

NO. 56 MAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

V.

JAMES HENRY COBBS,

Appellant.

REPLY BRIEF

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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INTRODUCTION

Mr. Cobbs's life sentence predicated on his conviction under 18 Pa.C.S.A. § 2704 ("Assault by Life Prisoner") is the direct result of a proven constitutional violation. He filed a timely petition for relief after the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), and a subsequent Amended Petition after the Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Mr. Cobbs was resentenced to forty (40) years to life. When the life without parole sentence underlying his Section 2704 conviction was invalidated based on those newly recognized constitutional rights, Mr. Cobbs's Assault by Life Prisoner conviction should have also been vacated. All of the Commonwealth's arguments to the contrary fail.

ARGUMENT

I. MR. COBBS FILED A TIMELY POST-CONVICTION RELIEF PETITION

In its brief, the Commonwealth incorrectly asserts that timeliness of the petition is an issue for this Court to review. The Superior Court expressly concluded that Mr. Cobbs's petition "was not untimely" and in fact raised "an issue that arises based on the alleged direct effect of the newly recognized and retroactive constitutional right on his conviction." *Commonwealth v. Cobbs*, 230 A.3d 388, 389,

392 (Pa. Super. Ct. 2020). Additionally, this Court’s September 15, 2020 Order granting allocator phrased the *only* issue on appeal 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?

(Sept. 15, 2020 Order.)

Mr. Cobbs’s petition for relief under the Post-Conviction Relief Act (“PCRA”) was also timely filed as provided under 42 Pa.C.S.A. § 9545(b)(1). Mr. Cobbs took every reasonable step to preserve his claim as the law changed: he raised it within sixty days of the date his mandatory life sentence was invalidated by the United States Supreme Court’s decision in *Miller v. Alabama*, 567 U.S. 460 (2012); he amended that petition to raise his claim again within sixty days of the United States Supreme Court’s subsequent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); and he amended his still-active petition once more within sixty days of his resentencing, where the court re-sentenced him to a term of forty (40) years to life but left his life without parole sentence for assault by a life prisoner unchanged.¹

¹ In an attempt to relitigate this issue, the Commonwealth and *Amicus* PDAA assert *Miller* should not have applied because Mr. Cobbs was 25-years-old at the time of the Assault by Life Prisoner sentence. (*See* Commw. Br. at 8; PDAA *Amicus* Br. at 11-12.) However, Mr. Cobbs was 17-years-old at the time of his offense. The life without parole sentence stemming from this conviction is what the Court of Common Pleas in Allegheny County reduced to 40 years to life.

Mr. Cobbs could not have raised his claim any earlier, because his predicate life sentence was not invalidated until *Miller* and *Montgomery* were decided in 2012 and 2016, respectively. As such, the Commonwealth's argument against timeliness has already failed.

II. MR. COBBS'S ASSAULT BY LIFE PRISONER SENTENCE SHOULD BE OVERTURNED

In its brief, the Commonwealth mischaracterizes Mr. Cobbs's claims as a "sufficiency of the evidence" argument. (*See* Commw. Br. at 19-22.) The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S.A. § 9542. Mr. Cobbs's petition is not raising issues regarding what evidence was before the jury at the time of his trial. A jury could not have contemplated the later-recognized constitutional rights that so dramatically changed Mr. Cobbs's status as a life prisoner. *Miller's* retroactive application to Mr. Cobbs confirms that he was not a life prisoner and thus was ineligible to be charged with Assault by Life Prisoner. The validity of this predicate life sentence is not just a factual element that falls within the scope of a sufficiency claim; it is a legal fiction that was invalidated by *Miller* and *Montgomery*.

Furthermore, the Commonwealth's attempt to characterize Mr. Cobbs's new sentence of 40-years-to-life as a determinate sentence overlooks the important fact

that the sentence Mr. Cobbs was serving at the time of the assault has been vacated. Moreover, a term of years sentence such as 40 years to life is not a life sentence as contemplated by Section 2704. Cases arising under the provision involve individuals serving life sentences, not term of years sentences. *See Commonwealth v. Bryant*, 361 A.2d 350, 352 (Pa. Super. Ct. 1976) (“the legislature has sought fit to specify mandatory life imprisonment as punishment for assaults committed by prisoners **already serving life terms**”) (emphasis added); *see also Commonwealth v. Dessus*, 396 A.2d 1254 (Pa. Super. Ct. 1978) (holding same). Indeed, the cases cited by the Commonwealth for this proposition do not involve Section 2704 cases. (*See Commw. Br. at 24-25* (citing *Martin v. Pennsylvania Bd. of Prob. & Parole*, 840 A.2d 299 (Pa. 2003) (reviewing time credited for individual’s sentence); *Commonwealth v. Daniel*, 243 A.2d 400 (Pa. 1968) (reviewing claim of gender discrimination in Muncy Act sentencing); *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (adopting presumption against sentencing youth to life imprisonment without parole.))) Moreover, in its *amicus* brief, the Pennsylvania District Attorneys Association (PDAA) argues that Section 2704 should apply to youth convicted of first- or second-degree murders as well. (*See PDAA Amicus Br. at 13-14.*)² Yet, no court decision or statute provides support for this statement. Simply put, *amicus*

² First- and second-degree murder carry minimum sentences of 25 years to life, or 35 years to life, depending on the individual’s age and nature of the offense. 18 Pa.C.S.A. § 1102.1(a)(1),(2).

PDAA and the Commonwealth seek to vastly broaden the reach of Section 2704 to term of years sentences despite its clear language that its provisions only apply to Life Prisoners.

Finally, *Amicus* PDAA asserts that the purpose of 18 Pa.C.S.A § 2704 is deterrence so that individuals who “have nothing to lose” are not free to engage in criminal behaviors while incarcerated. (*See* PDAA *Amicus* Br. at 12-13.) This statement fails to account for research demonstrating that youth and older adolescents naturally grow out of their tendency toward risky or criminal conduct. National Institute of Justice, *From Juvenile Delinquency to Young Adult Offending*, Mar. 10, 2014, <https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx> (summarizing studies on desistance and persistence among offenders); *see also* Bianca E. Bersani & Elaine Eggleston Doherty, *Desistance from Offending in the Twenty-First Century*, 1 ANN. REV. CRIMINOLOGY 311, 327 (2018) (“Evidence documenting the pervasive pattern of desistance, even among high-rate offenders, combined with research revealing that ‘there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs’ challenge the utility of invoking increasingly harsh sanctions that extend into late adulthood.” (citation omitted)); ALEX R. PIQUERO ET AL., *Criminal Career Patterns*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY,

AND PREVENTION 14, 37 (Rolf Loeber & David P. Farrington, eds. 2012) (“The few career length studies that exist have found that criminal careers tend to be of a short duration (typically under ten years), which calls into question many long-term sentences that have characterized American penal policy.”). Furthermore, the alleged deterrent purpose of Section 2704 cannot override an unconstitutional sentence. Upholding an Assault by Life Prisoner disposition which is based on an unconstitutional sentence erodes the purpose of remedying the wrongful conviction.

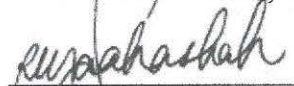
CONCLUSION

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

Respectfully submitted,

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DATED: January 19, 2021

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 1,288 words. In preparing this certificate, I relied on the word count feature of Microsoft Word. I further certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Marsha L. Levick

Marsha L. Levick

DATED: January 19, 2021