

IN THE
SUPERIOR COURT OF PENNSYLVANIA

3339 EDA 2018

COMMONWEALTH OF PENNSYLVANIA

APPELLEE,

V.

JAMES HENRY COBBS,

APPELLANT.

BRIEF OF APPELLANT

On Appeal from the Order of October 23, 2018 Dismissing Amended PCRA
Petition in the Court of Common Pleas, Montgomery County, Docket CP-46-CR-
0000287-1979.

Lee Awbrey, 313083
Office of the Public Defender
MONTGOMERY COUNTY
COURTHOUSE
P.O. Box 311
Norristown, PA 19404-0311
Telephone (610) 278-3320
lawbrey@montcopa.org

Marsha L. Levick, 22535
Brooke L. McCarthy, 325155
JUVENILE LAW CENTER
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
Telephone (215) 625-0551
Facsimile (215) 625-2808
mlevick@jlc.org

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION.....	1
ORDER IN QUESTION.....	1
SCOPE AND STANDARD OF REVIEW	1
STATEMENT OF THE QUESTION INVOLVED	2
STATEMENT OF THE CASE.....	2
I. Procedural Background	2
II. Factual History.....	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. JAMES WAS SERVING AN UNCONSTITUTIONAL LIFE SENTENCE WHICH RENDERS HIS “ASSAULT BY A LIFE PRISONER” CONVICTION AND SENTENCE UNCONSTITUTIONAL.....	14
A. A Conviction of Assault by a Life Prisoner Requires an Individual to Be Serving a Life Sentence	14
B. <i>Miller</i> and <i>Montgomery</i> Invalidated James’ Underlying Life Sentence, Excluding Him from the Definition of a Life Prisoner.....	18
II. JAMES TIMELY FILED HIS POST CONVICTION RELIEF ACT PETITION CHALLENGING HIS ASSAULT BY A LIFE PRISONER SENTENCE AS HE COULD ONLY RAISE THE CLAIM AFTER HE WAS RESENTENCED IN ACCORDANCE WITH <i>MILLER</i> AND <i>MONTGOMERY</i>	20

III. THE RELIEF REQUESTED DOES NOT BURDEN THE COURTS22

CONCLUSION23

APPENDIXA1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Commonwealth ex rel. Stephens v. Myers</i> , 213 A.2d 613 (Pa. 1965).....	13
<i>Commonwealth v. Carbone</i> , 707 A.2d 1145 (Pa. Super. Ct. 1998).....	12
<i>Commonwealth v. Chandler</i> , 721 A.2d 1040 (Pa. 1998).....	17
<i>Commonwealth v. Cintora</i> , 69 A.3d 759 (Pa. Super. Ct. 2013).....	20
<i>Commonwealth v. Cobbs</i> , 431 A.2d 335 (Pa. Super. Ct. 1981).....	16
<i>Commonwealth v. Cunningham</i> , 81 A.3d 1 (Pa. 2013).....	3
<i>Commonwealth v. Fletcher</i> , 861 A.2d 898 (Pa. 2004).....	18
<i>Commonwealth v. Furgess</i> , 149 A.3d 90 (Pa. Super. Ct. 2016).....	20
<i>Commonwealth v. Holmes</i> (“ <i>Holmes II</i> ”), 933 A.2d 57 (Pa. 2007).....	1, 20
<i>Commonwealth v. Johnson</i> , 81 A.2d 569 (Pa. 1951).....	17
<i>Commonwealth v. Peterkin</i> , 722 A.2d 638 (Pa. 1998).....	23
<i>Commonwealth v. Robinson</i> , 931 A.2d 15 (Pa. Super. Ct. 2007).....	13
<i>Commonwealth v. Scoggins</i> , 353 A.2d 392 (Pa. 1976).....	15

<i>Commonwealth v. Thomas</i> , 717 A.2d 468 (Pa. 1998).....	17
<i>Mickens-Thomas v. Vaughn</i> , 321 F.3d 374 (3d Cir. 2003)	17
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	3, 19
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	<i>passim</i>
<i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994).....	17

Statutes

18 Pa. C.S.A. § 1103.....	13
18 Pa. C.S.A. § 2704.....	<i>passim</i>
37 Pa. Code § 81.211	16
42 Pa. C.S.A. § 742.....	1
61 Pa. C.S.A. § 6137.....	16
42 Pa. C.S.A. § 9541.....	12
42 Pa. C.S.A. § 9542.....	13
42 Pa. C.S.A. § 9543.....	13
42 Pa. C.S.A. § 9545.....	<i>passim</i>

Secondary Sources

Commutation of Sentence, 12 West’s Pa. Prac., Law of Probation & Parole § 6:4 (3d ed.).....	16
--	----

STATEMENT OF JURISDICTION

Pursuant to 42 Pa. C.S.A. § 742, this Court has exclusive appellate jurisdiction of this appeal as it is an appeal from the final order of October 23, 2018 of the Court of Common Pleas of Montgomery County, Pennsylvania, Docket No. CP-46-CR-0000287-1979, dismissing James Cobbs' Amended Post Conviction Relief Act ("PCRA") Petition.

ORDER IN QUESTION

James appeals from the Final Order of Dismissal of his Amended PCRA Petition,¹ issued on October 23, 2018, by the Honorable Carolyn T. Carluccio.

SCOPE AND STANDARD OF REVIEW

A determination of whether a PCRA court has jurisdiction to review a petition is a question of law for which the scope of review is plenary, and this Court's standard of review is de novo. *See Commonwealth v. Holmes*, 933 A.2d 57, 65 (Pa. 2007) (*Holmes II*).

¹ A copy of the October 23, 2018 Order is attached hereto as Appendix "A." A copy of James' November 17, 2017 Amended PCRA Petition is attached hereto as Appendix "B." A copy of Judge Carluccio's March 7, 2019 Opinion is attached hereto as Appendix "C." A copy of James' January 8, 2019 Concise Statement of Matters Complained of on Appeal is attached hereto as Appendix "D." A copy of the November 14, 2018 Notice of Appeal is attached hereto as Appendix "E."

STATEMENT OF THE QUESTION INVOLVED

1. Did the lower court err in denying James Cobbs relief under Pennsylvania's Post-Conviction Relief Act where James timely challenged his unconstitutional conviction and sentence of "Assault by Life Prisoner" that resulted in a mandatory life sentence, where a newly-recognized constitutional right was retroactively applied to James and nullified the life sentence on which the conviction and life without parole sentence was predicated and where James took every reasonable measure to pursue his claim in a timely fashion?

Suggested answer: Yes. Answered in the negative below.

STATEMENT OF THE CASE

I. Procedural Background

When James Cobbs was seventeen years old, he was arrested and charged with murder in Allegheny County. Following a jury trial in which evidence was presented that James participated in a robbery that resulted in a death, he was convicted of first-degree murder on July 16, 1971. *See* CP-02-CR-0008549-1970. The Allegheny County judge sentenced him to what was then a mandatory sentence of life imprisonment without the possibility of parole.

While James was serving his juvenile life without parole sentence, he was charged with assaulting another prisoner. A jury found him guilty of 18 Pa. C.S.A. § 2704, Assault by Life Prisoner, and other lesser, related charges. Section 2704 imposes a mandatory life sentence for "[e]very 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.” 18 Pa. C.S.A. § 2704. Because James was serving a mandatory life sentence for his juvenile homicide, on August 17, 1979, he was sentenced by the Honorable Robert W. Tredinnick of Montgomery County to a second, concurrent life without parole sentence. He appealed that conviction. The Superior Court affirmed the lower court on June 19, 1981. James timely filed his first PCRA, in which he raised the ineffectiveness of his counsel. His first PCRA petition was denied.

On June 25, 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), holding that mandatory life without parole sentences are unconstitutional when applied to individuals who were under the age of eighteen at the time of the crime. Because James was a child at the time of his first offense, he timely filed a *pro se* PCRA petition in the Allegheny County case seeking a new sentence on the basis of *Miller*. He also filed a *pro se* PCRA petition with the Court of Common Pleas in Montgomery County in the above-docketed case seeking review of his conviction of Assault by Life Prisoner.

The Pennsylvania Supreme Court initially determined, incorrectly, that *Miller* was not retroactive. *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), *abrogated by Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The PCRA court in this case issued a Notice of Intent to Dismiss the PCRA on February 11, 2013. James

filed a motion in Opposition nine days later. No additional action was taken by the PCRA court at that time.

On January 25, 2016, the United States Supreme Court decided *Montgomery*, 136 S. Ct. 718, and ruled that *Miller's* ban on mandatory juvenile life without paroles sentences was indeed retroactive. On March 22, 2016 (within sixty days of *Montgomery*), James requested permission to file an Amended PCRA Petition; the PCRA court granted permission on December 8, 2017. The amended petition stated that, based on the newly-discovered constitutional right established in *Miller* and *Montgomery*, James would be seeking PCRA relief from the mandatory life sentence issued in Allegheny County for the homicide committed when he was a juvenile. In light of the relevance of the Allegheny County PCRA petition to the Montgomery County PCRA claim, the Montgomery County PCRA court ordered that the matter be held in abeyance pending resolution of the petition that challenged the first life sentence.

James' Allegheny County PCRA succeeded. *See* Appendix B, November 17, 2017 Amended PCRA Petition's Ex. A at A21-A65. On September 19, 2017, James had a resentencing hearing in Allegheny County and was sentenced, per agreement, to a minimum term of forty (40) years to life with credit from October 29, 1970 (17,127 days of time credit). *Id.* at A63:20-A64:1. The resentencing court expressly

noted that the new sentence would make James eligible for parole. *Id.* at A61:15-16, A63:20-A64:1.

With his predicate juvenile life without parole sentence now voided as an unconstitutional sentence on the basis of *Miller/Montgomery*, counsel for James filed on November 17, 2017 an Amended PCRA and brief in this, the second life without parole case. *See* Appendix B, November 17, 2017 Amended PCRA Petition. The PCRA court issued a Notice of Intent to Dismiss Amended PCRA Petition without Hearing on October 4, 2018, noting its intent to dismiss on the basis of timeliness. *See* Rule 907 Order, Oct. 4, 2018. After additional briefing, on October 23, 2018, the Montgomery County PCRA court dismissed James' Amended PCRA Petition as untimely. *See* Appendix A, October 23, 2018 Order. James timely appealed that dismissal on November 14, 2018.

II. Factual History

James was a functionally illiterate, orphaned teen who had been living with his aunt and fourteen other children when he was arrested at age seventeen for his role in a robbery that resulted in a death. By the time of his arrest he had seen his share of hardship, although he was described as a child who “enjoyed singing, and known for his artistic ability, his cooking, and his attendance at Sunday school.” Appendix F, August 18, 2017 Mitigation Summary Report at A104.² James' mother

² A copy of the August 18, 2017 Mitigation Summary Report is attached hereto as Appendix “F.” The exhibits have not been included due to size.

had died three years prior. He never knew his father, who did not provide for his family. His mother, with whom he had been very close, developed cancer and deteriorated quickly. *Id.* at A105. Young James' siblings first sought to protect him by hiding her illness. When he learned that she had been hospitalized, "he would walk to the hospital every day to visit her, often bearing gifts." *Id.* at A105. She died at age thirty-five. James was fourteen.

It was the height of the sixties, and James, an African-American boy, grew up surrounded by the racial tensions that accompanied that era. In 1967, the Pittsburgh Public School district desegregated James' middle school. A year later, on April 5, 1968, Dr. Martin Luther King was assassinated, and volatile protests characterized as race riots erupted in his neighborhood, lasting six days. *Id.* at A106. Attending school in that climate, his special needs were entirely overlooked. At age eleven he could only read at a first-grade level. *Id.* at A107. He never received special education services and was passed from grade to grade. *Id.* Not surprisingly, as a teen his school attendance increasingly faltered.

On October 28, 1970, at seventeen, James made a choice that would define his life forever. That day he was socializing with a fifteen-year-old peer, Michael Perkins. According to police statements, Michael had been fighting with his brother, Donald, and was drunk. *Id.* at A109. Michael had a knife and suggested the two boys go and "get some money." *See* Appendix B, November 17, 2017 Amended PCRA

Petition's Ex. A at A30:10-20. They first approached a man getting into his car, but he drove away. Appendix F, August 18, 2017 Mitigation Summary Report at A109. The two eventually approached a man who was walking, Mr. James Breslin. *Id.* An eye-witness described watching an attack by two assailants, one of whom was "dressed like a woman" and both approximated to be in their twenties. *Id.* at A110. James admitted to going through the man's pockets before running away. *Id.* at A110. As James was running away, he heard the man groan. Michael caught up to James and told James that he had stabbed Mr. Breslin three times. *Id.* at A109. When questioned by police, Michael admitted that he stabbed Mr. Breslin. *Id.* at A110. A jury convicted James of first-degree murder under the felony murder rule. *See* Appendix B, November 17, 2017 Amended PCRA Petition's Ex. A at A28:12-A29:16. At the time he was convicted, the law required a mandatory sentence of life without parole.

James was transferred to SCI Graterford in Montgomery County, Pennsylvania to serve his sentence. His early adjustment did not go well. On December 18, 1978, he was arrested and charged for his role in a fight with another inmate. A correctional officer testified that he saw James respond to a punch by another inmate, Walter Brown, by lunging at him with a knife. James proceeded to a jury trial where he asserted that the fight was started by Walter Brown and that it was Mr. Brown who initially had the knife. Counsel for James introduced evidence

that James' hand was injured and argued that the injury occurred when he tried to grab the knife from Mr. Brown to prevent Mr. Brown from harming him. (Trial Transcript Case No 287-79, "Trial Tr." at p. 100-110). Mr. Levensgood, an employee at the infirmary of SCI Graterford, testified that James received severe lacerations to several fingers on his left hand. Following the incident, James was transferred to Pottstown Memorial Hospital for tendon and nerve repair of the fingers on his left hand. (Trial Tr. at p. 94-96). Mr. Levensgood also testified that Walter Brown received small lacerations on his head and forehead. (Trial Tr. at p. 121). Mr. Brown's injuries required butterfly stitches. Mr. Brown refused to testify at trial, asserting a Fifth Amendment privilege and his belief that any testimony would incriminate himself. (Trial Tr. at p. 44-48). Although no evidence of significant injury to Mr. Brown was introduced, the action was found by a jury to constitute aggravated assault, a felony of the second degree. *See* Bills of Information; *see also* Dkt. as Appealed 11/13/86. Because James was classified as a life prisoner, he was also convicted of Assault by Life Prisoner, 18 Pa. C.S.A. § 2704.

The Assault by Life Prisoner conviction carried a mandatory life sentence. At the time of sentencing, the Court exercised the only discretion it had by running the sentence concurrent to the pre-existing sentence, noting that the "law gives me no choice but to impose a life sentence, and secondly, I think that under all the circumstances a life sentence consecutive in this case would be improper so I'm

going to make it concurrent.” (May 29, 1979 Sentencing Transcript No. 287-79 “S.T.”, at 6). The court made the sentence effective December 18, 1978 and imposed no additional sentence for the related counts. (S.T. at 7).

Over the decades that followed, James worked on rehabilitating himself. His early years show misconduct citations, but no additional convictions. As he matured, he received fewer citations for conduct and over the last two decades his file reveals a well-behaved inmate with few misconduct citations, and none which involve violence. *Id.* at 13-15; *see also* Appendix F, August 18, 2017 Mitigation Summary Report at A111-A113. By 1998, his annual report described him as “quiet, does not talk much and appears stable ... adjustment appears adequate.” *Id.* at A111.

James taught himself how to read in prison: “He would write down the words he did not understand and learned how to spell words from the books and magazines that were available to him. When he wrote letters to his family, he would refer to his list of learned words. As James’ list of words and vocabulary expanded, he became more confident in his reading and writing abilities.” *Id.* at A112. At the time of his resentencing he was enrolled in social studies and mathematics and had earned fourteen certificates for programming that spans victim awareness to career planning and technology skills. *Id.* at A113.

James was released to the general population in 2007. *Id.* He developed a strong employment record, having worked as a yard worker, window washer, sewing

machine operator, and at assignments in plumbing, the clothes room, labor pool, laundry, sanitation, and dietary. *Id.* at 12. Since 2007 he has worked in the bake shop, where he consistently receives positive and above-average reviews. *Id.* at A112; *see also* Appendix B, November 17, 2017 Amended PCRA Petition’s Ex. A. Throughout his incarceration he remained in close contact with his sister, Gwendolyn Jennings, who visited him regularly during his over 47 years of incarceration, often weekly and often bringing her children. Appendix B, November 17, 2017 Amended PCRA Petition’s Ex. A. at A45. In spite of the challenges of incarceration he served as a mentor and source of emotional support for his niece—the daughter of the eldest sister who also raised him—encouraging her to do well in school and providing advice. *Id.* at A48-A49. If released, James’ family has demonstrated that they can provide him with housing, transitional support, and employment.

SUMMARY OF THE ARGUMENT

James, who was incarcerated at 17 and is now a baker in his 60s with strong family supports, is currently serving an unconstitutional life without parole sentence based upon his conviction for assault while incarcerated. Unless granted relief by this court, James will die in prison. Yet James did everything one could possibly do to pursue his right to remedy this unconstitutional sentence in a timely fashion. He filed a PCRA petition within sixty days of the *Miller* decision; he amended the still-

active PCRA within sixty days of the *Montgomery* decision; and amended again within sixty days of the resentencing that voided his original life sentence, rendered him parole-eligible, and eliminated the predicate condition for his second life without parole sentence. Nonetheless, the Commonwealth and PCRA court wrongly assert that the doors of justice shall remain shut to him. James is exactly the type of petitioner for whom PCRA remedies are intended. This Court should reverse the dismissal and vacate James' conviction and sentence for assault by a life prisoner.

As described above, seventeen-year-old James Cobbs was condemned to life in prison with no chance of parole for his participation in a robbery that resulted in death. While serving his sentence at SCI Graterford in Montgomery County, and as an adult, he was arrested and charged with assault. A general charge of assault would have led to an additional term of years, but because he was labeled a "life prisoner," he was charged with the crime of Assault by Life Prisoner, 18 Pa. C.S.A. § 2704. That charge carried a mandatory term of life without parole.

The law is now abundantly clear that James' first life sentence was unconstitutional. A court in Allegheny County accordingly resentenced him on the initial conviction, giving him a sentence that renders him a prisoner with a term-of-years sentence and eligible for parole. That ruling was based entirely on newly-recognized constitutional rights that were retroactively applied to James after *Miller* and *Montgomery*. But the Allegheny Court's jurisdiction could only reach one of the

two wrongful sentences. Therefore, the remedy to which James is entitled remains incomplete as Montgomery County refuses to review his second life sentence which occurred solely as the result of his originally unconstitutional life sentence. His petition falls squarely under the enumerated exceptions to the PCRA statute's timeliness that permits review of later-filed PCRA petitions where the facts could not have been reasonably discovered and the United States Supreme Court recognized a new constitutional right that applies retroactively. *See* 42 Pa. C.S.A. § 9545.

ARGUMENT

James' PCRA petition was timely-filed and he is entitled to relief from the wrongful life sentence in this case—a sentence to die in prison that is entirely predicated on what subsequently became a prior unconstitutional life sentence. In Pennsylvania, once the accused has exhausted his direct appeal rights, or has waived his right to do so, he may seek collateral relief from a conviction for a crime he did not commit or from an illegal sentence under provisions of the Post-Conviction Relief Act, 42 Pa. C.S.A. §9541 (“PCRA” or “the Act”). *Commonwealth v. Carbone*, 707 A.2d 1145, 1148 (Pa. Super. Ct. 1998). Pennsylvania's post-conviction relief statute evolved from the post-conviction writ of habeas corpus, the aim of which is to “afford an adequate corrective process for hearing and determining alleged violations of federal constitutional guarantees.” *Commonwealth ex rel. Stephens v.*

Myers, 213 A.2d 613, 620 (Pa. 1965) (citations omitted). Although the statute has been amended over time, its central purpose remains to create an avenue of post-conviction relief for those serving sentences for crimes which they did not commit and those serving illegal sentences. *See* 42 Pa. C.S.A. § 9542. The specific nature of claims that may be raised in PCRA petitions are set forth in 42 Pa. C.S.A. § 9543.

James' current petition is squarely within the four corners of the PCRA; his predicate life sentence was declared unconstitutional by the US Supreme Court and his subsequent life sentence must now be declared unconstitutional as well and vacated.³ He is serving a life sentence for a second-degree felony of aggravated assault that is well outside the statutory limits permitted for such a crime since the Commonwealth should have been precluded from charging him as a life prisoner. The appellate courts have long recognized that a sentence is illegal when it is outside the legal parameters prescribed by the applicable statute. *Commonwealth v. Robinson*, 931 A.2d 15, 21 (Pa. Super. Ct. 2007) (*en banc*). The statutory maximum for aggravated assault is twenty (20) years when categorized as a first degree and only ten (10) years when a felony of the second degree. 18 Pa. C.S.A. § 1103. James has served over forty (40) years on this conviction and is entitled to a resentencing

³ *See* 42 Pa. C.S.A. § 9543(a)(2)(i). The exculpatory evidence that he is not serving a predicate life sentence was not available and would have changed the outcome of the trial if it had been introduced. *See* 42 Pa. C.S.A. § 9543(a)(2)(vi). James is also serving a term beyond the lawful maximum for a conviction of aggravated assault. *See* 42 Pa. C.S.A. § 9543(a)(2)(vii).

and discharge. As applied to James, 18 Pa. C.S.A. § 2704's mandatory life sentence violates the ban on cruel and unusual punishment imposed by the United States Constitution's Eighth Amendment and by Article I, Section 13 of Pennsylvania's Constitution.

I. JAMES WAS SERVING AN UNCONSTITUTIONAL LIFE SENTENCE WHICH RENDERS HIS "ASSAULT BY A LIFE PRISONER" CONVICTION AND SENTENCE UNCONSTITUTIONAL.

A. A Conviction of Assault by a Life Prisoner Requires an Individual to Be Serving a Life Sentence.

James did not commit Assault by Life Prisoner because he was not serving a life sentence; his 1970 juvenile life without parole sentence was always unconstitutional:

A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

Montgomery, 136 S. Ct.at 731 (citations omitted).

The predicate, unconstitutional juvenile life without parole sentence was a critical element of the subsequent assault conviction. In 1979, the Assault by Life Prisoner statute read, in pertinent part:

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.A. § 2704 (version enacted in 1974).

For a conviction of an assault by a life prisoner to stand, “[t]he statute . . . requires, as a necessary element, a showing by the Commonwealth that the accused ‘has been sentenced to imprisonment for life’” *Commonwealth v. Scoggins*, 353 A.2d 392, 395 (Pa. 1976) (citations omitted). Therefore, at trial, the Commonwealth introduced testimony of a Department of Corrections record officer to show that James was indeed serving a life sentence out of Allegheny county, a sentence for his juvenile homicide conviction.⁴ This unconstitutional sentence has now been vacated, removing the predicate condition for his second life without parole sentence and an essential element of the assault crime for which he was convicted.

The context of the Assault by a Life Prisoner statute and how Pennsylvania has historically defined a life prisoner demonstrates that even though James is now

⁴ The testimony of the record officer at Graterford Prison was as follows:

[PROSECUTOR]: Now, do you have any records regarding Mr. James Henry Cobbs, also known as P-0836?

A: Yes, I do.

Q. Could you take a look at them for me, please. Now, Mr. Kooker, do those records reflect what type of sentence the defendant is serving?

A. Yes. He’s serving a life sentence from Allegheny County.

N.T. August 17, 1979 at 5. Per Pennsylvania law, the Commonwealth should only present evidence of the sentence and not the underlying facts of the crime. *See Scoggins*, 353 A.2d at 395.

on parole for life, he is still not a life prisoner under Section 2704.⁵ Section 2704 explicitly excludes individuals whose life sentences have been commuted, and when James challenged his second life sentence, this Court affirmed the lower court's determination that "a life sentence which has been commuted is no longer a life sentence in being" as understood by the statute. *Commonwealth v. Cobbs*, 431 A.2d 335, 337 (Pa. Super. Ct. 1981).⁶ This statement remains true even when an individual's maximum sentence remains a life of parole as commutation does not require the vacatur of all remaining time to be served. Instead commutation of "life imprisonment to life on parole" is explicitly defined in the Board's powers, and the most common commutation changes a life sentence to a minimum term of years that permits parole. *See* 37 Pa. Code § 81.211 ("Clemency"); *Commutation of Sentence*, 12 West's Pa. Prac., Law of Probation & Parole § 6:4 (3d ed.) (citations omitted). Thus, once a life sentence has been altered to allow for parole through commutation, an individual is no longer a life prisoner as intended by Section 2704. *See id.*, *see also* 61 Pa. C.S.A. § 6137(a)(4)(i).⁷ This inclusion of the commutation exception reveals a legislative intent to exempt from a mandatory life sentence those who are

⁵ Notable here is the statute's exemption of those serving life sentences that have "not been commuted." 18 Pa. C.S.A. § 2704.

⁶ This Court has essentially already answered the foundational question at hand as to whether an individual is considered a life prisoner when their minimum sentence has been altered.

⁷ The parole board may parole an individual "whose term of imprisonment was *commuted from life to life on parole*." 61 Pa. C.S.A. § 6137(a)(4)(i) Unless the sentence is commuted to one of life on parole, the parole board is not permitted to release an individual.

granted a lesser sentence, becoming eligible for parole. Prior to 2012, one could be paroled from a life sentence through a commutation issued by the governor. *Miller* and *Montgomery* provide an additional, analogous mechanism for commutation through re-sentencing of all individuals serving mandatory juvenile life without parole sentences in the Commonwealth.

Furthermore, as far back as 1951, the Pennsylvania Supreme Court recognized that life means life without parole. *See Commonwealth v. Johnson*, 81 A.2d 569 (Pa. 1951) (remanding where the judge improperly inserted commentary about pardons following questioning by the jury about what life imprisonment meant); *see also Commonwealth v. Thomas*, 717 A.2d 468, 481 (Pa. 1998) (affirming the trial court’s definition that “[a] sentence of life imprisonment has no minimum, therefore a life prisoner never becomes eligible for parole” because “it essentially informed the jury that ‘life means life’ unless a governor grants a commutation, which is rare” (citations omitted)). More recent case law allows for the jury to clearly understand that a sentence of life imprisonment means life without the possibility of parole, particularly where future dangerousness was raised. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Commonwealth v. Smith*, 675 A.2d 1221 (Pa. 1996); *Commonwealth v. Chandler*, 721 A.2d 1040 (Pa. 1998). As the Third Circuit explained, “[l]ife sentences in Pennsylvania presumptively exclude any possibility of parole.” *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 377 (3d Cir. 2003); *see also*

Commonwealth v. Fletcher, 861 A.2d 898, 913 (Pa. 2004) (noting that jurors dealing with capital case decisions have a right, under certain circumstances, to understand that a “life sentence means that a defendant is not eligible for parole, but that the Governor has the power to grant a commutation of a sentence of life or death if based on the recommendation of the Board of Pardons following a public hearing. Further, the trial court should relay any available statistical information relating to the percentage of life sentences that have been commuted within the last several years.” (citations omitted) (internal quotation marks omitted)). Any individual who is eligible for parole is exempt from the punishment enumerated in Section 2704 since they are not a life prisoner.

B. *Miller* and *Montgomery* Invalidated James’ Underlying Life Sentence, Excluding Him from the Definition of a Life Prisoner.

Now that James is eligible for parole on his juvenile sentence, he is categorically excluded from the class of individuals intended to be punished by Section 2704 and, in accordance with the principle underlying retroactivity, should have always been excluded. James was unable to raise this claim, though, until his new sentence of a term of years was imposed – a change in sentence dependent on the rulings of *Miller* and *Montgomery*. In 2012, the Supreme Court in *Miller* recognized that a sentencing scheme that mandates the imposition of a life-without-parole sentence for a juvenile violates the Eighth Amendment to the United States Constitution. “By making youth (and all that accompanies it) irrelevant to imposition

of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Miller*, 567 U.S. at 479. The fact that relief was unquestionably due came when the United States Supreme Court expressly stated that *Miller* was to be applied retroactively. *Montgomery*, 136 S. Ct. 718. *Montgomery* clarified that *Miller* requires more than just a consideration of an offender’s age and that life without parole is a “disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption,” “permanent incorrigibility,” and “such irretrievable depravity that rehabilitation is impossible.” *Id.* at 726, 733, 734. The *Montgomery* Court recognized “that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflect the transient immaturity of youth.” *Id.* at 734 (citations omitted) (internal quotation marks omitted). “As a result, *Miller* announced a substantive rule of constitutional law.” *Id.* It was on these grounds that the Allegheny Court resentenced James and rendered his first life without parole sentence null and void.

Contrary to the argument of the Commonwealth and opinion of the PCRA court, James does not challenge his Montgomery County life without parole sentence as excessive in regard to his youth – he concedes he was over the age of eighteen at the time of the assault. Rather, his claim arises from the vacatur of his first life without parole sentence after it was declared unconstitutional by the Supreme Court. The current life without parole sentence that he is serving for an assault was the

direct result of the Commonwealth’s unconstitutional imposition of a mandatory life sentence in the earlier case.⁸ Absent the first life sentence, there can be no second life sentence. Despite this, James has served over four decades on the assault conviction to date.⁹

II. JAMES TIMELY FILED HIS POST CONVICTION RELIEF ACT PETITION CHALLENGING HIS ASSAULT BY A LIFE PRISONER SENTENCE AS HE COULD ONLY RAISE THE CLAIM AFTER HE WAS RESENTENCED IN ACCORDANCE WITH *MILLER AND MONTGOMERY*.

Generally, petitions for post-conviction relief must be filed within one year of the date the judgment of sentence becomes final. 42 Pa. C.S.A. § 9545. There are, however, three statutory exceptions¹⁰ to that rule. The PCRA permits latter-filed petitions 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

⁸ James’ claim is thus distinguishable from other cases in which petitioners may seek relief from life without parole sentences on the basis of *Miller* and *Montgomery* where the acts leading to conviction were committed after the age of eighteen. In *Commonwealth v. Cintora*, 69 A.3d 759 (Pa. Super. Ct. 2013), for example, petitioners argued that *Miller* should apply to them and others “whose brains were not fully developed at the time of their crimes,” seeking to apply the rationale of *Miller* to those close to, but slightly beyond the age of eighteen. The Court declined to extend the concept of “juvenile” to reach those petitioners. Similarly, the petitioner in *Commonwealth v. Furgess*, 149 A.3d 90 (Pa. Super. Ct. 2016) argued that he was a “technical juvenile” due to immature brain development. That court declined to expand the definition of juvenile in that case, as well. Here, James does not seek to expand the definition of “juvenile” to acquire relief. Notwithstanding the fact that James was over eighteen when the second life without parole sentence was imposed, the rights recognized in *Miller* and *Montgomery* gave rise to his claim and for that reason the Act’s jurisdictional exception applies.

⁹ James’ sentence in this matter became effective on December 18, 1978.

¹⁰ The Supreme Court also recognizes limited authority of the courts to exercise jurisdiction outside of these enumerated exceptions for the purpose of correcting patent errors that result in illegal sentences. *Holmes II*, 933 A.2d at 65.

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.A. § 9545(b)(1)(i)-(iii). Any petition invoking one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.” 42 Pa. C.S.A. § 9545(b)(2) (recently amended in 2018 to extend the deadline from 60 days to one year). James’ claim satisfies both the newly-discovered facts requirement and the newly-recognized constitutional right exception. 42 Pa. C.S.A. § 9545(b)(1)(ii)-(iii). In fact, it is the PCRA court’s failure to recognize the unique overlap presented by these two exceptions which leaves James serving an illegal sentence that condemns him to die in prison.

James’ assault by a life prisoner conviction factually depends on the earlier, illegal juvenile life without parole sentence which was overturned following *Montgomery*. Thus, James’ subsequent life sentence is as unconstitutional as his first since “[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final before the law was held unconstitutional.” *Montgomery*, 136 S. Ct. at 731. He was unable to ascertain the set

of facts that nullified his earlier conviction, though, until the Allegheny County court granted him relief under *Miller* and affirmed that his original juvenile life sentence had always been unconstitutional. It was only at this time that James had the facts and legal standing to raise a challenge to the legality of his second life sentence. Prior to his resentencing, the courts had not recognized James' sentence as illegal and only at the time of his resentencing did he receive a minimum term of years placing him outside of Section 2704. Therefore, the only logical time to start his clock for a PCRA petition is the day of his resentencing, *i.e.*, the day that he was removed from the group of individuals Section 2704 is constitutionally allowed to punish by imposing a second, mandatory life without parole sentence.

III. THE RELIEF REQUESTED DOES NOT BURDEN THE COURTS.

James is one of less than a dozen identified cases of individuals who were wrongly classified as Life Prisoners under 18 Pa. C.S.A. § 2704 because of an unconstitutional predicate juvenile life without parole sentence. However, any number of illegal life without parole sentences in the state of Pennsylvania would be unacceptable. Indeed, counties are already addressing these claims and the parole board is releasing them. *See Commonwealth v. Martinez Frazier*, CP-08-CR-96-22 (resentenced out of Northumberland County through PCRA relief for Assault by a Life Prisoner conviction; released); *Commonwealth v. Joseph Laconte*, CP-14-0001515-2000 (resentenced to 8 to 16 years for aggravated assault after receiving

PCRA relief on his assault by a life prisoner conviction; released); *Commonwealth v. Herbert Louis Harris*, CP-31-CR-0000210-1989 (PCRA granted and sentence for assault by a life prisoner set aside; pending resentencing).

The PCRA's statutory framework regarding time limitations is intended to "strike[] a reasonable balance between society's need for finality in criminal cases and the convicted person's need to demonstrate that there has been an error in the proceedings that resulted in his conviction." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998). James' petition and the petitions of those similarly situated are not cases of an endless pursuit of empty remedy that may only be culled with a time bar. To the contrary, James did everything in his power to raise a timely claim. The claims arising from these anomalous life prisoner cases are exactly the type of constitutional claims that the PCRA is meant to address and in no way undermine society's need for finality. The PCRA's built-in third timeliness exception permits the court to review the constitutional violation that condemned James for life.

CONCLUSION

James has demonstrated the exact type of rehabilitation that the United States Supreme Court spoke of in *Miller* and *Montgomery*, and that our Supreme Court discussed in *Batts*. James is far from permanently incorrigible and thus there was no effort to even seek a life without parole sentence when he was resentenced in Allegheny County. Instead, he was given a sentence with parole eligibility, one

whose minimum he has now surpassed by several years. During that lengthy period of incarceration, James made efforts over time to change his life and rehabilitate himself.

James' claim arose from the belated recognition of constitutional rights that have since been retroactively applied to him. He took all reasonable measures to ensure the timeliness of his claim once it became known to him. His petition thus falls squarely within the ambit of 42 Pa. C.S.A. § 9545(b)(ii) and (iii). The absurdity of a result to the contrary cannot be denied. Absent access to post-conviction review, James would be eligible for release on a murder conviction after forty years but would remain incarcerated for the whole of his natural life for an assault conviction that inflicted a non-serious injury that required butterfly stitches.

For the foregoing reasons, this Honorable Court should find James' petition was timely-filed and vacate his unlawful conviction and life without parole sentence for remand to the court below.

Respectfully submitted,

/s/Lee Awbrey

Lee Awbrey, 313083

OFFICE OF THE PUBLIC DEFENDER

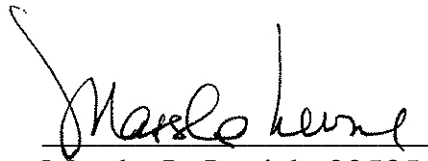
Montgomery County Courthouse

Norristown, Pennsylvania 19404-0311

Phone: (610) 278-3320

Fax: (610) 278-5941

lawbrey@montcopa.org



Marsha L. Levick, 22535
Brooke L. McCarthy, 325155
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (Fax)
mlevick@jlc.org

COUNSEL FOR APPELLANT

DATED: July 30, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify this 30th day of July, 2019, that the foregoing brief of Appellant complies with the word count limits as set forth in Pa.R.A.P. 2135.

/s/Lee Awbrey _____
Lee Awbrey, 313083
OFFICE OF THE PUBLIC DEFENDER