
NO. 56 MAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

V.

JAMES HENRY COBBS,

Appellant.

BRIEF OF APPELLANT

Appeal from the February 24, 2020 Opinion of The Superior Court of Pennsylvania (No. 3339 EDA 2018) Affirming the Order of October 23, 2018 Dismissing Amended PCRA Petition in the Court of Common Pleas, Montgomery County, Docket CP-46-CR-0000287-1979.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to 42 Pa.C.S.A. § 724(a), which provides that orders of the Superior Court may be reviewed by this Court upon allowance of appeal. This Court granted James Cobbs’ petition for allowance of appeal on September 15, 2020. Pa.R.A.P. 1112(a).

ORDER IN QUESTION

On February 24, 2020, the Superior Court of Pennsylvania issued an opinion that concludes: “Order affirmed.” (*See* App. A at A13.) The Superior Court held that in determining the propriety of James Cobbs’ current life sentence, it was only relevant that his underlying sentence was constitutional at the time of his conviction for Assault by Life Prisoner. (*See* App. A at A12.) The Court found that a later reversal of a life sentence or determination that the sentence was unconstitutional does not affect the validity of a Section 2704 conviction. (*See* App. A at A12.)

SCOPE AND STANDARD OF REVIEW

James Cobbs challenges the validity of his life without parole sentence, imposed solely based on a life sentence that did not comport with the federal and state constitutional requirements articulated in *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017). Issues relating to the legality of a sentence are questions of law. This Court’s standard of review over such questions is *de novo* and its scope of review is plenary. *Commonwealth v. Furness*, 153 A.3d 397, 405 (Pa. Super. Ct. 2016); *see*

also Batts, 163 A.3d at 434-35 (holding that youth's challenge to state's authority to impose a life without parole sentence is a question of the sentence's legality).

STATEMENT OF THE QUESTION INVOLVED

In the Order granting Mr. Cobbs' Petition for Allowance of Appeal, this Court rephrased the question involved as:

Where a prisoner's constitutionally infirm life-without-parole sentence for murder committed while a minor formed the basis for a conviction of assault by a life prisoner under 18 Pa.C.S. §2704 committed as an adult, and the prisoner is re-sentenced to forty-years-to-life on the original murder conviction, is the Section 2704 conviction vitiated by such re-sentencing?

Suggested answer: Yes.

STATEMENT OF THE CASE

Procedural Background

When James Cobbs was seventeen years old, he was arrested and charged with murder in Allegheny County. Following a jury trial, he was convicted of first-degree murder on July 16, 1971 through the felony murder rule. *See* CP-02-CR-0008549-1970. He was sentenced to what was then a mandatory sentence of life imprisonment without the possibility of parole.

In 1978, while a young adult serving his mandatory juvenile life without parole sentence, James 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 conviction, he was subsequently sentenced by the Montgomery County Court to a second, mandatory, concurrent life without parole sentence. He appealed that conviction. The Superior Court affirmed the lower court on June 19, 1981. *Commonwealth v. Cobbs*, 431 A.2d 335 (Pa. Super. Ct. 1981). James timely filed his first PCRA, raising the ineffectiveness of his counsel. This PCRA petition was denied.

Thirty-one years later, 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. 567 U.S. at 465. Because James was a child at the time of his first offense, he timely filed a *pro se* PCRA petition in Allegheny County 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 instant case seeking review of his conviction of Assault by Life Prisoner.

Before James's PCRA was reviewed, this Court concluded 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 Montgomery County PCRA court 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.

Nearly three years later, on January 25, 2016, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. at 736, ruling that *Miller's* ban on mandatory juvenile life without paroles sentences was indeed retroactive. On March 22, 2016 (within sixty days of the decision in *Montgomery*), James requested permission to file an Amended PCRA Petition; the Montgomery County PCRA court granted permission on December 8, 2017. The Amended Petition sought post-conviction relief from the mandatory juvenile life sentence issued in Allegheny County based on the newly discovered constitutional right established in *Miller* and *Montgomery*. 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 Montgomery County PCRA Petition be held in abeyance pending resolution of the petition that challenged the predicate life sentence.

James's Allegheny County PCRA succeeded. He was re-sentenced in Allegheny County, per agreement, to a minimum term of forty (40) years to life with credit from October 29, 1970 (17,127 days of time credit). *See* Superior Ct. Br. of Appellant, App. B, Exh. A at A63:20-A64:1 [hereinafter Allegheny Cty. S.H. Tr.].

With his predicate juvenile life without parole sentence now void *ab initio* pursuant to *Miller* and *Montgomery*, counsel for James filed an Amended PCRA in his second life without parole (the mandatory sentence for a conviction of Section 2704) case. The Montgomery County PCRA court dismissed James's Amended PCRA Petition as untimely. James timely appealed that dismissal.

In its February 24, 2020 Opinion, the Superior Court concluded James's PCRA petition was timely filed. *Commonwealth v. Cobbs*, 230 A.3d 388, 390-91 (Pa. Super. Ct. 2020). However, the court ruled that James was serving a constitutional life sentence at the time he was sentenced to a mandatory term of life without parole for the Assault by Life Prisoner conviction. *Id.* at 394. The Superior Court reasoned that the later nullification of this predicate sentence had no bearing on James's current sentence. *Id.* James filed a timely Petition for Allowance of Appeal which was granted by this Court on September 15, 2020.

Factual History

James Cobbs 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. Allegheny Cty. S.H. Tr., at A28, A30, A32-A33; Superior Ct. Br. of Appellant, App. F, at A103-A107 [hereinafter Mitigation Report]. On October 14, 1970, James was socializing with a fifteen-year-old peer, Michael Perkins. Allegheny Cty. S.H. Tr., at A28:22-24. According to

police statements, Michael had been fighting with his brother, Donald, and was drunk. Allegheny Cty. S.H. Tr., at A28-A30; *see also* Mitigation Report, at A109. Michael had a knife and suggested the two boys go and “get some money.” Allegheny Cty. S.H. Tr., at A30:10-20. They approached a man and James admitted to going through the man’s pockets before running away. Mitigation Report at A110. As James was running away, he heard the man groan. *Id.* Michael ran after James and told him that he had stabbed the man three times. *Id.* at A109. When questioned by police, Michael admitted that he stabbed the man. *Id.* at A110. A jury convicted James of first-degree murder under a theory of felony murder liability. *See* Allegheny Cty. S.H. Tr., at A28:12-A29:16. At the time of his conviction, the law required a mandatory sentence of life without parole. Allegheny Cty. S.H. Tr., at A26:1-4.

James was transferred to SCI Graterford in Montgomery County, Pennsylvania to serve his sentence. His early adjustment as a young teen did not go well. Mitigation Report, at A111. On December 18, 1978, he was arrested and charged for his role in a fight with another inmate. Despite no evidence of significant injury to the other inmate, a jury determined that the fight constituted aggravated assault, a felony of the second degree. Because James was classified by the Department of Corrections as a life prisoner, he was convicted of Assault by Life Prisoner, 18 Pa. C.S.A. § 2704 which carried a mandatory life sentence. During his

sentencing for that charge, the court expressly noted 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 and so I am going to make it concurrent.” (N.T., (MONTCO S. Tr.), 8/17/79, at 6)

In the decades that followed, James worked on rehabilitating himself. Although his early years show misconduct citations, he had no additional convictions. Allegheny Cty. S.H. Tr., at A34-A36. As he matured, he received fewer citations for conduct and over the last two decades his file reveals a well-behaved inmate with very few misconduct citations, none of which involve violence. *Id.* Since 2007, he has been working in the bakery, where he consistently receives positive and above-average reviews. *Id.* at A33-A34.

Following the United States Supreme Court’s decision in *Montgomery v. Louisiana*, James was resentenced in 2017 to a term of 40 years to life. During his resentencing hearing, the Allegheny sentencing judge stated:

[W]hat I have seen is after the last 10 or 15 years . . . it’s not that you are not going to rehabilitate, it is **you have rehabilitated and you have changed your life**, and you have wonderful reviews from where you do the work in the prison, at the bakery, and you also have very strong family support, particularly from your nephew who works at the Hill House. He will be able to, I’m almost certain, get you work when the time comes if and when you get paroled.

Id. at A63 (emphasis added). James’s new sentence, which applies retroactively, renders him parole eligible.

James now serves only one life sentence—the one imposed for a conviction of Section 2704, Assault by a Life Prisoner. Yet, James is not a life prisoner. While he is parole-eligible for his juvenile conviction, he will nevertheless be confined for his lifetime for an assault.

SUMMARY OF THE ARGUMENT

James Cobbs was condemned to life in prison with no chance of parole at age 17 for his participation in a robbery that resulted in death. While serving his sentence, he was 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. His conviction carried a mandatory term of life without the possibility of parole.

James’s first life sentence was unconstitutional. An Allegheny County court accordingly resentenced him on the initial conviction, giving him a term-of-years sentence and rendering him eligible for parole. That ruling was based entirely on newly-recognized constitutional rights that were retroactively applied to James after *Miller* and *Montgomery*. However, the Allegheny court could only remedy 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 was imposed solely as the result of his original unconstitutional life sentence. James was incarcerated at age 17 and is now 67 years old. Absent relief by

this Court, James will die in prison. This Court should vacate James's unlawful Section 2704 conviction and life without parole sentence.

ARGUMENT

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

A. James's Predicate Life Sentence Was Determined To Be Unconstitutional

In 2012, the United States Supreme Court recognized that a sentencing scheme mandating life without parole sentences for juveniles 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 v. Alabama*, 567 U.S. 460, 479 (2012). *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." *Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 733-734 (2016); *see also Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017). The *Montgomery* Court recognized "that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at

479-80).

“As a result, *Miller* announced a substantive rule of constitutional law.” *Id.* That rule provides that life without parole is an “unconstitutional penalty” for offenders under the age of 18. *Id.* After the United States Supreme Court ruled in *Montgomery*, courts across the country—and here in Pennsylvania—began implementing its mandate: that children sentenced to mandatory life without parole sentences must be immediately paroled or provided the opportunity for a resentencing hearing. *Montgomery*, 136 S. Ct. at 736 (“A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole.”). Indeed, this Court wrote that Pennsylvania courts “may sentence affected defendants to a minimum term-of-years sentence and a maximum sentence of life in prison, exposing these defendants to parole eligibility upon the expiration of their minimum sentences.” *Batts*, 163 A.3d at 450-51 (citing 61 Pa.C.S.A. § 6137(a)(3)). It was in accordance with these decisions that a resentencing court in Allegheny County rendered James’s juvenile life without parole sentence null and void *ab initio*. See Allegheny Cty. S.H. Tr., at A24:14-A25:2; A63:20-A64:1.

B. James’s “Assault By Life Prisoner” Conviction And Sentence Are Unconstitutional

James continues to serve a life sentence predicated on his juvenile life sentence that was void *ab initio*. For a conviction of Assault by 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. Scroggins*, 353 A.2d 392, 395 (Pa. 1976). Consistent with this standard, the Commonwealth introduced testimony at trial of a Department of Corrections record officer to show that James was serving a life sentence out of Allegheny County for his juvenile homicide conviction. (N.T., (MONTCO), 5/29/79, at 4-5.) Upon sentencing him under Section 2704, the court noted that the law required the imposition of a life sentence. (N.T., (MONTCO S. Tr.), 8/17/79, at 6) (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 and so I am going to make it concurrent.”) Noting the injustice of imposing this sentence consecutively, the court required James’s sentence under Section 2704 to be served concurrently with his juvenile life sentence. *Id.*

Yet, James’s unconstitutional juvenile sentence was vacated, removing the predicate condition of the “assault by a life prisoner” crime for which he was convicted. As such, the current life sentence he continues to serve is constitutionally infirm.

Based on available information, James is among less than a dozen 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. Indeed, under identical circumstances several other individuals have already been released or will

be eligible for release upon their resentencing, determining that the underlying sentence was void. *See Commonwealth v. Frazier*, Legacy Docket No. CP-08-CR-96-22 (released after resentencing through PCRA relief for Assault by a Life Prisoner conviction showed underlying life sentence no longer existed); *Commonwealth v. Laconte*, CP-14-CR-0001515-2000 (resentenced to 8 to 16 years for aggravated assault after receiving PCRA relief on his Assault by Life Prisoner conviction and later released); *Commonwealth v. Harris*, CP-31-CR-000210-1989 (resentenced to 35 years to life for original juvenile offense; resentenced to 1-2 years for assault (previously Assault by Life Prisoner)); *Commonwealth v. Gay*, CP-40-CR-0001987-1981 (predicate life sentence vacated and PCRA petition pending); *Commonwealth v. Hicks*, CP-02-0004000-2001 (PCRA hearing pending with the Court of Common Pleas); *Commonwealth v. Jones*, CP-46-CR-0004187-1993 (appeal of PCRA denial pending, 1847 EDA 2019).

The Superior Court did not reach the Commonwealth's argument that James's sentence of 40 years to life should be construed as a "life" sentence. The Commonwealth's argument is contrary to prevailing law that parole-eligible life prisoners are not life prisoners under Section 2704. As far back as 1951, the Pennsylvania Supreme Court recognized that "life" means life without parole. *See Commonwealth v. Johnson*, 81 A.2d 569, 573 (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.” (citation 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, 156 (1994); *Commonwealth v. Smith*, 675 A.2d 1221, 1232 (Pa. 1996); *Commonwealth v. Chandler*, 721 A.2d 1040, 1046-47 (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.” (quoting *Commonwealth v. Trivigno*, 750 A.2d 243, 255-56 (Pa. 2000))). An individual who is eligible for parole is exempt from the punishment enumerated in Section 2704 when the individual is not a life prisoner. The Superior 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). This statement applies even when an individual's maximum sentence extends to the full term of their lifetime, as commutation does not require the vacatur of all remaining time to be served. Instead, commutation of "[l]ife imprisonment to life on parole" is explicitly defined in the Board's powers, *see* 37 Pa. Code § 81.211 ("Clemency"), and the most common commutation changes a life sentence to a minimum term of years that permits parole. 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* 61 Pa.C.S.A. § 6137(a)(4)(i).¹ Section 2704 explicitly excludes individuals whose life sentences have been commuted. 18 Pa.C.S.A. § 2704.

The inclusion of a commutation exception reveals a legislative intent to exempt those who are eligible for parole from the sentencing requirements of Section 2704. Prior to 2012, one could only be paroled from a life sentence through a commutation issued by the governor. *Miller* and *Montgomery* provide an additional, analogous mechanism for the reduction of life sentences through re-sentencing of all individuals serving mandatory juvenile life without parole sentences in the Commonwealth.

¹ 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.

The commutation exception also reveals why the Superior Court erred below in relying on cases discussing firearm convictions as analogous. *See Commonwealth v. Cobbs*, 230 A.3d 388, 393-94 (Pa. Super. Ct. 2020). In *Lewis v. United States*, the Supreme Court reasoned that even constitutionally invalid felony convictions can serve as predicate convictions to unlawful firearm possession charges. 445 U.S. 55, 67 (1980). As an initial matter, the overall context of that analysis is distinguishable from the facts presented here—the Supreme Court analyzed the constitutionality of a firearm possession statute under a rational basis analysis and the restrictions on firearm ownership were considered in that context as a “civil disability.” *Id.* At issue here are James’s fundamental Eighth Amendment rights and a life sentence through which the state imposes the ultimate restraint on his physical liberty. This deprivation of physical liberty is much more than a “civil disability.” Moreover, in reaching its conclusion in *Lewis*, the Supreme Court reasoned that “federal gun laws . . . focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons.” *Id.*

The Pennsylvania General Assembly’s inclusion of a commutation exception in Section 2704, in contrast, reveals that the Assault by Life Prisoner statute *does* focus on reliability. This is as it should be, because the undeniable liberty interests that attach to mandatory life sentences require the application of ultimate care.

II. THIS COURT SHOULD OVERTURN THE SUPERIOR COURT'S RULING TO ENSURE COURTS ADHERE TO U.S. SUPREME COURT PRECEDENT

A. The Superior Court Holding Gives Legitimacy To James's Unconstitutional Life Sentence

The Superior Court incorrectly concluded that James was a life prisoner at the time of his Section 2704, Assault by Life Prisoner conviction. His Section 2704 conviction was imposed as a direct result of the Commonwealth's unconstitutional imposition of a mandatory life sentence for an offense James committed as a youth. *See Cobbs*, 230 A.3d at 394. The court incorrectly ruled that the fact that James's underlying sentence was ruled unconstitutional "does not change the fact that he was serving such a sentence at the time that he committed the assault." *Id.* Such rationale ignores the plain meaning of the term "retroactive" and negates the holdings of *Miller* and *Montgomery* as well as this Court's ruling in *Batts*.

This Court should reverse the lower court's ruling affirming James's conviction under Section 2704 to ensure that Pennsylvania courts adhere to the U.S. Supreme Court rulings in *Miller* and *Montgomery* as well as this Court's ruling in *Batts*. The current life without parole sentence that James is serving for a conviction of Assault by Life Prisoner was imposed as a direct result of the Commonwealth's imposition of an unconstitutional mandatory life sentence for an offense James committed as a youth.

In *Montgomery*, the Supreme Court determined that *Miller* applies

retroactively. This decision effectively rendered James's predicate life sentence void *ab initio*.

A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, **void**. *See Siebold*, 100 U.S., at 376. 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 (emphasis added). Thus, the Supreme Court's *Montgomery* decision unequivocally held that the rights recognized in *Miller* constitute a new substantive rule of constitutional law that applies retroactively. *Id.* at 729, 736 (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”) “No circumstances call more for the invocation of a rule of complete retroactivity” than those in which “the Constitution immunizes the defendant from the sentence imposed.” *Id.* at 730 (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)). The retroactive application of the Eighth Amendment rights recognized in *Miller* requires the conclusion that James was not a life prisoner at the time of the assault and *could not* have been sentenced to life in 1978. Moreover, the Commonwealth was barred from inflicting that punishment. *See id.* at 729.

The Commonwealth contested this conclusion below, relying on

Commonwealth v. Ciccone, 152 A.3d 1004 (Pa. Super. Ct. 2016). *Ciccone* addressed whether a statute that was abrogated was rendered void *ab initio* by a subsequent change in law; the Superior Court concluded it was not. *Ciccone*, 152 A.3d at 1009-10. *Ciccone* did not reach the question of whether a sentence rendered invalid by a retroactively applied constitutional right is void *ab initio*. The Superior Court in *Ciccone* indeed could not address the legality of the petitioner’s sentence because the relevant claim arose from changes in law recognized by *Alleyne v. United States*, 570 U.S. 99 (2013)—changes that were expressly held to not apply retroactively. *Ciccone*, 152 A.3d at 1010 (“Appellant’s sentence can be considered illegal now only if *Alleyne* is held to apply retroactively. . . . such is not the case.”). In contrast, *Montgomery* instructs that the substantive rights recognized in *Miller* do apply retroactively. *Montgomery*, 136 S. Ct. at 734. More specifically, the Allegheny Court of Common Pleas found those rights applied retroactively to James in vacating his original juvenile life sentence. Allegheny Dkt. CP-02-CR-8549-1970, Sept. 19, 2017 Order. Unlike the petitioner in *Ciccone*, James does not challenge the constitutionality of the statute under which he was prosecuted—he asserts that the statute doesn’t apply to him because he never was a life prisoner.² His status as a life

² As noted by Judge Charles H. Saylor of Luzerne County in an order granting PCRA relief to a similarly situated individual, “The authority cited by the Commonwealth, *Commonwealth v. Ciccone*, 152 A.3d 1004 (Pa. Super. 2016), actually supports Defendant’s position here that the key [of] whether or not a statute that is found to be unconstitutional is void *ab initio* depends upon

prisoner was a legal fiction, and one that is derived from a constitutional violation.

B. In Analogous Cases Pennsylvania Courts Have Granted The Relief Requested

James is entitled to relief from the wrongful life sentence that is entirely predicated on an unconstitutional life sentence. In comparable cases where a predicate disposition or statute have been invalidated, appellate courts have reversed subsequent convictions. *See, e.g., Commonwealth v. McIntyre*, 232 A.3d 609 (Pa. 2020); *Commonwealth v. Zeno*, 232 A.3d 869 (Pa. Super. Ct. 2020).

In *McIntyre*, the appellant was convicted in 2012 of failing to register as a sex offender under 18 Pa.C.S.A. § 4915. *McIntyre*, 232 A.3d at 611. In 2013, this Court concluded in *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013) that Section 4915 was unconstitutional in its entirety. *McIntyre*, 232 A.3d at 611 This Court reversed McIntyre’s judgment of sentence even though his conviction and sentence predated the *Neiman* decision. *Id.* at 619. Indeed, this Court wrote that upholding his sentence and conviction would “violate principles of due process, inasmuch as there was no validly-enacted criminal statute on which the Commonwealth could base Appellant’s conviction.” *Id.* Here, there was no validly imposed criminal sentence upon which the Commonwealth could base James’s conviction for Assault by Life

a finding of retroactive application, and *Montgomery v. Louisiana, supra*, determined that issue here.” Superior Ct. Br. of Appellant, App. D, Sept. 21, 2018 Order, *Commonwealth v. Martinez Frazier*, Legacy Docket No. CP-08-CR-96-22, at D2 n.1.

Prisoner and upholding his conviction would likewise violate principles of due process.

The Superior Court reached a similar conclusion in *Zeno*. Zeno pled guilty to offenses committed at ages 14 and 16 requiring him to register as a sex offender in 2007. *Zeno*, 232 A.3d at 870-71. On appeal, the Superior Court ordered the trial court to vacate the sentencing requirement because Pennsylvania law no longer requires individuals who were minors at the time of their offense to register as sex offenders. *Id.* at 872 (citing *Commonwealth v. Haines*, 222 A.3d 756, 759 (Pa. Super. Ct. 2019)). Even though *Haines* was decided more than a decade after Zeno's offenses, the Court still remedied his disposition, which was based on a now-invalid statutory requirement. *Id.* Likewise, this Court should vacate James's Assault by Life Prisoner disposition which is based on an unconstitutional sentence imposed on James as a youth.

CONCLUSION

For the foregoing reasons this Court should vacate James's conviction under Section 2704, Assault by Life Prisoner, and his life without parole sentence.

Respectfully submitted,

/s/ Marsha L. Levick

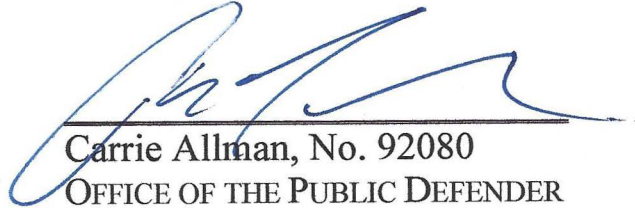
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Dated: November 16, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 4,796 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: November 16, 2020

/s/ Marsha L. Levick
Marsha L. Levick

Appendix A:

February 24, 2020 Superior Court Opinion

OPINION BY COLINS, J.:

Appellant, James Henry Cobbs, appeals from the order of the Court of Common Pleas of Montgomery County (trial court) that dismissed his petition filed under the Post Conviction Relief Act (PCRA)¹ as untimely. Appellant's PCRA petition sought relief from a sentence of life imprisonment without parole under 18 Pa.C.S. § 2704, which imposes a mandatory life sentence for assaults by prisoners under life sentence, based on **Miller v. Alabama**, 567 U.S. 460 (2012) and **Montgomery v. Louisiana**, 136 S.Ct. 718 (2016) and their effect on Appellant's prison assault conviction. Appellant was an adult at the time of the prison assault, but was under the age of 18 when he committed the underlying crime for which he was serving the life sentence

* Retired Senior Judge assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541–9546.

that made 18 Pa.C.S. § 2704 and a mandatory life sentence applicable to the assault. We conclude that Appellant's PCRA petition was not untimely, but affirm the dismissal of the PCRA petition on the ground that it fails on the merits.²

In 1970, when he was 17 years old, Appellant participated in a robbery in which the victim was stabbed to death. Appellant was convicted of first-degree murder and sentenced to life imprisonment without parole for that crime in the Court of Common Pleas of Allegheny County (the Allegheny County case).

On December 18, 1978, when he was 25 years old and was serving the Allegheny County case life without parole sentence at SCI-Graterford, Appellant stabbed another inmate in the forehead in a fight. Appellant was convicted by a jury of assault by a life prisoner on May 31, 1979, and was sentenced to life without parole for this crime in accordance with 18 Pa.C.S. § 2704, with that sentence concurrent to his Allegheny County case life sentence. There was evidence at trial that the other inmate had instigated the fight, but the evidence also showed that Appellant continued the fight and stabbed the other inmate after the other inmate was being restrained by a

² We may affirm a trial court's decision if there is a proper basis for the result reached, even if it is different than the basis relied upon by the trial court. **Generation Mortgage Co. v. Nguyen**, 138 A.3d 646, 651 n.4 (Pa. Super. 2016); **In re Estate of Rood**, 121 A.3d 1104, 1105 n.1 (Pa. Super. 2015).

prison guard. ***Commonwealth v. Cobbs (Cobbs I)***, 431 A.2d 335, 337 (Pa. Super. 1981).

Appellant appealed the assault by a life prisoner conviction and this Court affirmed the conviction on June 19, 1981. ***Cobbs I, supra***. The Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal on June 4, 1982. 181 E.D. Allocatur Docket 1982. In 1986, Appellant filed a petition under the former Post Conviction Hearing Act (PCHA), 42 Pa.C.S. §§ 9541-9551 (superseded), which the trial court denied. This Court affirmed the denial of Appellant's PCHA petition and the Pennsylvania Supreme Court denied his petition for allowance of appeal. ***Commonwealth v. Cobbs***, 528 A.2d 255 (Pa. Super. 1987) (unpublished memorandum), ***appeal denied***, 539 A.2d 810 (Pa. 1987).

Appellant filed the instant PCRA petition on August 20, 2012, 56 days after the United States Supreme Court held in ***Miller*** that mandatory life without parole sentences are unconstitutional where the defendant was under the age of 18 at the time of the crime. On February 11, 2013, the trial court issued a notice of its intent to dismiss Appellant's petition without a hearing as untimely. Appellant filed a *pro se* response to this notice arguing that the PCRA petition was timely because it was filed within 60 days of the ***Miller*** decision. 2013 Response to Notice of Intent to Dismiss ¶2. The trial court took no further action on the PCRA petition at that time.

On March 22, 2016, 57 days after the United States Supreme Court's decision in **Montgomery v. Louisiana** holding that **Miller** applies retroactively, counsel entered an appearance for Appellant and filed a request for leave to file an amended PCRA petition. The trial court granted this request in December 2016 and an amended PCRA petition was filed on December 30, 2016. Because Appellant had filed a PCRA petition in the Allegheny County case challenging his underlying life without parole sentence under **Miller** and **Montgomery v. Louisiana**, the trial court ordered that this PCRA petition be held in abeyance pending resolution of that Allegheny County case PCRA petition. On September 19, 2017, Appellant was resentenced in the Allegheny County case to 40 years to life for the 1970 murder that he committed when he was 17.

On October 4, 2017, the trial court issued an order granting Appellant leave to file a further amended PCRA petition and Appellant filed a second amended PCRA petition and supporting brief on November 17, 2017. In this second amended PCRA petition and supporting brief, Appellant asserted that **Miller, Montgomery v. Louisiana** and the September 2017 Allegheny County case resentencing eliminated his status as a life prisoner under 18 Pa.C.S. § 2704, and that the PCRA petition was timely under 42 Pa.C.S. § 9545(b)(1)(iii) because it was filed within 60 days after the **Miller** decision and was pending when **Montgomery v. Louisiana** made **Miller** retroactive and when Appellant's underlying life without parole sentence in the Allegheny

County case was set aside. Second Amended PCRA Petition & Brief ¶¶15-17, 22-24, 27-31, & pp. 6-8. The Commonwealth moved to dismiss the PCRA petition and the trial court on October 5, 2018, issued a notice pursuant to Pa.R.Crim.P. 907 of its intent to dismiss Appellant's petition without a hearing on the ground that it was untimely. Appellant timely responded to the Pa.R.Crim.P. 907 notice making arguments similar to those in the second amended PCRA petition and supporting brief. 2018 Response to Notice of Intent to Dismiss ¶¶4, 13-15, 20-22, 25-27, 31, & pp. 5-9. On October 23, 2018, the trial court dismissed the PCRA petition as untimely. This timely appeal followed.

Appellant presents the following single issue for our review:

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?

Appellant's Brief at 2.

As a threshold matter, we must address whether the PCRA petition at issue in this appeal was timely filed. We conclude that it was.

The PCRA provides that "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." 42 Pa.C.S. § 9545(b)(1). A PCRA petition may be

filed beyond the one-year time period only if the convicted defendant pleads and proves one of the following three exceptions:

- (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.

Id. At the time of all events relevant to this PCRA petition, Section 9545(b)(2) required that a PCRA petition invoking an exception “be filed within 60 days of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2) (in effect January 16, 1996 to December 23, 2018).³ The PCRA’s time limit is mandatory and jurisdictional, and a court may not ignore it and reach the merits of the PCRA petition, even where the convicted defendant claims that his sentence is unconstitutional and illegal. **Commonwealth v. Fahy**, 737

³ In 2018, Section 9545(b)(2) was amended to provide that a PCRA petition invoking an exception “shall be filed within one year of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2); Act of October 24, 2018, P.L. 894, No. 146, § 2. The Act amending Section 9545(b)(2) provided that the one-year period applies only to timeliness exception claims arising on or after December 24, 2017. Act of October 24, 2018, P.L. 894, No. 146, §§ 3, 4. The events on which Appellant claims timeliness exceptions are the 2012 **Miller** decision, the 2016 **Montgomery v. Louisiana** decision and Appellant’s September 2017 Allegheny County case resentencing. Because all of these occurred prior to December 2017, the 60-day rather than the one-year period applies here.

A.2d 214, 223 (Pa. 1999); **Commonwealth v. Pew**, 189 A.3d 486, 488 (Pa. Super. 2018); **Commonwealth v. Woods**, 179 A.3d 37, 43 (Pa. Super. 2017).

Appellant's judgment of sentence became final on September 2, 1982, upon the expiration of the ninety-day period to seek review with the United States Supreme Court after the denial of his petition for allowance of appeal. 42 Pa.C.S. § 9545(b)(3); U.S.Sup.Ct.R. 13. This PCRA petition, filed over 29 years later, is untimely unless one of the three Section 9545(b)(1) timeliness exceptions applies. Appellant pled in his PCRA petition and argues in this Court that the PCRA petition is timely under Section 9545(b)(1)(iii)'s exception for newly recognized constitutional rights. We agree.

The timeliness exception for newly recognized constitutional rights applies only where the defendant is entitled to relief under the holding of a United States or Pennsylvania Supreme Court decision. 42 Pa.C.S. § 9545(b)(1)(iii); **Commonwealth v. Lee**, 206 A.3d 1, 9-11 (Pa. Super. 2019) (*en banc*); **Commonwealth v. Furgess**, 149 A.3d 90, 93-94 (Pa. Super. 2016). Arguments that a decision of the United States or Pennsylvania Supreme Court must be extended to apply to other types of cases do not satisfy the requirements of Section 9545(b)(1)(iii) of the PCRA. **Lee**, 206 A.3d at 9-11; **Commonwealth v. Montgomery**, 181 A.3d 359, 366-67 (Pa. Super. 2018) (*en banc*); **Furgess**, 149 A.3d at 94; **Commonwealth v. Lawson**, 90 A.3d 1, 6-8 (Pa. Super. 2014).

Here, the United States Supreme Court recognized a new constitutional right in **Miller**, that mandatory life imprisonment without parole is unconstitutional for crimes committed when the defendant was under the age of 18, and held that right retroactive in **Montgomery v. Louisiana**. That right applied to Appellant without extension beyond the Supreme Court's holdings and his Allegheny County case life imprisonment without parole sentence was therefore set aside based on **Miller** and **Montgomery v. Louisiana**. Because Appellant is challenging his assault by a life prisoner conviction on the ground that **Miller** and **Montgomery v. Louisiana** invalidated a predicate on which that conviction necessarily depended,⁴ he is not seeking to extend these decisions to a new class of defendants or cases, but is raising an issue that arises based on the alleged direct effect of the newly recognized and retroactive constitutional right on his conviction. We therefore conclude that Appellant's PCRA petition is based on "a constitutional right that was recognized by the Supreme Court of the United States ... after the time period provided in this section [that] has been held by that court to apply retroactively." Because Appellant filed this PCRA petition within 60 days of the United States Supreme Court's decision in **Miller** and it remained

⁴ If, in contrast, Appellant were asserting an argument that it is unconstitutional to consider his conviction as a juvenile as a basis for a life without parole sentence for his prison assault as an adult, that would be an extension of **Miller** and **Montgomery v. Louisiana** that cannot be raised under 9545(b)(1)(iii). **Lawson**, 90 A.3d at 6-8.

pending when **Montgomery v. Louisiana** was decided and when he was resentenced under those decisions, it was timely filed.

The fact that Appellant's PCRA petition was timely filed does not, however, require the conclusion that the unconstitutionality of his life without parole murder sentence under **Miller** and **Montgomery v. Louisiana** invalidates his conviction under 18 Pa.C.S. § 2704 for an assault committed more than 30 years before that murder sentence was set aside. Whether **Miller** and **Montgomery v. Louisiana** affect Appellant's assault by a life prisoner conviction turns on two issues: 1) whether a subsequent vacating of the underlying life sentence affects the validity of an assault by a life prisoner conviction for an assault that occurred while the life sentence was in effect; and if so, 2) whether Appellant's current sentence of 40 years to life constitutes a sentence of "life imprisonment" under 18 Pa.C.S. § 2704.

Section 2704 provides, and provided at the time of Appellant's prison assault and conviction for that assault,

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. § 2704.⁵ The penalty for murder of the second degree is life imprisonment without parole. 18 Pa.C.S. § 1102(b). The mandatory life sentence imposed by Section 2704 has been upheld as constitutional by this Court. ***Commonwealth v. Dessus***, 396 A.2d 1254, 1257 (Pa. Super. 1978); ***Commonwealth v. Bryant***, 361 A.2d 350, 351-52 (Pa. Super. 1976). The purpose of Section 2704 is to deter prisoners already serving life sentences from committing assaults in prison. ***Dessus***, 396 A.2d at 1257; ***Bryant***, 361 A.2d at 352.

Although no appellate decisions have addressed the issue of the effect of unconstitutionality or other subsequent invalidation of the underlying life sentence on a conviction for assault by a life prisoner,⁶ both the language of Section 2704 and its deterrent purpose strongly support the conclusion that it is the existence and status of the life sentence at the time of the assault that is an element of the crime and that subsequent invalidation of that sentence

⁵ Section 2704 was amended in 1998 to add language including intentional exposure to infected bodily fluids in this offense, but no change was made in the applicable language quoted above.

⁶ The only issues under Section 2704 that have been addressed by our appellate courts, other than the constitutionality of the statute and its purpose, are whether particular assaults satisfied the element of “an aggravated assault with a deadly weapon or instrument upon another, or by any means of force likely to produce serious bodily injury,” and whether testimony of a prison records officer is sufficient proof that the defendant was under an uncommuted life sentence. ***Cobbs***, 431 A.2d at 337; ***Dessus***, 396 A.2d at 1261-62; ***Bryant***, 361 A.2d at 351.

does not negate this element. Section 2704 provides that it applies to a defendant “who **has been** sentenced to ... life imprisonment ... and whose sentence **has not been** commuted,” 18 Pa.C.S. § 2704 (emphasis added), which refer to the defendant’s status at the time of the assault without regard to future events. The statute does not contain any language requiring that the life sentence be upheld by the courts or limiting its effect in the event of a subsequent reversal, vacatur, or commutation of the underlying conviction or sentence. Deterrence can only apply to the situation existing and known to the defendant at the time of the assault. Indeed, the deterrent value of the statute’s life sentence would be strongest if it applies to assaults committed under a life sentence that was later vacated. A life sentence for the prison assault imposes no actual additional punishment on a defendant who remains under an earlier life without parole sentence, but does impose an additional serious consequence if the life sentence for the prison assault remains valid even if the underlying life sentence is vacated or reduced.

Moreover, in the analogous situation of firearms statutes that define a crime based on the defendant’s status as having been convicted of certain offenses, both our Supreme Court and the United States Supreme Court and federal courts have held that the firearms conviction is not affected by a subsequent reversal of, expungement of, or constitutional challenge to the predicate conviction. ***Commonwealth v. Stanley***, 446 A.2d 583, 588 n. 6 (Pa. 1982) (subsequent reversal of murder conviction on which illegal

possession of firearms charge was based did not affect proof of illegal possession of firearms charge because defendant was “an individual convicted of a ‘crime of violence’ at the time he was charged with possessing the firearm”); **Lewis v. United States**, 445 U.S. 55, 59-65 (1980) (fact that prior conviction was constitutionally invalid because of denial of right to counsel was not a defense to federal firearms charge where prior conviction had not been set aside at time of the offense); **United States v. Julian**, 974 F. Supp. 809, 815-17 (M.D.Pa. 1997), **aff’d without opinion**, 168 F.3d 480 (3d Cir. 1998) (the subsequent setting aside of a conviction for lack of jurisdiction and expungement of the conviction “after an arrest for possession of a firearm by a felon does not ‘relate back’ and render the firearm possession lawful”). Unconstitutionality of such a predicate conviction does not require the invalidation the later conviction where the later conviction is based on the existence of the predicate conviction, not its reliability or validity. **Lewis**, 445 U.S. at 65-67.

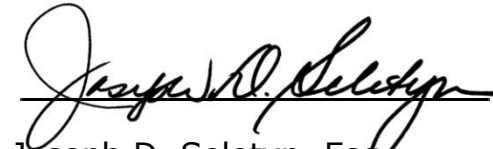
We therefore conclude that only the defendant’s sentence status at the time of the assault is relevant to a conviction for assault by a life prisoner and that a later reversal of the life sentence or determination that the life sentence is unconstitutional has no effect on the validity of a conviction under Section 2704. The fact that Appellant’s underlying life without parole sentence has now been set aside as unconstitutional does not change the fact that he was serving such a sentence at the time that he committed the assault. It

therefore cannot provide grounds for PCRA relief from his assault by a life prisoner conviction. In light of our ruling on this issue, we need not determine whether the sentence of 40 years to life that Appellant is still serving constitutes a sentence of “life imprisonment” under 18 Pa.C.S. § 2704.

We recognize that it appears anomalous that Appellant can be released on parole from a murder sentence and is subject to life imprisonment without parole for a non-life-threatening assault. That, however, is a product of the fact that Appellant was a juvenile when he committed the murder and that the Legislature has imposed a mandatory life without parole sentence for the prison assault that he committed as an adult. Absent an overruling of this Court’s precedents upholding the constitutionality of the mandatory life without parole sentence imposed by Section 2704, a claim that is neither before this Court nor within the power of a panel of this Court, Appellant’s assault by a life prisoner conviction and life without parole sentence for that conviction remain valid. Appellant’s arguments concerning his rehabilitation and the inappropriateness of life imprisonment without parole under the facts of his case are matters that must be directed to the Board of Pardons and Governor, not to this Court.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/24/20

Appendix B:

March 7, 2019 Trial Court Opinion

IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 287-1979

VS. :

JAMES COBBS :

CARLUCCIO, J.

MARCH 7th, 2019

3339-EDA-2018

2019 MAR -7 PM 2:38

CLERK OF COURT
MONTGOMERY COUNTY
PENNA.

JMC

OPINION

FACTS AND PROCEDURAL HISTORY:

On May 25, 1972, an Allegheny County jury convicted the Defendant, James Cobbs, of First Degree Murder. The Allegheny trial court then sentenced the Defendant to life imprisonment without the possibility of parole. Notably, Cobbs was seventeen (17) years old at the time of the Allegheny County murder. (*Cobbs' Amended PCRA And Brief From Illegal Sentence, 11/17/17*)

On December 18, 1978, while serving the above sentence at SCI Graterford, Montgomery County, Pennsylvania, Defendant assaulted an inmate by stabbing the inmate in the forehead with a knife. A guard intervened, however, the Defendant continued his assault on the inmate. Cobbs was twenty-five (25) years old at the time of the Montgomery County prison offense. (*Notes of Testimony, 5/29/79, pgs. 4-12*)

In 1979, after trial, a Montgomery County jury convicted the Defendant of Assault by a Life Prisoner, and the trial court sentenced Cobbs to life without parole, to be served concurrently with the Allegheny County sentence. (*Notes of Testimony, 8/17/79, pgs. 6-7*)

On June 19, 1981, the Pennsylvania Superior Court affirmed Defendant/Cobbs' judgment of sentence in the Montgomery County matter.

On June 4, 1982, the Pennsylvania Supreme Court denied Defendant Cobbs' petition for allowance of appeal in the Montgomery County matter.

Almost thirty (30) years later, on August 20, 2012, in Montgomery County, Defendant/Cobbs filed a *pro se* Petition under the Post Conviction Relief Act (hereinafter

“PCRA”), 42 PA.C.S.A. Section 9545(b)(3) seeking relief pursuant to the then recent United States Supreme Court decision in Miller v. Alabama, 132 S.Ct. 2455 (2012). Miller held that mandatory life without parole for those under the age of eighteen (18) at the time of their crimes, violated the Eighth Amendment’s prohibition against cruel and unusual punishment. Id.

The Montgomery County trial court appointed Defendant/Cobbs counsel, who later filed an Amended PCRA Petition in light of the 2016 Supreme Court ruling of Montgomery v. Louisiana, 136 S.Ct. 718 (2016). Montgomery made the Miller holding, *supra*, retroactive on collateral review. Id. In the Amended PCRA Petition, appointed counsel requested a re-sentencing hearing under the Miller holding.

In the meantime, Defendant/Cobbs **also challenged his Allegheny County life without parole sentence** via a PCRA Petition relying on Miller and Montgomery.

On March 10, 2017, the Montgomery County trial court issued an order holding the Montgomery County PCRA Petition in abeyance pending the resolution of the above Allegheny County PCRA Petition.

On September 19, 2017, Defendant/Cobbs had a re-sentencing hearing on the Allegheny County murder. Given that Cobbs was, in fact, a juvenile when he committed the Allegheny County murder, and that Cobbs was serving a sentence of life without the possibility of parole, the parties agreed that Cobbs’ sentence was contra the Miller holding. Accordingly the Allegheny trial court re-sentenced Cobbs to forty (40) years to life imprisonment for the murder in Allegheny County.

After the re-sentence in the Allegheny County matter, Defendant/Cobbs filed another Amended PCRA Petition in Montgomery County asserting that his Montgomery County sentence was also illegal under Miller and Montgomery.

On October 23, 2018, the Montgomery County trial court Dismissed Defendant/Cobbs’ Amended PCRA Petition as untimely.

On November 14, 2018, Defendant/Cobbs timely appealed the Dismissal of his Amended PCRA Petition filed in Montgomery County.

The Montgomery County trial court supports its’ ruling below.

DISCUSSION:

Under the Post Conviction Relief Act, all petitions must be filed within one (1) year of the date on which judgment becomes final, or the court lacks jurisdiction to review the merits of the petition. A judgment becomes final at the conclusion of direct review, including discretionary review, or at the expiration of time for seeking review. *42 Pa.C.S. Section 9545(b)(3)*.

Where a PCRA Petition is untimely, the petitioner must plead and prove the applicability of one of the three (3) statutorily enumerated exceptions to the time bar, or the court will lack jurisdiction to entertain the claim. Commonwealth v. Dickerson, 900 A.2d 407, 410 (Pa.Super. 2006). These statutory exceptions are as follows:

1. 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;
2. 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,
- 3. 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 provide in this section and has been held by that court to apply retroactively.**

42 Pa.C.S. Section 9545(b)(1).

In addition, the PCRA Petition must be filed within sixty (60) days of the date the claim could have been presented. *42 Pa.C.S. Section 9545(b)(2)*. The sixty (60) day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence. Commonwealth v. Marshall, 947 A.2d 714, 720 (Pa. 2008).

Finally and significantly, the timeliness requirements under the PCRA are mandatory and must be interpreted literally. Commonwealth v. Lambert, 765 A.2d 306, 318 (Pa.Super. 2000).

Indeed, because the time limit is jurisdictional, a court must address the timeliness of a PCRA Petition first, and may not consider the merits of an untimely petition. Commonwealth v. Peterkin, 722 A.2d 638, 641 (Pa. 1988). Notably, it is a defendant's burden to allege and prove that one of the aforementioned timeliness exceptions applies. Whether a defendant has carried that burden is a threshold inquiry prior to considering the merits of any claim. Commonwealth v. Edmiston, 65 A.3d 339, 346 (Pa. 2013).

Defendant Cobbs' judgement of sentence for his Montgomery County prison assault became final on September 2, 1982, the expiration date for seeking certiorari in the United States Supreme Court. *Pa.C.S. Section 9545(b)(3)*. Thus, Defendant had one (1) year from that date, or until September 2, 1983, to file a timely PCRA Petition. Defendant/Cobbs filed the present PCRA Petition on August 20, 2012, almost three (3) decades later, making his Petition facially untimely under the Act. *42 Pa.C.S. Section 9545(b)*.

To avoid the time bar, Defendant/Cobbs relied on the Miller and Montgomery holdings described above, and alleged the newly recognized constitutional right exception in his PCRA Petition. *9545(b)(1)(iii)*. As explained below, the Montgomery County trial court properly determined that Defendant/Cobbs failed to plead and prove that the newly recognized constitutional right exception to the PCRA time barr applied to the Montgomery County offense. Thus, the trial court properly concluded that it lacked jurisdiction to review the merits of Defendant/Cobbs' Amended PCRA Petition.

The Miller case held that a sentence of mandatory life without parole for an individual **under the age of eighteen (18) years old at the time of the offense** violated the Eight Amendment's prohibition against cruel and unusual punishments. The Amended PCRA Petition *subjudice* addresses the sentence for the Montgomery County Prison offense. The Montgomery County offense occurred on December 18, 1978. (*Notes of Testimony from Trial 10/24/07, pg.7*) Defendant/Cobbs was born on August 6, 1953, making Cobbs twenty-five (25) years old, and an adult, at the time of the prison offense. (*Cobbs' Amended PCRA And Brief From Illegal Sentence, 11/17/17; Notes of Testimony from Trial 10/24/07, pg.7*) Thus, on the facts, the Miller holding did not apply, and Defendant/Cobbs failed to overcome the jurisdictional time-barr to his PCRA Petition.

Accordingly, for the foregoing reasons, the Montgomery County trial court respectfully requests that its' October 23, 2018, Final Order of Dismissal of Amended PCRA Petition be **AFFIRMED**.

By the Court:


The Honorable Carolyn Tornetta Carluccio

Copies of the above Opinion
mailed on **3-7-19** to:
Robert M. Falin, Esquire, Deputy District Attorney
Chief, Appellate Division
Adrienne D. Jappe, Esquire, ADA
Lee Awbrey, Esquire, APD


Secretary

Appendix C:

September 15, 2020 Order
Granting Allocatur

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 165 MAL 2020
	:	
Respondent	:	
	:	
v.	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
	:	
	:	
JAMES HENRY COBBS,	:	
	:	
Petitioner	:	


ORDER

PER CURIAM

AND NOW, this 15th day of September, 2020, the Petition for Allowance of Appeal is **GRANTED**. The issue, rephrased for clarity, is:

Where a prisoner's constitutionally infirm life-without-parole sentence for murder committed while a minor formed the basis for a conviction of assault by a life prisoner under 18 Pa.C.S. §2704 committed as an adult, and the prisoner is re-sentenced to forty-years-to-life on the original murder conviction, is the Section 2704 conviction vitiated by such re-sentencing?

A True Copy Amy Dreibelbis, Esquire
As Of 09/15/2020

Attest: 
Deputy Prothonotary
Supreme Court of Pennsylvania