18 Pa. C.S. § 2704 (emphasis added).⁵ Defendant is challenging one of the elements of Section 2704; to wit, whether he was sentenced to life imprisonment or death. *See Second Amended Petition*, at 13 (noting that “the elements of § 2704 can no longer be met” because defendant was re-sentenced to 40 years to life imprisonment in Allegheny County); *id.* at 10 (noting that the statute under which defendant was convicted only applies to inmates who have been sentenced to death or life imprisonment, but defendant’s life without parole sentence in Allegheny County was ruled unconstitutional); *Defendant’s Brief*, at 14 (noting that defendant “did not commit [a]ssault by [l]ife [p]risoner because he was not serving a life sentence”); *id.* (noting that defendant’s unconstitutional juvenile life

⁵ This language is identical to the present-day version of the statute.

without parole sentence was a “critical element” of the subsequent assault conviction).

A challenge to the sufficiency of the evidence is not a cognizable PCRA claim. *See Commonwealth v. Bell*, 706 A.2d 855, 861 (Pa. Super. 1998) (holding that sufficiency claims are not cognizable under the PCRA); *see also* 42 Pa. C.S. § 9543 (setting forth the cognizable PCRA claims).

Accordingly, even if the PCRA court had jurisdiction to consider defendant’s untimely petition, he would still not be entitled to relief because he fails to present a cognizable PCRA claim.

C. IN ANY EVENT, DEFENDANT’S PETITION FAILS ON THE MERITS.

Assuming *arguendo* that defendant could overcome the untimeliness of his petition (he cannot) and his failure to set forth a cognizable claim (he cannot), his petition would still fail on the merits – regardless of whether his challenge was a true illegal sentencing claim or a challenge to the sufficiency of the evidence.

In this regard, defendant’s new Allegheny County sentence of 40 years to life imprisonment still constitutes a sentence of life imprisonment under Pennsylvania law. Indeed, “[p]ursuant to Pennsylvania law, the maximum term represents the sentence imposed for a criminal offense,

with the minimum term merely setting the date after which a prisoner may be paroled.” *Commonwealth v. Martin v. Pa. Bd. Of Prob. & Parole*, 840 A.2d 299, 302 (Pa. 2003) (citing *Commonwealth v. Daniel*, 243 A.2d 400, 403 (Pa. 1968)). To be sure, the Pennsylvania Supreme Court has expressly held that “the maximum sentence is the only portion of the sentence which has legal validity, and ... the minimum sentence is merely an administrative notice by the court to the executive department,” informing it of when a prisoner’s minimum sentence is about to expire, for purposes of parole. *Id.* at 403.

Even if defendant’s current Allegheny County sentence was no longer considered a life sentence, however, defendant’s claim would still fail because he was unequivocally serving a life sentence *at the time he committed the prison assault*, which is all that is required under § 2704. *See id.* (defining an assault by a life prisoner as one committed by an individual who, at that time, has been sentenced to death or life imprisonment). Contrary to defendant’s contention, the fact that his Allegheny County life sentence was later deemed unconstitutional in light *Miller* and *Montgomery* does not render it *void ab initio*, causing his Montgomery County sentence to be illegal. *See Commonwealth v. Ciccone*, 152 A.3d 1004, 1009 (Pa. Super.

2016) (finding that while the mandatory minimum sentencing statute at issue was rendered illegal by *Alleyne v. United States*, at the time the defendant was sentenced under the statute it was constitutional and, therefore cannot be considered void from inception); compare *Commonwealth v. Stanley*, 446 A.2d 583, 588 n.6 (Pa. 1982) (fact that murder conviction was subsequently reversed did not require new trial on charge of violating statute prohibiting one convicted of a crime of violence from possessing firearms because at the time defendant was charged with possessing a firearm he had been convicted of murder and thus was an individual convicted of a crime of violence).

Finally, defendant's claim that his sentence has been "commuted" and, thus, he no longer meets the elements of an assault by life prisoner conviction under Section 2704, is, in addition to being a non-cognizable sufficiency of the evidence claim, unavailing. While Section 2704 does exclude from its confines those whose sentence has been "commuted," defendant does not fall into this category. "Article 4, Section 9 of the Pennsylvania Constitution delegates the 'high power' to commute a sentence of death to the Governor, based upon a unanimous recommendation of the Board of Pardons." *Commonwealth v. Brown*, 196

A.3d 130, 144 n.5 (Pa. 2018) (citing Pa. Const. Art. 4, § 9). Pennsylvania’s Administrative Code, too, makes clear that the power to formally “commute” a sentence rests with *the* Governor – not the courts – following a recommendation from the Board of Pardons of the Commonwealth. *See* 37 Pa. Code § 81.202; *id.* at § 81.211. Indeed, the power of commutation is an adjunct of the pardoning power and can be granted only by the authority in which the pardoning power resides. *Brown*, 196 A.3d at n.5 (quoting *Commonwealth v. Sutley*, 378 A.2d 780, 789 n.12 (Pa. 1977)).

Defendant’s Allegheny County life without parole sentence was not commuted by the governor; it was simply reduced by the trial court upon re-sentencing. Even if the trial court did have jurisdiction to consider the merits of defendant’s petition, therefore, no relief would be due.⁶

⁶ Incidentally, defendant dedicates a substantial portion of his “factual history” to facts that are set forth in the “mitigation summary report” that was presented in his Allegheny County re-sentencing and is attached to his brief. *See Defendant’s Brief* at 5-7, 9. Neither this report nor the assertions contained therein, however, are part of the certified record on appeal; as such, they may not be considered by this Court. *See Commonwealth v. Preston*, 904 A.2d 1, 6 (Pa. Super. 2006) (noting that “an appellate court is limited to considering *only* the materials in the certified record when resolving an issue”) (emphasis added). Indeed, “[i]t is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the case.” *Commonwealth v. Martz*, 926 A.2d 514, 524-525 (Pa. Super. 2007) (citation omitted); *see Commonwealth v. Stanton*,

CONCLUSION

For the reasons discussed above, the Commonwealth respectfully requests that this Court affirm the dismissal of defendant's untimely PCRA petition.

RESPECTFULLY SUBMITTED:



ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY
ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
EDWARD F. MCCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY

440 A.2d 585, 588 (Pa. Super. 1982) (“[i]t is of course fundamental that matters attached to or contained in briefs are not evidence and cannot be considered part of the record ... on appeal”). To this end, this Court has repeatedly stated that copying material and attaching them to a brief does not make it a part of the certified record. *See, e.g., Lundy v. Manchel*, 865 A.2d 850, 855 (Pa. Super. 2004); *First Union Nat. Bank v. F.A. Realty Investors Corp.*, 812 A.2d 719, 724 n. 3 (Pa. Super. 2002); *Commonwealth v. Holley*, 945 A.2d 241 (Pa. Super. 2008).

Accordingly, since neither the mitigation summary report nor the factual assertions contained therein that defendant sets forth in his brief are part of the record on appeal, they may not be considered by this Court. *See Rosselli v. Rosselli*, 750 A.2d 355, 359 (Pa. Super. 2000) (refusing to consider what purported to be a copy of a motion for reconsideration, and an order denying it, that appellant attached to his brief because neither document was listed in the docket, nor was it a part of the certified record).