

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

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

JAMES HENRY COBBS,
Appellant.

**BRIEF FOR AMICUS CURIAE
PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA**

Appeal from the Order dated February 24, 2020, of the Superior Court, No. 3339 EDA 2018, affirming the order entered October 23, 2018, in the Court of Common Pleas, Montgomery County, at CP-46-CR-0000287-1979.

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STATEMENT OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of constitutional and sentencing questions in criminal matters is of special interest to district attorneys throughout Pennsylvania.

CERTIFICATION PURSUANT TO Pa.R.A.P. 531(b)(2)

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

STATEMENT OF THE QUESTION PRESENTED

1. 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?

SUMMARY OF ARGUMENT

Appellant's conviction for violation 18 Pa.C.S. §2704 is not vitiated by his resentencing to forty-years-to-life on his conviction for first-degree murder. Appellant was serving a life sentence for first-degree murder at the time of his conviction for violating Section 2704. Appellant's current sentence of forty-years-to-life for that murder conviction remains a life sentence. Appellant's murder sentence began as a determinate life sentence and is now an indeterminate life sentence. This resentencing occurred to comply with the dictates of the United State Supreme Court decisions in Miller and Montgomery. It does not, however, alter the fact that Appellant was serving a life sentence at the time he was convicted of violating Section 2704 and the fact that he continues to serve a life sentence. Miller and Montgomery offer no relief for Appellant's life sentence pursuant to Section 2704 as Appellant was an adult at the time of conviction for that offense.

Section 2704 serves to deter those persons serving life sentences from committing further violent acts while incarcerated. A conviction under the statute is predicated on the offender being subject to a life sentence at the time the offense was committed. If an adult offender has his or her

underlying life sentence subsequently commuted, vacated, or adjusted in some fashion, he or she assumes the risk of still being subject to life imprisonment without parole should he or she engage in violent behavior.

Section 2704 is applicable to those offenders who are currently serving indeterminate life sentences.

ARGUMENT

I. Appellant's conviction for violating 18 Pa.C.S. §2704 is not vitiated by his resentencing to forty-years-to-life on the original murder conviction

Appellant challenges his conviction for violating 18 Pa.C.S. §2704 – Assault by a Life Prisoner. This conviction occurred in 1979 when Appellant was 25 years of age and serving a life sentence for first-degree murder. See Commonwealth v. Cobbs, 288 Pa. Super. 155, 431 A.2d 335 (Pa. Super. 1981)(Cobbs I). Appellant engaged in a fight with another inmate. While guards were restraining the victim to stop the fight, Appellant stabbed the victim in the head. 288 Pa. Super. at 157.

To be convicted of Assault by a Life Prisoner, the Commonwealth must prove the following:

[that the defendant is a] person who has been sentenced to death or life imprisonment in any 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,...the penalty for which shall be the same as the penalty for murder of the second degree.

18 Pa.C.S. §2704.¹ The penalty for second-degree murder was and

¹ Since Appellant's conviction the statute has been amended to include language related to exposing a victim to bodily fluids. The portion of the statute cited above remains the same as when Appellant was convicted of the offense.

remains, for those over the age of 18, life imprisonment. See 18 Pa.C.S. §§ 1102 & 1102.1. Appellant was sentenced to life imprisonment because of his conviction for violating Section 2704, to be served concurrent to the life sentencing he was already serving for first-degree murder. 288 Pa. Super. 156.

Appellant, at the time of his conviction for violating 18 Pa.C.S. § 2704, was serving a life sentence. This cannot be disputed. Appellant's resentencing to forty-years-to-life for first degree murder following the United States Supreme Court's decisions in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) does not vitiate his conviction for violating that section. Appellant was serving a sentence of life imprisonment at the time of the conviction and continues to serve a sentence of life imprisonment.

Sentencing schemes can be either determinate or indeterminate.

Indeterminate systems feature discretionary parole release, whereas determinate schemes do not. In indeterminate systems, the judge most often will impose a sentence with two numbers, the earliest time that the defendant will be eligible for discretionary parole release and the latest date upon which the defendant may be released from confinement or parole supervision. Determinate sentences take the form of a single release date.

Commonwealth v. Yuhasz, 592 Pa. 120, 125-6, 923 A.2d 1111 (Pa. 2007).

Pennsylvania, with some exceptions, has historically had an indeterminate sentencing scheme.

The most notable exception to the indeterminate sentencing structure utilized by the Pennsylvania criminal system is the sentence for first- and second-degree murder. Prior to 2012, all persons convicted of either offense were sentenced to life imprisonment. See 18 Pa.C.S. § 1102. A trial court had no other sentencing option for these offenses. It did not matter if a person was under the age of 18 at the time of the offense, he or she would still be sentenced to life in prison. Persons sentenced to life in prison were not given a minimum sentence date and were not eligible for parole. See 61 Pa.C.S. § 6137. Thus, those persons convicted of first- or second-degree murder were given what amounts to a determinate sentence. The remainder of their natural life would be spent incarcerated.

In 2012, the United States Supreme Court issued the Miller decision. In Miller, the Court held “...that the Eighth Amendment [to the United States Constitution] forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 567 U.S at 479. Therefore, any person under the age of 18 who was convicted of first- or second-degree murder in Pennsylvania could no longer be

automatically sentenced to life imprisonment. It is important to note that the holding of the Court forbade the *automatic* imposition of a life sentence without the possibility of parole for juvenile offenders. It did not forbid the possibility of a sentence of life with parole or without parole for those under 18 years of age.

In response to Miller, the Pennsylvania legislature amended the penalties for first- and second-degree murder for those under 18 years of age at the time of the offense. Per statute, the amendments applied to those juveniles convicted after June 24, 2012. Of relevance to the instant matter, a person under the age of 18 when he or she committed the offense of first-degree murder would now be subject to the following penalties:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.

(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life.

18 Pa.C.S. §1102.1(a)(1)&(2). If the Commonwealth gives notice that it will be seeking a sentence of life imprisonment without the possibility of parole, there are several factors the trial court must consider: victim

impact; impact on the community; threat to safety of the public or individuals; nature and circumstances of the offense; degree of culpability; guidelines adopted by sentencing commission; and age-related characteristics. 18 Pa.C.S. §1102.1(d). Thus, juveniles could now be sentenced to a determinate sentence of life imprisonment without parole or an indeterminate sentence of life imprisonment with a parole minimum.

In Commonwealth v. Batts, 620 Pa. 115, 134, 66 A.3d 286 (Pa. 2013)(Batts I), this Honorable Court determined that, for cases on direct appeal, individuals who had been automatically sentenced to life imprisonment without the possibility of parole as the result of a conviction for first-degree murder as a juvenile could be resentenced in accordance with the dictates of Miller and with the guidance of 18 Pa.C.S. §1102.1.

In 2016, the United States Supreme Court announced in Montgomery that its holding in Miller was a new substantive rule of constitutional law that was, therefore, retroactive in its application. 136 S. Ct. at 736. Thus, defendants in Pennsylvania, like Appellant, who had been automatically sentenced to life imprisonment without the possibility of parole by virtue of their conviction for first-degree murder

– and whose direct appeal rights had long expired - could seek to be resentenced for their crime. Appellant sought and was granted resentencing by agreement on his underlying conviction for first-degree murder. In accord with this Honorable Court’s decision in Batts I, Appellant was resentenced to forty-years-to-life imprisonment.

As a result of the resentencing, Appellant is now serving an indeterminate life sentence on his murder conviction. “[I]t is pertinent and appropriate to note that whether a sentence is stated in terms of minimum and maximum or is for a purely indeterminate term, the maximum sentence is the real sentence.” Commonwealth v. Daniel, 430 Pa. 642, 647, 243 A.2d 400 (Pa. 1968). “Pursuant to Pennsylvania law, the maximum term represents the sentence imposed for a criminal offense, with the minimum term merely setting the date after which a prisoner may be paroled.” Martin v. Pennsylvania Bd. of Probation and Parole, 576 Pa. 588, 595 840 A.2d 299 (Pa. 2003). Bearing this in mind, it is clear that a sentence where the maximum is life imprisonment with a parole minimum is still a life sentence. Therefore, Appellant’s sentence on the first-degree murder conviction remains a life sentence. Said sentence complies with the dictates of Miller and Montgomery in that Appellant is now parole eligible.

Appellant was, without question, serving a sentence of life imprisonment at the time he assaulted another inmate. Appellant continues to serve a life sentence on the underlying murder conviction. His original sentence for the murder conviction was not a “legal fiction” and it cannot be said that Appellant was never a life prisoner. See Appellant’s Brief, pp. 18-19. At the time of his original sentencing for the murder conviction, the sentence imposed was permissible. See Montgomery, 136 S. Ct. at 732-736 (holding that Miller announced a *new* substantive rule of constitutional law)(emphasis added). The Commonwealth convicted Appellant of violating Section 2704 because it proved not only that Appellant assaulted the victim, but that Appellant was, in fact, serving a life sentence which had not been commuted, as required by the statute. See Cobbs I, *supra*.

Despite Appellant’s protestations to the contrary, the Superior Court’s ruling does not violate the dictates of Miller and Montgomery. While these precedents applied to Appellant’s murder conviction, for which he has received appropriate relief, they do not apply to his conviction for violating Section 2704. At the time of his conviction for violating Section 2704, Appellant was 25 years of age – an adult

committing a criminal offense. The life sentence imposed for the Section 2704 conviction does not fall under the mandates of Miller and Montgomery. Miller and Montgomery provide relief in a specific set of circumstances - when a *juvenile* was automatically sentenced to life without parole for murder. The cases simply do not apply to the conviction Appellant now challenges. Upholding the conviction does not deprive Appellant of the benefit that Miller and Montgomery sought to impart to defendants. Miller and Montgomery did not seek to give relief to adult offenders who have received mandatory life sentences.

As was addressed by the Superior Court, Section 2704 has deterrence as a purpose. See Commonwealth v. Cobbs, 2020 PA Super 44, 339 EDA 2018, pp. 10-11 (Pa. Super. 2020)(Cobbs II). The Superior Court addressed that the deterrent effect of the life sentence imposed for violating Section 2704 is at its greatest when the statute applies even when a conviction has been vacated. *Id.* at 11. What, however, is it that the statute is trying to deter? It is, in the simplest of terms, designed to deter violence by individuals who think they have nothing to lose. Persons serving a life sentence may be inclined to think that there is no risk to them should they choose to engage in violent behavior against other inmates or correctional staff. Section 2704 sets forth that there is

a risk. The statute itself sets forth that it applies to those persons who are currently serving a life sentence that has not been commuted at the time of the offense. 18 Pa.C.S. §2704. As such, if an adult offender has his or her underlying life sentence subsequently commuted, vacated, or adjusted in some fashion, he or she assumes the risk of still being subject to life imprisonment without parole should he or she engage in violent behavior. Appellant, as an adult, made the choice to engage in violent behavior while serving a life sentence. He assumed the risk that his behavior could impact any chance of release from incarceration in the future. He engaged in the very behavior Section 2704 seeks to deter and bears the consequences of that decision.

Finally, the question this Honorable Court took for consideration encompasses more than just Appellant's conviction for violating Section 2704 and what Appellant terms as a small class of individuals similarly situated. See Appellant's Brief, p. 11. The question encompasses whether a sentence of forty-years-to-life constitutes a life sentence. As has been addressed, the sentence is indeed a life sentence. See Daniel, supra; See Martin, supra. That the sentence is a life sentence impacts future prosecutions pursuant to Section 2704. The vast majority of juveniles convicted of first- or second-degree murder (in addition to those

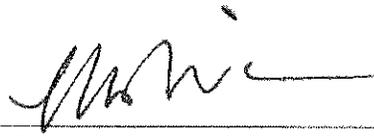
who have been resentenced pursuant to Miller and Montgomery) will now be sentenced to a life sentence that includes the possibility of parole. As these offenders become incarcerated adults, Section 2704 should apply to them just as it applies to those adult offenders who are serving mandatory life without parole sentences.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, amicus curiae, respectfully requests that the Superior Court's Judgment and Order be affirmed.

Respectfully submitted,


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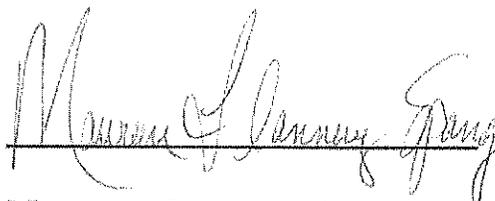
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Certification

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



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