

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

No. 56 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE,
v.

JAMES HENRY COBBS,
APPELLANT.

BRIEF FOR APPELLEE

APPEAL FROM THE OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA, No. 3339 EDA 2018, DATED FEBRUARY 24, 2020, AFFIRMING THE ORDER OF THE HONORABLE CAROLYN T. CARLUCCIO, J., DATED OCTOBER 23, 2018, DENYING RELIEF UNDER THE POST-CONVICTION RELIEF ACT, IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, CRIMINAL DIVISION, AT No. CP-46-CR-0000287-1979.

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

OFFICE OF THE DISTRICT ATTORNEY
MONTGOMERY COUNTY COURTHOUSE
NORRISTOWN, PA 19404
(610) 278-3104

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether this Court should dismiss this appeal as improvidently granted where defendant's PCRA petition is time-barred and, in any event, he raises a non-cognizable sufficiency of the evidence claim; as such, this Court does not have jurisdiction to entertain the merits of the claim raised in this appeal?

(Suggested answer in the affirmative.)

II. In any event, whether defendant's re-sentencing from life without parole to life with the possibility of parole on his underlying juvenile conviction vitiates his assault by a life prisoner conviction, which occurred decades before his re-sentencing, where he was serving a life sentence at the time of his assault by a life prisoner conviction and continues to serve a life sentence today?

(Suggested answer in the negative.)

COUNTERSTATEMENT OF THE CASE

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

In December 1978, when he was a 25-year-old adult serving a life sentence at SCI Graterford for a crime he committed as a juvenile,¹ defendant assaulted another inmate, stabbing him in the forehead with a knife. When a guard intervened and restrained the victim, defendant continued his attack on the victim, stabbing him again in the head (N.T. Trial, 5/29/79, at 4-12).

A Montgomery County jury convicted defendant of assault by life prisoner, 18 Pa. C.S. § 2704; on August 17, 1979, the court sentenced him to life without parole, as was then – and continues to be today – required under Section 2704, *see* 18 Pa. C.S. § 1102. The court ordered the sentence to

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

be served concurrently with his Allegheny County life without parole sentence (N.T. Sentencing, 8/17/79, at 6-7).

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

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

their crimes violated the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"² *Id.* at 2460 (emphasis added).

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

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

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

County, and he was serving a mandatory sentence of life without parole for his conviction for that crime. Upon re-sentencing, the Allegheny County Court sentenced defendant to 40 years to life imprisonment. *Commonwealth v. Cobbs*, 230 A.3d 388, 390 (Pa. Super. 2020) (*Cobbs II*).

Following his re-sentencing in Allegheny County, defendant filed another amended PCRA petition in this case. In it, he reiterated his claim that he was entitled to re-sentencing in light of *Miller* and *Montgomery*, and he further asserted that he was no longer a life prisoner within the meaning of the assault by life prisoner statute in light of his new 40-year-to life sentence in Allegheny County. *See Second Amended Petition*, at 6-13. In addition, he once again asserted that his petition was timely in light of the newly recognized constitutional right exception. *Id.* at 3 (citing 42 Pa. C.S. § 9545(b)(1)(iii)). The trial court denied PCRA relief, finding his petition untimely.

The Superior Court affirmed on a different basis. It found that defendant's petition was timely, but meritless. *Cobbs II*, 230 A.3d at 389. At the outset of its merits analysis, the Court noted that defendant's claim that his unconstitutional Allegheny County life without parole sentence invalidated his Montgomery County assault by life prisoner conviction that

occurred more than 30 years before the Allegheny County sentence was set aside 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 [defendant]’s current sentence of 40 years to life constitutes a sentence of ‘life imprisonment’ under 18 Pa. C.S. § 2704.” *Cobbs II*, 230 A.3d at 392. The court answered the first question in the negative. Specifically, it found that only the sentence *at the time of the prison assault* is relevant to an assault by a life prisoner conviction, and that a later reversal of the life without parole sentence, or a finding that the sentence is unconstitutional, has no effect on the validity of a Section 2704 conviction. *Id.* at 394. Thus, it concluded that “the fact that [defendant]’s 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.” *Id.* In light of this holding, the court did not reach the second question regarding whether defendant’s current term-of-years-to-life-sentence constitutes “life imprisonment” under Section 2704.

This Court granted defendant’s petition for allowance of appeal, framing the issue to be resolved as follows:

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 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?

Commonwealth v. Cobbs, No. 165 MAL 2020 (Pa. Sep. 15, 2020) (*per curiam* order).³

³ Incidentally, defendant dedicates the majority of his "Factual History" to facts that are set forth in the "mitigation report" that was presented in his Allegheny County re-sentencing. *See Defendant's Brief* at 5-7. Neither this report nor the assertions contained therein, however, are part of the certified record on appeal; as such, they may not be considered by this Court. *See Commonwealth v. Preston*, 904 A.2d 1, 6 (Pa. Super. 2006) (noting that "an appellate court is limited to considering *only* the materials in the certified record when resolving an issue") (emphasis added). Indeed, "[i]t is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the case." *Commonwealth v. Martz*, 926 A.2d 514, 524-525 (Pa. Super. 2007) (citation omitted); *see Commonwealth v. Stanton*, 440 A.2d 585, 588 (Pa. Super. 1982) ("[i]t is of course fundamental that matters attached to or contained in briefs are not evidence and cannot be considered part of the record ... on appeal"). Accordingly, since neither the mitigation report nor the factual assertions contained therein that defendant sets forth in his brief are part of the record on appeal, they may not be considered by this Court.

SUMMARY OF THE ARGUMENT

This Court should dismiss this appeal as improvidently for two reasons. First, defendant's PCRA petition is time-barred. It was filed almost three decades after his judgment of sentence became final, and none of the statutorily enumerated exceptions to the PCRA time bar apply in this case. The newly recognized constitutional right exception, in particular, is inapplicable because neither *Miller v. Alabama* nor *Montgomery v. Louisiana* has any application to his case. *Miller* held that mandatory life without parole for those under the age of eighteen at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishments; *Montgomery* held that *Miller* applies retroactively on collateral review. Defendant was not a juvenile when he committed the crime of assault by life prisoner; he was 25 years old. His petition, therefore, is time-barred; as such, this Court does not have jurisdiction to consider the merits of the issue before this court on allocatur. Second, notwithstanding the jurisdictional time-bar, defendant's claim is nothing more than a challenge to the sufficiency of the evidence supporting his assault by a life prisoner conviction; he challenges the "life sentence" element of his conviction. It is well-settled, however, that sufficiency of the evidence claims are not

cognizable PCRA claims. This Court is, therefore, precluded from reaching the merits of defendant's claim for this reason, too. Accordingly, defendant's appeal should be dismissed as having been improvidently granted.

In any event, defendant's claim fails on the merits. His assault by a life prisoner conviction was not vitiated by his re-sentencing on his underlying first-degree murder conviction from life imprisonment without parole to 40 years to life imprisonment. He was serving a sentence of life imprisonment that had not been commuted at the time he committed the offense of assault by a life prisoner, which is the operative time-period under the assault by a life prisoner statute. Moreover, he continues to serve a life sentence today, albeit an indeterminate life sentence as opposed to a determinate life sentence. Thus, the fact that defendant's predicate life sentence was vacated decades later in no way undermines his current conviction and sentence. No relief is due.

ARGUMENT

I. THIS COURT SHOULD DISMISS DEFENDANT’S APPEAL AS IMPROVIDENTLY GRANTED.

This Court should not reach the merits of the issue for which it granted allowance of appeal. To do so, it would have to circumvent two of the mandatory, statutorily enumerated threshold requirements for obtaining PCRA relief; to wit, that a PCRA petition be timely filed and that it raise a cognizable PCRA claim. *See* 42 Pa. C.S. §§ 9543(a)(2), 9545(b). Defendant’s petition was not timely filed, and he has not raised a cognizable PCRA claim. For these reasons, this Court should dismiss this appeal as improvidently granted.

A. Defendant’s PCRA Petition is Time-Barred.

Defendant’s time for seeking PCRA review expired decades ago, and he failed to establish the applicability of any of the statutorily enumerated exceptions to the jurisdictional time bar. His petition, therefore, was time-bared under 42 Pa. C.S. § 9545(b); as such, this Court does not have jurisdiction to reach the merits of the claim raised in his petition.

Under the PCRA, all petitions must be filed within one year of the date on which judgment becomes final unless one of the three statutory

exceptions set forth in 42 Pa. C.S. § 9545(b)(1) applies. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999). The one-year period in which to file a petition for post-conviction relief begins to run at the conclusion of direct review or at the expiration of time for seeking such review. 42 Pa. C.S. § 9545(b)(3).

The PCRA timeliness requirements are jurisdictional in nature and must be strictly construed. *Commonwealth v. Lambert*, 765 A.2d 306, 318 (Pa. Super. 2000) (noting that the timeliness provisions of the PCRA are mandatory and must be interpreted literally). Thus, if a petition is untimely, neither the trial court nor this Court has jurisdiction over the PCRA petition. *Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 (Pa. 2010) (citing *Commonwealth v. Chester*, 895 A.2d 520, 522 (Pa. 2006)).

Because the time limit is jurisdictional, a court must address timeliness *first*, and may not consider the merits of an untimely petition. *Commonwealth v. Peterkin*, 722 A.2d 638, 641 (Pa. 1998). Moreover, the timeliness requirements may not be altered or disregarded to reach the merits of the claims raised in a petition. *See Commonwealth v. Capello*, 823 A.2d 936 (Pa. Super. 2003) (holding that the trial court cannot disregard the timeliness requirements of the PCRA in order to address the merits of the

claims raised therein); *Commonwealth v. Murray*, 753 A.2d 200, 203 (Pa. 2000) (courts cannot ignore the mandatory and jurisdictional nature of the PCRA's timeliness requirements, which apply to all PCRA petitions, regardless of the nature of the claims). To be sure, under the plain language of 42 Pa. C.S. § 9545, the substance of a PCRA petition is irrelevant to its timeliness. *Commonwealth v. Owens*, 718 A.2d 330 (Pa. Super. 1998); see *Williams v. Erie County District Attorney's Office*, 848 A.2d 967, 969 (Pa. Super. 2004) (timeliness requirements do not depend on the nature of the violations alleged). Consequently, unless a defendant seeking collateral relief pleads and proves that an exception to the PCRA time-bar applies, the courts of this Commonwealth are without jurisdiction to consider the merits of a claim presented in an untimely petition. *Commonwealth v. Whitney*, 87 A.2d 473, 475-78 (Pa. 2003); *Albrecht*, 994 A.2d at 1093. Indeed, as this Court has expressly acknowledged, "[w]ithout jurisdiction, we simply do not have the legal authority to address the substantive claims." *Id.* (quoting *Chester*, 895 A.2d at 522).

Additionally, the PCRA's timeliness requirements, are not subject to the doctrine of equitable tolling. *Commonwealth v. Lewis*, 63 A.2d 1274, 1279 (Pa. Super. 2013). Accordingly, "when a PCRA petition is not filed within

one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." *Commonwealth v. Robinson*, 12 A.3d 477, 479 (Pa. Super. 2011) (citation omitted).

Defendant's judgment of sentence became final on September 2, 1982, when his time for seeking *certiorari* to the United States Supreme Court expired. *See* 42 Pa. C.S. § 9545(b)(3) (providing that for purposes of the PCRA, "a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review"); *see also* U.S. Sup. Ct. Rule 13 (allowing 90 days to file for *certiorari* following denial of relief in state supreme court). He had one year from that date (September 3, 1983) to file a timely PCRA petition. *See* 42 Pa. C.S. § 9545(b). He did not file the instant petition until 2012 – almost three decades later. The petition is thus facially untimely pursuant to Section 9545(b).

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

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

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

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

42 Pa. C.S. § 9545(b)(1). Moreover, a defendant must plead and prove the applicability of one of these exceptions in order to overcome the untimeliness of his petition. *Commonwealth v. Dickerson*, 900 A.2d 407, 410 (Pa. Super. 2006). Unless he can plead and prove that he satisfies an exception, his petition remains untimely, and a reviewing court is without jurisdiction to consider his claims. *Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999); see *Commonwealth v. Edmiston*, 65 A.3d 339, 346 (Pa. 2013)

("We have repeatedly stated it is the [petitioner's] burden to allege and prove that one of the timeliness exceptions applied. Whether [the petitioner] has carried his burden is a threshold inquiry prior to considering the merits of any claim."). In addition, the petition must be filed "within 60 days of the date the claim could have been presented." 42 Pa. C.S. § 9545(b)(2).

In the courts below, defendant alleged that he met the newly recognized constitutional right exception to the jurisdictional time-bar based on *Miller* and *Montgomery*.⁴ The trial court rejected defendant's claim, finding his petition time-barred. The Superior Court, however, deemed his petition timely, finding that he satisfied the newly recognized constitutional right exception. *Cobbs II*, 230 A.3d at 389-392. In doing so, it correctly noted that "[a]rguments that a decision of the United States or Pennsylvania Supreme Court must be extended to apply to other types of

⁴ He also alleged – for the first time in his appellate brief to the Superior Court – that he met the newly discovered fact exception. He did not present this theory in the trial court, however, so it is waived. See *Commonwealth v. Cline*, 177 A.3d 922, 927 (Pa. Super. 2017) (stating that "issues . . . are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal."); *Commonwealth v. Phillips*, 141 A.3d 512, 522 (Pa. Super. 2016) (stating that an appellant is barred "from raising a new and different theory of relief for the first time on appeal"); compare *Whitney*, 817 A.2d at 475-478 (noting that a trial court is without jurisdiction under the PCRA unless a defendant seeking collateral relief *pleads and proves* that an exception applies); see generally Pa. R.A.P. 302(a) ("[i]ssues not raised in the [trial] court are waived and cannot be raised for the first time on appeal").

cases do not satisfy the requirements of Section 9545(b)(1)(iii) of the PCRA.” *Cobbs II*, 230 A.3d at 390 (citing *Commonwealth v. Lee*, 206 A.3d 1, 9-11 (Pa. Super. 2019) (*en banc*)). It proceeded to find, however, that “[b]ecause [defendant] is challenging his assault by life prisoner conviction on the ground that *Miller* and *Montgomery v. Louisiana* invalidated a predicate on which that conviction necessarily depended, 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.” *Cobbs II*, 230 A.3d at 392 (footnote omitted). The court thus found that defendant satisfied the newly recognized constitutional right exception, and because he filed his petition within 60 days of the *Miller* decision, and it was pending when *Montgomery* made *Miller* retroactive and when his underlying life without parole sentence in Allegheny County was set aside, his petition was timely. *Id.* Respectfully, the Superior Court was mistaken.

Contrary to the court’s conclusion, the newly recognized constitutional right exception does not apply to defendant’s PCRA petition. While *Montgomery* did make *Miller* retroactively applicable to defendants on collateral review, *see Montgomery*, 136 S. Ct. at 732, neither *Miller* nor

Montgomery applies to defendant's assault by a life prisoner conviction because *he was not a juvenile* at the time he committed his assault in Montgomery County. As previously noted, *Miller* held that "mandatory life without parole *for those under the age of eighteen at the time of their crimes* violated the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 132 S. Ct. at 2460 (emphasis added). The United States Supreme Court's express language makes clear that its holding only applies to juvenile offenders. While defendant was a juvenile when he committed the murder in Allegheny County, he was an *adult* when he committed the assault in Montgomery County. The *Miller* and *Montgomery* decisions, accordingly, do not apply to him. See *Commonwealth v. Lawson*, 90 A.3d 1, 14 (Pa. Super. 2014) (holding that a prior sentence for a juvenile cannot be used to implicate *Miller* for an adult sentence of life imprisonment without parole).

To be sure, in order to apply the *Miller* and *Montgomery* rule to defendant, this Court would have to extend the ruling to other types of cases that do not satisfy the requirements of Section 9545(b)(1)(iii) – such as, in this case, a situation where defendant was not a juvenile at the time of his crime, but he is, nonetheless, relying on an underlying juvenile life

without parole sentence in an attempt to bring his claim within the confines of Section 9545(b)(1)(iii). As the Superior Court aptly noted, such an extension is not permitted. *See Cobbs II*, 230 A.3d at 392 (“[a]rguments 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) (citations omitted). Inexplicably, however, the Superior Court appears to have simply paid lip-service to this well-established principle in finding that defendant satisfied the newly recognized constitutional right exception.

Simply stated, defendant does not satisfy the newly recognized constitutional right exception; his petition is thus time-barred. Accordingly, this Court does not have jurisdiction to consider the merits of the substantive issue for which it granted allowance of appeal. *See Albrecht*, 994 A.2d at 1093 (“[w]ithout jurisdiction, we simply do not have the legal authority to address the substantive claims”). The Commonwealth, therefore, respectfully requests that this Court dismiss this appeal as having been improvidently granted. *See Commonwealth v. Taylor*, 734 A.2d 1271, 1273 (Pa. 1999) (*per curiam* order) (Zappala, J., concurring) (noting that the appeal was properly dismissed as having been improvidently granted

because “this Court may not reach the merits of either of the claims raised by Appellant”); *Commonwealth v. Ricker*, 170 A.3d 494, 495 (Pa. 2017) (*per curiam* order) (Saylor, C.J., concurring) (noting that the appeal was dismissed as having been improvidently granted because it does not present a suitable vehicle by which to resolve the questions presented”); *Commonwealth v. Tighe*, 224 A.3d 1268, 1292 (Pa. 2020) (Wecht, J., concurring and dissenting) (stating that the Court can dismissed an appeal as having been improvidently granted where “we determine that the questions we granted allowance of appeal to resolve are moot or otherwise not well-suited to facilitate our principal function of advancing the law”).

B. Defendant Raises a Non-Cognizable Sufficiency of the Evidence Claim.

Assuming *arguendo* that defendant’s petition was timely, he is still not entitled to PCRA relief because he fails to raise a cognizable PCRA claim; he simply challenges the sufficiency of the evidence supporting his assault by a life prisoner conviction. The PCRA, however, does not allow such claims. *See* 42 Pa. C.S. § 9543(a)(2) (setting forth the cognizable PCRA claims).

Defendant petitioned for allowance of appeal on the issue of whether his conviction for assault by a life prisoner under Section 2704 can still stand after his underlying life-without-parole sentence was vacated in favor of a term-of-years-to-life-imprisonment sentence. Upon granting defendant's petition, this Court reframed the issue as follows:

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?

Commonwealth v. Cobbs, No. 165 MAL 2020 (Pa. Sep. 15, 2020) (*per curiam* order). As the allocator question makes clear, the issue sought to be addressed by the Court is nothing more than a run-of-the-mill sufficiency of the evidence challenge.

To be sure, the assault by a life prisoner statute provides, and provided at the time of defendant's prison assault, as follows:

Every person *who has been sentenced to death or life imprisonment* in any penal institution located in this Commonwealth, and whose sentence has not been commuted, who commits an aggravated assault with a deadly weapon or instrument upon another, or by any means of force likely to produce serious

bodily injury, is guilty of a crime, the penalty for which shall be the same as the penalty for murder of the second degree. . . .

18 Pa. C.S. § 2704 (emphasis added).⁵ In this appeal, defendant is simply challenging one of the elements of Section 2704; to wit, whether he was sentenced to life imprisonment. *See Appellant's Brief*, at 10-11 (noting that the assault by life prisoner statute "requires, as a necessary element, a showing by the Commonwealth that the accused has been sentenced to imprisonment for life") (internal quotations omitted) (citation omitted) (emphasis added); *Second Amended Petition*, at 13 (noting that "the elements of § 2704 can no longer be met" because defendant was re-sentenced to 40 years to life imprisonment in Allegheny County) (emphasis added); *id.* at 10 (noting that the statute under which defendant was convicted only applies to inmates who have been sentenced to death or life imprisonment, but defendant's life without parole sentence in Allegheny County was ruled unconstitutional).

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

⁵ Section 2704 was amended in 1998 to add language related to exposing a victim to bodily fluid, but no changes were made to the relevant language quoted above.

also 42 Pa. C.S. § 9543 (setting forth the cognizable PCRA claims). Thus, if this Court were to address the sufficiency of the evidence challenge upon which it granted allowance of appeal, it would be circumventing one of the threshold requirements for obtaining PCRA relief – that a defendant set forth a cognizable PCRA claim. *See id.* Put simply, this Court should not reach the merits of defendant’s claim. Instead, the Commonwealth respectfully requests that the Court dismiss this appeal as having been improvidently granted due to defendant’s failure to present a cognizable PCRA claim. *See Taylor*, 734 A.2d at 1273 (*per curiam* order) (Zappala, J., concurring) (noting that the appeal was properly dismissed as having been improvidently granted because “this Court may not reach the merits of either of the claims raised by Appellant”); *Ricker*, 170 A.3d at 495 (*per curiam* order) (Saylor, C.J., concurring) (noting that the appeal was dismissed as having been improvidently granted because it does not present a suitable vehicle by which to resolve the questions presented”).

II. DEFENDANT’S ASSAULT BY A LIFE PRISONER CONVICTION UNDER 18 PA. C.S. § 2704 IS NOT VITIATED BY THE FACT THAT HIS UNDERLYING LIFE WITHOUT PAROLE SENTENCE WAS LATER SET ASIDE IN FAVOR LIFE WITH THE POSSIBILITY OF PAROLE SENTENCE.

Assuming *arguendo* that defendant could overcome the procedural deficiencies in this appeal (he cannot), his petition still fails on the merits. Defendant’s conviction for assault by life prisoner remains intact despite the fact that nearly 40 years after his conviction, his underlying juvenile life without parole sentence was vacated as unconstitutional in favor of a 40-year-to-life sentence. This is so for two reasons. First, his 40-year-to-life sentence is still considered a “life sentence” for purposes of Section 2704, as the maximum term represents the actual sentence imposed for a criminal offense, with the minimum term merely setting the date after which a prisoner may be paroled. Second, even if the term-of-years-to-life sentence is not considered a “life sentence” for purposes of Section 2704, the subsequent vacating of the underlying life without parole sentence does not affect the validity of an assault by life prisoner conviction for an assault that occurred while the sentence was in effect. This is so because the relevant inquiry for Section 2704 purposes is whether a prisoner was

serving the life sentence *at the time of the assault*. Defendant unquestionably was.

A. Defendant's 40-Year-to-Life-Imprisonment Sentence Still Constitutes a Sentence of "Life Imprisonment" for Purposes of Section 2704.

To secure a conviction under Section 2704, the Commonwealth must establish, among other things, that the defendant “has been sentenced to . . . life imprisonment in any penal institution located in this Commonwealth . . . and [that his] sentence has not been commuted . . .” 18 Pa. C.S. § 2704. Defendant’s new Allegheny County sentence of 40 years to life imprisonment still constitutes a sentence of life imprisonment under Pennsylvania law. While at the time of the prison assault he was serving a *determinate, life without parole* sentence, now, he is simply serving an *indeterminate, life with parole* sentence. Either way, his sentence constitutes a sentence of “life imprisonment” under Section 2704. Accordingly, he was serving a sentence of life imprisonment, as contemplated under Section 2704, at the time of the prison assault and he continues to serve a sentence of life imprisonment today.

Indeed, “[p]ursuant to Pennsylvania law, the maximum term represents the sentence imposed for a criminal offense, with the minimum

term merely setting the date after which a prisoner may be paroled.”

Commonwealth v. Martin v. Pa. Bd. Of Prob. & Parole, 840 A.2d 299, 302 (Pa. 2003) (citing *Commonwealth v. Daniel*, 243 A.2d 400, 403 (Pa. 1968)). Thus, “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.*” *Id.* (emphasis added).

To be sure, this Court has expressly stated, on more than one occasion, that “the maximum sentence is the only portion of the sentence which has legal validity, and ... the minimum sentence is merely an administrative notice by the court to the executive department,” informing it of when a prisoner’s minimum sentence is about to expire, for purposes of parole. *Id.*; *Commonwealth v. Batts*, 163 A.3d 410, 427 (Pa. 2017) (reiterating that “the maximum sentence is the real sentence . . . the only portion of the sentence which has legal validity”) (quoting *Daniel*, 243 A.2d at 403). Accordingly, even if defendant had been serving his current term-of-years-to-life-sentence at the time of the prison assault, because his maximum sentence life sentence is the only component of his sentence that has any “legal validity,” his sentence remains a life sentence for purposes of the application of Section 2704. Defendant’s claim that parole-eligible

life prisoners are not considered life prisoners under Section 2704 is contrary to this established authority.

Defendant's claim that his sentence has been "commuted" and, thus, he no longer meets the elements of an assault by life prisoner conviction under Section 2704, is equally unavailing. While Section 2704 does exclude from its confines those whose sentence has been "commuted," defendant does not fall into this category. "Article 4, Section 9 of the Pennsylvania Constitution delegates the 'high power' to commute a sentence of death to the Governor, based upon a unanimous recommendation of the Board of Pardons." *Commonwealth v. Brown*, 196 A.3d 130, 144 n.5 (Pa. 2018) (citing Pa. Const. Art. 4, § 9). Pennsylvania's Administrative Code, too, makes clear that the power to formally "commute" a sentence rests with *the Governor* – not the courts – following a recommendation from the Board of Pardons of the Commonwealth. *See* 37 Pa. Code § 81.202; *id.* at § 81.211. Indeed, the power of commutation is an adjunct of the pardoning power and can be granted only by the authority in which the pardoning power resides. *Brown*, 196 A.3d at n.5 (quoting *Commonwealth v. Sutley*, 378 A.2d 780, 789 n.12 (Pa. 1977)). Defendant's Allegheny County life without parole sentence was not commuted by the governor; it was simply reduced

by the trial court upon re-sentencing. His life sentence, therefore, was not commuted within the meaning of Section 2704.⁶

B. The Relevant Inquiry Under Section 2704 is Whether the Prisoner was Serving a “Life Sentence” at the Time of the Assault.

Even if defendant’s current Allegheny County sentence is no longer considered a life sentence (it is), his claim still fails because he was unequivocally serving a life sentence at the time he committed the prison assault, which is all that is required under § 2704.

Section 2704 provides as follows:

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

18 Pa. C.S. § 2704 (emphasis added). As this express statutory language⁷ makes clear, it is the existence of a life sentence *at the time of the prison*

⁶ In any event, as discussed, *infra*, it is the sentence *at the time of the prison assault* that is relevant for a Section 2704 analysis. At that time, it is beyond dispute that defendant’s predicate life without parole was not commuted.

assault – without regard to any future occurrences – that is an element of the crime; thus, subsequent invalidation of that sentence does not negate this element. *Cobbs II*, 230 A.3d at 393. Indeed, an examination of Section 2704 reveals that it is unambiguously directed to any “person who *has been sentenced* to . . . life imprisonment.” (emphasis added). There is no modifier or qualifying language present, and there is no restriction on the scope of the term “sentenced.” See *Lewis*, 445 U.S. at 60. More particularly, the statute does not require as criteria a “valid” sentence; nor does it require a sentence “not subject to a later successful constitutional challenge. See *id.* at 62. Indeed, “[n]othing on the face of the statute suggests a [legislative] intent to limit its coverage to persons [whose [sentences] are not subject to collateral attack].” *Id.* at 60 (quoting *United States v. Culbert*, 435 U.S. 371, 373 (1978)).

Contrary to defendant’s contention, the fact that his Allegheny County life without parole sentence was later deemed unconstitutional in light *Miller* and *Montgomery* does not render it *void ab initio*, causing his Montgomery County sentence to be illegal. Compare *Commonwealth v.*

⁷ When a case concerns the interpretation of a statute, the starting point must always be the language of the statute itself. *Lewis v. United States*, 445 U.S. 55, 60 (1980).

Ciccone, 152 A.3d 1004, 1009 (Pa. Super. 2016) (finding that while the mandatory minimum sentencing statute at issue was rendered illegal by *Alleyne v. United States*, at the time the defendant was sentenced under the statute it was constitutional and, therefore cannot be considered void from inception). A review of the authority from both this Court and the United States Supreme Court addressing an analogous situation involving a challenge to a conviction for a firearms statute that requires an underlying conviction, where that conviction was later reversed or otherwise undermined, warrants this conclusion.

For instance, in *Commonwealth v. Stanley*, the defendant argued that he was entitled to a new trial because his previous murder conviction, that was later reversed, was introduced at trial to prove that he was an individual who had been convicted of a “crime of violence” such that he was prohibited from possessing a firearm under 18 Pa. C.S. § 6105. *Stanley*, 446 A.2d 583, 588 n.6 (Pa. 1982). This Court disagreed, finding that the subsequent reversal of his murder conviction on which his person not to possess a firearm charge was based did not affect proof of the person not to possess a firearm charge because *at the time* he was charged with

possession of the firearm he was a person convicted of a “crime of violence.” *Id.*

Similarly, in *Lewis, supra*, the United States Supreme Court found that the fact that the defendant’s prior conviction underlying his federal firearms charge was later deemed to be constitutionally invalid due to the denial of his right to counsel was not a defense to the firearms charge because the prior conviction had not been set aside *at the time* of the firearms charge. 445 U.S. 55, 59-65 (1980); *id.* at 65 (holding that the federal firearms statute “prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds”). Importantly, moreover, the Court expressly noted that the subsequent finding that the predicate conviction was unconstitutional does not require invalidation of the later conviction where the later conviction is based on the existence of the predicate conviction, not its reliability or validity. *Id.* at 65-67.

Here, as the language in Section 2704 makes clear, a conviction of assault by a life prisoner is dependent on the *existence* of the predicate sentence at the time of the prison assault; it is not predicated on the validity or reliability of the predicate sentence. *See Commonwealth v. Dessus*, 396

A.2d 1254, 1262 (Pa. Super. 1978) (finding, in a sufficiency of the evidence challenge under Section 2704, that the Commonwealth sufficiently established the existence of a life sentence by presenting testimony from the prison custodian of records to the effect that the defendant was serving a life sentence at the time of the assault). Accordingly, the precedent from both this Court and the United States Supreme Court dictates that the decades-later finding that defendant's life without parole sentence was unconstitutional in no way undermines his assault by a life prisoner conviction.

Moreover, the deterrent purpose of Section 2704 further supports this conclusion. *See Cobbs II*, 230 A.3d at 393. To this end, as aptly noted by the Superior Court, the purpose of Section 2704 is to deter prisoners already serving life sentences from committing assaults in prison. *Id.* (citing *Dessus*, 396 A.3d at 1257). "Deterrence can only apply to the situation existing and known to the defendant at the time of the assault." *Cobbs II*, 230 A.3d at 393.

Moreover, as the Superior Court below further explained, "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." *Id.*

This is so because a life sentence for a prison assault technically imposes no additional punishment on a defendant who continues under an earlier life without parole sentence, but it does impose an additional serious consequence if the underlying life sentence is later vacated or reduced. *Id.* Therefore, it is the prisoners such as defendant, whose underlying life without parole sentence is later vacated, who have the most to lose; as such, deterrence is strongest among such individuals.

Despite the fact that both the language of Section 2704 and its deterrent purpose, coupled with the relevant case law, support the conclusion that subsequent invalidation of defendant's life without parole sentence does not negate the life imprisonment element of the offense, defendant insists that his conviction should be reversed because his underlying sentence was set aside in favor of a 40-year-to-life sentence. He relies on, *inter alia*, *Commonwealth v. McIntyre*, 232 A.3d 609 (Pa. 2020), in support of his claim. His reliance on this case is misplaced.

In *McIntyre*, the defendant was convicted of failing to register as a sex offender under 18 Pa. C.S. § 4915, but that statute was later declared unconstitutional. *McIntyre*, 232 A.3d at 611. Thereafter, this Court reversed the defendant's judgment of sentence in *McIntyre*, finding that it

could not upholding the conviction and sentence because “there was no validly-enacted criminal statute on which the Commonwealth could base [a]ppellant’s conviction.” *Id.* at 619. In the instant case, however, there *was* a validly imposed criminal sentence on which to base defendant’s assault by a life prisoner sentence. To be sure, *at the time of the prison assault* – which is the only relevant time-period for purposes of Section 2704 – defendant was serving a sentence of life imprisonment without parole, that had not been commuted, thereby satisfying the sentencing element of Section 2704. Indeed, even today, defendant is serving a valid life sentence for purposes of Section 2704, because his maximum sentence – “the only portion of the sentence which has legal validity,” *Daniel*, 243 A.2d at 403 – is life imprisonment. *McIntyre*, accordingly, is inapposite.

On final note. Defendant cites to six other court of common pleas cases and contends that “under identical circumstances several other individuals have already been released or will be eligible for release upon their resentencing.” *Appellant’s Brief*, at 11-12. But this is not true. In at least one of the cases cited, the trial court denied relief on defendant’s nearly identical claim. *See Commonwealth v. Jones*, CP-46-CR-0004187-1993,

appeal pending, No. 1847 EDA 2019.⁸ In any event, not only are these trial court cases non-precedential, but they are also not even persuasive authority – especially in light of the lack of information about the cases in the certified record on appeal in this case. For these reasons, the six supposedly similar lower court cases cited by defendant should not be considered by this court in reaching its decision.

⁸ And, based on undersigned counsel's information and belief, in several of the cases, the Commonwealth agreed to relief, for various reasons. Here, of course, the Commonwealth has not agreed to relief.

CONCLUSION

For the reasons discussed above, and those set forth in the trial and Superior Court opinions, the Commonwealth respectfully requests that this Court either dismiss defendant's appeal as improvidently granted or affirm the Superior Court decision denying defendant relief on his PCRA petition.

RESPECTFULLY SUBMITTED:

/s/ Adrienne D. Jappe

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

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 56 MAP 2020
	:	
APPELLEE,	:	
	:	
v.	:	
	:	
JAMES HENRY COBBS,	:	
APPELLANT.	:	

Certificate of Compliance

I, Adrienne D. Jappe, Montgomery County Assistant District Attorney, hereby certify that the brief in the above-captioned matter, filed today, contains 7,119 words, in compliance with Pa.R.A.P. 2135.

Respectfully submitted,

/s/ Adrienne D. Jappe

ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY

KEVIN R. STEELE
DISTRICT ATTORNEY