Received 12/14/2020 8:25:42 PM Superior Court Eastern District

Filed 12/14/2020 8:25:00 PM Superior Court Eastern District
1217 EDA 2020

IN THE SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. 1217 EDA 2020

COMMONWEALTH OF PENNSYLVANIA,

APPELLEE

V.

DERRICK HARVEY,

APPELLANT.

BRIEF FOR APPELLANT

Appeal from the sentencing order imposed by the Court of Common Pleas of Philadelphia County, entered on September 19, 2018, at No. CP-51-CR-0307631-1998.

David M. Simon, Esquire
Attorney for Appellee
Attorney I.D. No. 208044
330 Market Street
Camden, NJ 08102
david@davidmsimon.com

Table of Contents

TABLE OF CITATIONS

Cases **Page(s)**

Pennsylvania Cases:

Federal Cases:

Statutes & Rules **Page(s)**

Constitutions **Page(s)**

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 742 (exclusive appellate jurisdiction in the Superior Court of Pennsylvania from final orders of the Court of Common Pleas) and Pennsylvania Rule of Appellate Procedure 341(a) (appeals as a right from final orders of a lower court).

II. SCOPE AND STANDARD OF REVIEW

"[W]here an appellant challenges the trial court's failure to award credit for time served prior to sentencing, the claim involves the legality of sentence." *Commonwealth v. Hollawell*, 604 A.2d 723, 725 (Pa. Super. Ct. 1992) (quoting *Commonwealth v. Diamond,* 546 A.2d 628, 631 n.3 (Pa. Super. Ct. 1988)). "Our scope of review of challenges to the legality of a sentence is plenary, and the standard of review is *de novo.*" *Commonwealth v. Milhomme,* 35 A.3d 1219, 1221 (Pa. Super. Ct. 2011). A challenge to the legality of a sentence is non-waivable. *Id.*

III. ORDERS IN QUESTION

The Orders which are the subject of this appeal are the orders captioned "JLSWOP RE-SENTENCING ORDER" entered on September 19, 2018, in the Court of Common Pleas of Philadelphia County by the Honorable Jeffrey Minehart. These orders imposed judgment of sentence and are appended on the page immediately following.

Commonwealth of Pennsylvania
v.
Derrick Harvey

CP-51-CR-0307631-1998 Comm. v. Harvey, Derrick
Order - Sentence/Penalty Imposed

8165298301

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO:	**CP-51-CR-0307631-1998**
DATE OF ARREST:	**01/12/1998**
OTN:	**M 782406-2**
SID:	**242-44-73-3**
DOB:	**03/15/1981**
PID:	**0830976**

JLSWOP RE-SENTENCING ORDER

AND NOW, this 19th day of September, 2018, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows:The original sentence of 3/28/03 is vacated.

Count 1 - 18 § 2502 - MURDER-1ST DEGREE ()

To be confined for 20 YEARS to LIFE at _____.

The following conditions are imposed:

Credit Time Served - Resentence/Amended State Sent - Credit Time Served: Credit for Time Served as previously awarded on original sentence of :3/28/03

Count 2 - 18 § 3701 - ROBBERY ()

A determination of guilty without further penalty.

Count 6 - 18 § 907 - POSSESSING INSTRUMENTS OF CRIME ()

A determination of guilty without further penalty.

Count 7 - 18 § 2702 - AGGRAVATED ASSAULT ()

A determination of guilty without further penalty.

Count 8 - 18 § 2502 - ATTEMPTED MURDER ()

To be confined for a minimum period of 10 Year(s) and a maximum period of 20 Year(s) at _____.

LINKED SENTENCES:

Link 1

CP-51-CR-0307631-1998 - Seq. No. 8 (18§ 2502 §§) - Confinement is Consecutive to
CP-51-CR-0307631-1998 - Seq. No. 1 (18§ 2502 §§) - Confinement

The defendant shall pay the following:

	Fines	Costs	Restitution	Crime Victim's Compensation Fund - Victim / Witness Services Fund	Total Due
Amount:	$0.00	$168.50	$0.00	$60.00	$228.50
Balance Due:	$0.00	$168.50	$0.00	$60.00	$228.50

Judge Minehart ADA:Lightsey; PD: William Riley ; Steno: Lori Coffman; Clerk: Ashley Wilson

By the Court

CPCMS 2066

Printed: 09/19/2018 1:56:51PM

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Did the lower court violate Mr. Harvey's right to be free of double jeopardy and violate Pennsylvania's sentencing code by failing to properly give Mr. Harvey more than 20 years of time credit against his statutory-maximum sentence for attempted murder and then reimposing another statutory-maximum sentence on the same charge to run consecutively to a homicide sentence?

(Answered in the negative by the court below.)

B. Did the lower court impose a sentence based on a new rule of law that was judicially created, in violation of the separation of powers doctrine? And was that sentence impermissibly applied retroactively?

(Answered in the negative by the court below.)

V. STATEMENT OF THE CASE

PROCEDURAL HISTORY

Derrick Harvey was arrested on January 11, 1998, and charged with murder and related charges. At the time of his arrest, Mr. Harvey was 16 years, 9 months, and 27 days old. His case was assigned to the Honorable Ricardo C. Jackson of the Court of Common Pleas, in Philadelphia.

On October 26, 1998, Mr. Harvey waived his right to a trial by jury and commenced trial before Judge Jackson. At the conclusion of trial on October 27th, Judge Jackson found Mr. Harvey guilty of first-degree murder, attempt to commit murder, robbery, aggravated assault, and possessing an instrument of crime (hereinafter "PIC").

On March 19, 1999, Mr. Harvey again waived his right to a jury and proceeded to a bench penalty-phase hearing. That day, Judge Jackson sentenced Mr. Harvey to (1) execution for the murder conviction, (2) 10 to 20 years of incarceration for robbery, (3) 10 to 20 years of incarceration for attempt to commit murder, (4) 2 to 4 years of incarceration for PIC. For sentencing purposes, the aggravated assault conviction merged with the attempted murder conviction. The sentences were ordered to run concurrently to one another.

The Pennsylvania Supreme Court reviewed the matter. *Commonwealth v. Harvey*, 812 A.2d 1190 (Pa. 2002). The Supreme Court affirmed Judge Jackson's

verdicts but vacated the sentence of death because Judge Jackson incorrectly assessed one aggravating factor. As a result, the matter was remanded for resentencing.

On remand to the Court of Common Pleas, in Philadelphia, the case was reassigned to the Honorable Steven Geroff. On March 28, 2003, Judge Geroff resentenced Mr. Harvey to life imprisonment without the possibility of parole (hereinafter "LWOP") for murder and left intact the concurrent sentences of 10 to 20 years of incarceration on the robbery and attempted murder charges. Judge Geroff did not impose any sentence for PIC because Judge Jackson's sentence on that charge had already expired.

On September 3, 2003, Mr. Harvey filed a collateral attack on his convictions under the Post Conviction Relief Act (hereinafter "PCRA"), 42 Pa.C.S. § 9541, *et seq.* The case came back before Judge Jackson. Counsel was appointed and filed a no-merit letter. On May 27, 2005, Judge Jackson denied Mr. Harvey's petition. On June 29, 2005, Mr. Harvey filed a notice of appeal and his case came before this Court for the first time. This Court remanded the matter because Judge Jackson did not indicate that he had conducted an independent review of the case or that he had formally permitted counsel to withdraw. *Commonwealth v. Harvey*, No. 1956 EDA 2005 (Pa. Super. Ct. Jan. 17, 2007) (memorandum).

The matter again came before Judge Jackson. On October 5, 2007, he made the findings of fact and conclusions of law necessary and permitted counsel to withdraw. And Judge Jackson again dismissed the PCRA petition. Mr. Harvey appealed to this Court for a second time. This Court affirmed the denial of post-conviction relief because the claims raised were previously litigated before the Supreme Court on direct appeal. *Commonwealth v. Harvey*, No. 2826 EDA 2007 (Pa. Super. Ct. Feb. 13, 2009) (memorandum). The Supreme Court denied allocatur. *Commonwealth v. Harvey*, No. 330 EAL 2009 (Pa. Oct. 7, 2009).

Mr. Harvey then sought review in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 2254. On December 20, 2011, the United States Magistrate Judge Arnold C. Rapoport issued a report and recommendation in which he concluded that the matter should be dismissed without an evidentiary hearing. *Harvey v. Folino*, No. 10-1799, 2011 U.S. Dist. LEXIS 156286 (E.D.P.A. Dec. 20, 2011). On September 28, 2012, United States District Court Judge Legrome Davis entered an order adopting those recommendations and denying relief.

On August 7, 2012, Mr. Harvey filed his second petition seeking post-conviction relief under the PCRA. He filed the petition in the wake of the United States Supreme Court's decision in *Miller v. Alabama,* 567 U.S. 460 (2012), wherein the Supreme Court held that the 8th Amendment to the United States

Constitution forbids a sentencing scheme that mandates LWOP for juvenile homicide offenders, such as Mr. Harvey. Mr. Harvey filed multiple amended PCRA petitions, and eventually the Defender Association of Philadelphia was appointed to represent him.

Mr. Harvey's case was assigned to the Honorable Jeffrey Minehart of the Court of Common Pleas in Philadelphia. After 20 years, 8 months and 9 days of incarceration, on September 19, 2018, Judge Minehart granted the PCRA petition and vacated Mr. Harvey's sentence. Judge Minhart immediately commenced a new sentencing hearing at which the Commonwealth offered the testimony of one of the victims in the case and testimony of the deceased's mother. Mr. Harvey's mother testified on behalf of her son.

At the conclusion of the hearing, Judge Minehart imposed the sentences that are the subject of this appeal. On Count 1, murder in the first degree, Judge Minehart sentenced Mr. Harvey to 20 years of incarceration to life. Though Mr. Harvey had served the entirety of his statutory-maximum sentence for attempted murder already, on that count (Court 8) Judge Minehart re-sentenced Mr. Harvey to another statutory-maximum sentence of 10 to 20 years of incarceration on that charge. And Judge Minehart ordered that sentence to run consecutively to the sentence imposed for murder on court 1, creating an aggregate sentence of 30 years to life. Judge Minehart did not impose sentence on any other charge.

On September 24, 2018, Mr. Harvey filed a *pro se* motion asking for more time to file post-sentence motions. The lower court did not respond. On October 22, 2018, Mr. Harvey filed post-sentence motions, again *pro se*. Again, the lower court did not respond.

On November 13, 2018, Mr. Harvey filed a motion to proceed *pro se* and to dismiss his current counsel. In his motion, Mr. Harvey stated his desire to litigate post-sentence motions and to file a direct appeal. Motion for Dismissal of Counsel and Leave to Proceed Pro Se at 2-3, *Commonwealth v. Harvey*, No. CP-51-CR-0307631-1998 (Ct. Com. Pl. Nov. 13, 2018).

On February 27, 2019, Mr. Harvey filed a *pro se* notice of appeal to this Court. That case would come to be docketed at number 625 EDA 2019. After Mr. Harvey filed a concise statement of matters complained of on appeal, this Court entered an order on the lower court to hold a hearing to determine if Mr. Harvey should be allowed to proceed *pro se*. Order, *Commonwealth v. Harvey*, No. 625 EDA 2019 (Pa. Super. Ct. Jun. 27, 2019). On August 12th, with no action having been taken by the lower court, Mr. Harvey wrote to the Office of the Court Administrator for the Court of Common Pleas in Philadelphia. He sought some movement or action on his case. About one year after his first *pro se* filing seeking to preserve his post-trial rights, Mr. Harvey filed a petition seeking post-conviction relief in which he sought to preserve his post-sentence rights and raised his claim

that his sentence for attempted murder was unlawful, as he had already served that sentence in its entirety. Post-Conviction Relief Act Petition Pursuant to 42 Pa.C.S.A. § 9541, et. seq. at 5, *Commonwealth v. Harvey*, No. CP-51-CR-0307631-1998 (Ct. Com. Pl. Sept. 10, 2019).

On October 1, 2019, Judge Minehart convened an on-the-record hearing. At that hearing, Mr. Harvey's counsel indicated that it would be prudent to withdraw the pending appeal and seek permission from Judge Minehart to reinstate Mr. Harvey's post-sentence rights *nunc pro tunc*. (N.T. 10/1/19, pp. 3-9[1]) As such, it was agreed that counsel would remain in place.

In keeping with that agreement, Mr. Harvey's counsel filed a praecipe for discontinuance with this Court that same day. This Court discontinued the appeal the following day. Mr. Harvey filed a counseled petition seeking to file timely post-sentence motions and, if necessary, a timely notice of appeal to this Court thereafter. Post-Conviction Relief Act Petition for Allowance of Postsentence Motion and Appeal Nunc Pro Tunc and for the Appointment of Counsel, unpaginated at **6-7, *Commonwealth v. Harvey*, No. CP-51-CR-0307631-1998 (Ct. Com. Pl. Oct. 10, 2019).

[1] This citation format refers to the notes of testimony for the stated date and the page number of those notes of testimony where the cited material can be found.

On December 17, 2019, Judge Minhart convened another on-the-record hearing. The Commonwealth consented to Mr. Harvey's counseled request. And Judge Minehart issued an order that day reinstating Mr. Harvey's rights to file timely post-sentence motions and a direct appeal.

On December 27, 2019, through counsel, Mr. Harvey filed now-timely post-sentence motions. On May 18, 2020, those post-sentence motions were denied by operation of law, and on May 1, 2020, Mr. Harvey filed a notice of appeal to this Court. Current counsel entered his appearance several days later. And since then, both Mr. Harvey and Judge Minehart have complied with Rule 1925 of the Rules of Appellate Procedure, with both the concise statement of matters complained of on appeal and the corresponding opinion appended to this brief.

FACTUAL HISTORY

The Pennsylvania Supreme Court provided a thorough telling of the case in it's opinion vacating Mr. Harvey's death sentence. *Commonwealth v. Harvey*, 812 A.2d 1190, 1194-96 (Pa. 2002). Those facts are not contested and are not relevant to the legal issue in this appeal.

In short, though, the evidence proved that, on January 10, 1998, Shawn Wilkins came home with Mr. Harvey in tow. Mr. Wilkins and Mr. Harvey were cousins. Mr. Wilkins's three siblings were also home: Charity Wilkins, age 13, and

two younger siblings. Mr. Harvey and Mr. Wilkins went upstairs. While the two were in Mr. Wilkins's bedroom, some sort of a small drug sale took place and a fight resulted from that sale. In the end, Mr. Harvey shot Mr. Wilkins six times, at least three times in the head. Mr. Harvey then went downstairs and ordered Charity to come upstairs. She complied. Mr. Harvey ordered her to lie on the bed and then shot her three times in the head and neck. Somehow, she survived.

Mr. Harvey's penalty-phase hearing occurred in March of 1999, four days after his 18th birthday. At the hearing, he presented two expert witnesses, both of whom personally evaluated Mr. Harvey: Dr. Julie B. Kessel, a psychiatrist with a specialty in forensic psychiatry (N.T. 3/19/99, pp. 31-64), and Dr. Reed Goldstein, a clinical psychologist (*id.* at 65-86). Mr. Harvey also offered testimony from his father, Charles Wilkins, Sr., (*id.* at 86-99) his mother, Adrienne Harvey (*id.* at 101-08), and his grandmother, also Adrienne Harvey (*id.* at 108-09).

Each of the witnesses Mr. Harvey presented at his penalty-phase hearing offered his or her perspective on Mr. Harvey's life and upbringing. Mr. Harvey was the oldest of six siblings and they grew up in a household in which violence was the norm. (*Id.* at 34-35, 90) His father beat Mr. Harvey and he beat his wife. (*Id.* at 88, 91-92, 96, 101-08) Indeed, only a few days before Mr. Harvey's penalty-phase hearing, his father had his own sentencing for "beatings and attacks" he inflicted on his wife. (*Id.* at 91-92) His father's abuse caused severe mental-health

consequences in Mr. Harvey. He suffered from post-traumatic stress disorder and anxiety, as well as chronic nightmares. (*Id.* at 37-38, 73-74) As a child, he made choices based on those stressors and not based on a rational thought process his peers would. (*Id.* at 39-41) Drug and alcohol abuse was prevalent in the home, and his family members dealt drugs. (*Id.* at 90, 93, 104, 109).

VI. SUMMARY OF ARGUMENT

> *"Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."*
>
> - *Francis v. Resweber*, 329 U.S. 459, 462 (1947).

The statutory maximum penalty Mr. Harvey could face for attempted murder was 20 years. He served more than 20 years of incarceration before the lower court vacated his sentence and resentenced him. Even though the United States Constitution's and the Pennsylvania Constitution's protections against double jeopardy required the lower court to credit Mr. Harvey with all of that time, and even though he had served his sentence for attempted murder, the lower court chose to reimpose a new statutory-maximum sentence for the charge and change it from a concurrent sentence to run with the homicide sentence, to a consecutive sentence to be served after the homicide sentence. This was illegal. It violated Mr. Harvey's right to be free of double jeopardy and violated Pennsylvania's sentencing code.

The sentence imposed on Mr. Harvey's first-degree murder charge was also illegal. The new rule of law created in *Batts I* and *Batts II* permitting a life sentence on a juvenile offender with the possibility of parole was a judicially created law that violated the separation of powers doctrine. And even if that new rule of law

was not crafted in violation of the Pennsylvania Constitution (it was), retroactive application of the new rule of law was impermissible.

VII. ARGUMENT

A. The lower court gave Mr. Harvey more time for attempted murder, even though he had already served the statutory-maximum sentence. By reviving that served sentence, the lower court violated Mr. Harvey's right to be free from double jeopardy and his statutory right to time credit.

Mr. Harvey was sentenced to serve the statutory-maximum sentence for attempted murder. And he served that statutory-maximum sentence in its entirety – every day of the 20 years imposed. But the lower court reimposed that same sentence and ordered that it be served consecutively to the new life-with-the-possibility-of-parole sentence. The new sentence on attempted murder violated Mr. Harvey's constitutional rights to be free of double jeopardy. On this error, he respectfully requests that this Court amend the sentence for attempted murder to be served concurrently with his sentence for murder, with credit for time served dating from the time of his arrest.

1. The lower court did not have the power to impose a new sentence on attempted murder because Mr. Harvey already served the maximum-allowable sentence and the United States and Pennsylvania Constitutions' protections against double jeopardy forbid additional punishment.

In 1998, Judge Jackson convicted Mr. Harvey of attempted murder. That crime carries with it a maximum-allowable sentence of 20 years of incarceration.[2] 18 Pa.C.S. § 1102(c). Mr. Harvey served just that – an entire 20 years of incarceration for that offense. The lower court vacated Mr. Harvey's sentences only **after** he served those 20 years. Therefore, the lower court did not have the legal power to impose any new sentence on that charge because the guarantee against double jeopardy protects against multiple punishments for the same offense. But the lower court did impose a new sentence. Indeed, it imposed a new statutory-maximum sentence and changed that sentence from a concurrent sentence to a consecutive sentence to follow the sentence for murder. That was an error and must be corrected.

[2] Under Section 1102(c), if the Commonwealth proves that the victim suffered serious bodily injury, the maximum sentence grows to 40 years of incarceration. But in keeping with the mandates of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), serious bodily injury is an element of the offense and must be proved beyond a reasonable doubt. Judge Jackson's verdict sheet and the transcripts from the verdict make clear that Mr. Harvey was not convicted of causing serious bodily injury to Charity.

i. An "unbroken line of cases" mandates that Mr. Harvey be given enough time credit to satisfy his sentence for attempted murder and the lower court had no power to change the sentence from concurrent to consecutive.

The United States Supreme Court solidified modern double jeopardy law in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The Court held that "[t]he Fifth Amendment guarantee against double jeopardy . . . protects against multiple punishments for the same offense." *Id.* at 717. This protection, the Court continued, "absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense." *Id.* at 718-19 (internal quotation omitted). So, "[w]here a man successfully attacks a sentence that he has already fully served, the State cannot create an additional sentence and send him back to prison." *Id.* at 732-32 (Douglas, J. concurring) (internal citation and quotation omitted).

The Pennsylvania Supreme Court quickly incorporated that jurisprudence into this Commonwealth's double jeopardy analysis. The Pennsylvania Supreme Court highlighted the high court's "unbroken line of cases," *Commonwealth v. Allen*, 277 A.2d 803, 805 (Pa. 1971), that "concluded that increasing a sentence after the defendant has commenced to serve it is a violation of the double jeopardy clause[.]" *Id.* at 807 (citing *Ex parte Lange*, 85 U.S. 163 (1873)). And "there is no

exception to [double jeopardy] in the situation where the increase is allegedly designed to reflect the judge's true intent." *Id.*

Nearly as quickly, this Court began applying *Pearce* when confronted with "the basic issue of whether a court . . . has the power to change a sentence originally made to run concurrently with other sentences to one running consecutively." *Commonwealth v. Hermankevich*, 286 A.2d 644, 646 (Pa. Super. Ct. 1971). This Court held that a sentencing court does not have the power to change a concurrent sentence to a consecutive sentence unless the change is based on "identifiable conduct on part of the defendant occurring after the time of the original sentencing proceeding." *Id.* Without additional evidence, a concurrent sentence must remain a concurrent sentence.

The lower court's order changing Mr. Harvey's statutory maximum sentence from concurrent to consecutive is illegal. Mr. Harvey is entitled to time credit for every day of the 20 years, 8 months and 9 days he spent incarcerated prior to Judge Minehart vacating his sentence. *Pearce*, 395 U.S. at 718-19. Absent new evidence – of which there is none – Judge Minehart does not have the power to change the sentence for attempted murder from concurrent to consecutive, *Hermankevich*, 286 A.2d at 646, even if he believed that he was, in good faith, simply trying to implement Judge Jackson's true intent, *Allen*, 277 A.2d at 805. As a result, Judge Minehart imposed an illegal sentence on Mr. Harvey when he ordered the new,

consecutive statutory-maximum sentence on Mr. Harvey for the attempted murder conviction. Mr. Harvey thus respectfully requests that this Court vacate the sentence and amend it to be served concurrently with his sentence for murder, with credit for time served dating from the time of his arrest.

ii. The lower court tried to defend the sentence imposed by citing cases that do not apply to Mr. Harvey's case.

Though the Commonwealth specifically requested a consecutive sentence for attempted murder (N.T. 9/19/20, p. 34), it has not yet been asked to provide a lawful basis for imposing that sentence. The lower court, in its opinion, primarily relied on two cases. First, it cites to this Court's opinion in *Commonwealth v. McHale*, 924 A.2d 664 (Pa. Super. Ct. 2007), and an *en banc* opinion in *Commonwealth v. Fields*, 197 A.3d 1217 (Pa. Super. Ct. 2018) (*en banc*) (*per curium*). Neither of those two cases compels – or even suggests – a different result from Mr. Harvey's requests. But to understand why, we must briefly revisit *North Carolina v. Pearce*, *supra*.

In *Pearce*, the Supreme Court answered two questions. *Pearce*, 395 U.S. at 715. One "more limited question" was whether time must be credited on resentencing. *Id.* at 716. That Court's analysis in that regard has already been discussed. The other question was, what are "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon

retrial[?]" *Id.* at 715-16. The Court specifically stated that this question did not invoke double jeopardy concerns, but instead implicated Due Process, as protected by the Fourteenth Amendment. *Id* at 723. And the Court went on to hold that Due Process requires that, where a court imposes a greater sentence upon retrial, the sentencing judge "must set forth affirmative reasons based on objective information for his actions." *Commonwealth v. Speight*, 854 A.2d 450, 455 (Pa. 2004) (citing *Pearce*, 395 U.S. at 726).

The trial court cited *Commonwealth v. McHale, supra,* at length. Trial Court Opinion, Sept. 2, 2020, pp. 4-5. This Court started its analysis in *McHale* by framing the question presented as to whether, "after this Court reversed his convictions . . . the trial court increased his punishment in the absence of legitimate reasons and thus violated **the Due process Clause of the United States and Pennsylvania Constitutions**[?]" *McHale*, 924 A,2d at 686 (emphasis added). The question asked and answered in *McHale* was not about double jeopardy or time-credit concerns. That is because the defendant there successfully challenged his most serious convictions on appeal, but upon resentencing the lower court cobbled together the same aggregate sentence on lesser charges. *Id.* at 667. There is no discussion in the opinion of time credit or of particular sentences being fully served at the time of resentencing. The defendant claimed that the new sentences were

vindictive and violated his Due Process rights. *Id.* at 667, 671. That is simply not the issue presented in Mr. Harvey's case.

The lower court's reliance on *Commonwealth v. Fields*, *supra*, is similarly misplaced. A majority of the *en banc* panel agreed that the main argument presented by the defendants in *Fields* was not availing. *Id.* at 1221-23 (holding that the defendants' primary argument was incorrect). Next, the majority agreed that the defendants lacked jurisdiction. *Id.* at 1123-24.

Finally, in *dicta*, the majority raised *sua sponte* the question of double jeopardy. Both defendants in *Fields* had been sentenced on a plethora of charges stemming from a string of armed robberies. But on collateral attack, a limited few of those sentences were vacated because the mandatory-minimums imposed violated *Alleyne v. United States*, 570 U.S. 99 (2013). *Fields*, 197 A.3d at 1220. On remand, the sentencing courts resentenced the defendants on all of their multitudes of convictions, not just the challenged sentences that fell under *Alleyne*. *Id.*

But like *McHale*, the defendants in *Fields* had no time-credit issues. *See id.* at 1224 (the defendants "were each given credit for time served"). They had not completed any sentence on which they were given new time and certainly had not reached the statutory-maximum penalty for anything when they were resentenced. The *en banc* panel offered only that, when one sentence is successfully challenged,

upon remand, the lower court has the power to resentence on all charges, not just the charges whose sentences were challenged on appeal. *Id.* at 1224.

That holding was not new. This Court had already made clear that "[w]hen a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan." *Commonwealth v. Bartug*, 732 A.2d 1287 (Pa. Super. Ct. 1999) (quoting *Commonwealth v. Goldhammer*, 517 A.2d 1280, 1283 (Pa. 1986) (alteration in original) (further internal quotations omitted). Mr. Harvey does not suggest that Judge Minehart lacked jurisdiction to enter a sentence on attempted murder. Rather, proper credit for time served must be granted on any new sentence, and absent additional evidence, the sentence could not be converted from concurrent to consecutive.

The majority in *Fields* indirectly offered the most compelling reason why Mr. Harvey's position is the only just position. There, the *en banc* panel noted that resentencing on all charges was warranted because it "was necessary to preserve the integrity of the original sentencing scheme." *Fields*, 197 A.3d at 1224 (internal quotation omitted). For Mr. Harvey, his "original sentencing scheme" was execution. That sentence was cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is cruel and unusual under the Eighth Amendment to execute a minor). The new sentence imposed after that cruel and unusual sentence was a new cruel and unusual sentence. *See Miller v. Alabama*, 567 U.S. 460 (2012)

(holding that it is cruel and unusual under the Eighth Amendment to sentence as a statutory rule a minor to life without the possibility of parole). It is not necessary to preserve the integrity of Mr. Harvey's original sentencing scheme. It is not even legal to do so. Nor is it legal to preserve the integrity of the next sentence imposed on Mr. Harvey. The cases that the lower court cites to support its sentence are unavailing. The sentence should be vacated and amended to be served concurrently with his sentence for murder, with credit for time served dating from the time of his arrest.

2. Even if the lower court's sentence did not violate Mr. Harvey's right to be free from double jeopardy, Pennsylvania's sentencing code still clearly forbids the new consecutive sentence.

Even if the lower court's new sentence could be defended on double jeopardy grounds (it cannot), the sentence would still run afoul of Pennsylvania's Sentencing Code.

The Pennsylvania Sentencing Code provides certain statutory rights to time credit. It "mandates that a person being sentenced shall receive credit on his sentence for all time spent in custody as the result of the criminal charge for which a prison sentence is being imposed." *Commonwealth v. Walker*, 428 A.2d 661, 662 (Pa. Super. Ct. 1981).

The Code sets forth:

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

(2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.

(3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based.

(4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former

> charge that has not been credited against another sentence.

42 Pa.C.S. § 9760.

Application of this statute to Mr. Harvey's sentence is not complicated. This Court explained the framework succinctly in *Commonwealth v. Diamond*, 546 A.2d 628 (Pa. Super. Ct. 1988). There, the defendant was sentenced to 11½ to 23 months of imprisonment for risking a catastrophe. *Id.* at 487. After a successful collateral attack on his conviction, he again found himself being sentenced on the same charge and received 5 to 12 months of incarceration. *Id.* at 486. But before being resentenced, the defendant had already served more than 23 months of incarceration. *Id.* at 492. "Because [he] spent the entire [23] month maximum term of his prior sentence in custody," the court at resentencing was required to "have credited him with that time when it computed his new sentence." *Id.* at 792-93. And because the defendant's time served was in excess of the new sentence imposed, this Court held that the proper remedy was "for [the defendant] to be released[.]" *Id.* at 93.

Using this simple framework, it is plain to see that Mr. Harvey's is entitled to similar relief. He was sentenced to 10 to 20 years of incarceration on the attempted murder charge. And he served 20 years, 8 months and 9 days incarcerated prior to resentencing. Under Section 9760(1), Mr. Harvey is entitled to credit for "all time spent in custody as a result of the criminal charge for which

[his] prison sentence [was] imposed." 42 Pa.C.S. § 9760(1). And Section 9760(2) assures that Mr. Harvey receives full credit for the original sentence at the subsequent resentencing. As a result, he clearly had enough time credit to satisfy the entire 20-year maximum sentence he received. The defendant in *Diamond* was entitled to his outright release because his time credit exceeded his new sentence; but since Mr. Harvey has another sentence to serve – the homicide sentence – he should be allowed to serve that sentence.

The lower court tried to defend its sentence by citing *Commonwealth v. Ellsworth*, 97 A.3d 1255 (Pa. Super. Ct. 2014). See Trial Court Opinion, Sept. 20, 2020, p. 7. But that case is simply not relevant to the sentence at issue here.

The defendant in *Ellsworth* received a state sentence for a burglary conviction. *Ellsworth*, 97 A.3d at 1256. At the time, he was serving parole for an entirely separate offense. The sentencing court ordered that the defendant receive 312 days of time credit. *Id.* The state parole board later wrote a letter to the sentencing judge informing the judge that the board had awarded time credit for those 312 days when it revoked the defendant's parole and resentenced him to serve his back time. *Id.* The state parole board wanted to know whether the sentencing judge intended for those 312 days to be "double credited" to both the new burglary sentence and the older parole revocation sentence. *Id.*

Critically, the time-credit issue was based on one defendant with two separate sentences from two completely different and unrelated criminal acts. That calls into question Section 9760(4), which deals expressly with "time spent in custody under the former charge **that has not been credited against another sentence**."[3] 42 Pa.C.S. § 9760(4) (emphasis added). Mr. Harvey's sentences are from two related cases charged together on one criminal information arising out of a single set of facts. Section 9760(4) has no application here. And the lower court's reliance on it is misplaced.

Though neither the lower court nor the Commonwealth has attempted to justify Mr. Harvey's new consecutive statutory-maximum sentence for attempted murder on subsection (3) of Section 9760, it is clear that such a claim would be no more availing than the lower court's reliance on subsection (4). This Court recently clarified that "[s]ubsection (3) . . . applies to sentences for separate prosecutions that arise from unrelated offenses." *Commonwealth v. Richter*, 859 WDA 2019, p.

[3] *Ellsworth* does not expressly state which subsection of Section 9760 it relies on in reaching its conclusion, Indeed, the panel in *Ellsworth* does not even state that it is relying on Section 9760 at all. But the panel cites to *Commonwealth v. Merigris*, 681 A.2d 194, 195 (Pa. Super. Ct. 1996), and *Commonwealth v. Hollawell*, 604 A.2d 723, 725 (Pa. Super. Ct. 1992). *Ellsworth*, 97 A.3d at 1257. And both of those cases make clear that the time-credit issues presented deal with defendants confronted with sentences on multiple unrelated criminal episodes that fall within the parameters of subsection (4) of Section 9760.

7 (Pa. Super. Ct. June 8, 2020) (memorandum)[4]. Subsection 3 applies "whenever a person who is serving multiple sentences has one sentence set aside and that person is not reprosecuted or resentenced for the underlying crime." *Id.* at 7-8. This is not the case with Mr. Harvey. His sentences were vacated and he was reprosecuted and resentenced on the same charges. As a result, subsections (1) and (2) demand that he receive all original time credit up to the time of resentencing before Judge Minehart.

As a result, Mr. Harvey respectfully requests that this Court amend his sentence for attempted murder to be served concurrently with his sentence for murder, with credit for time served dating from the time of his arrest. *See Commonwealth v. Kozrad*, 499 A.2d 1096, 1099 (Pa. Super. Ct. 1985) ("Once we have determined that a sentence is illegal, we may remand for sentencing or vacate and amend the invalid sentence directly.").

[4] Under Rule of Appellate Procedure 126(b)(2), "non-precedential decisions . . . may be cited for their persuasive value."

B. The lower court imposed a sentence based on a new rule of law amending Section 1102 of the Crimes Code. By imposing a sentence on Mr. Harvey using that new law, the lower court violated the separation of powers doctrine, and impermissibly applied a new law retroactively.

When Mr. Harvey committed his crime, the permissible punishments were either execution or life imprisonment without the possibility of parole. The Legislature offered no alternative to those punishments. Over time, the United States Supreme Court held that both options are cruel and unusual punishment. That left no legislatively-enacted sentencing scheme to apply to Mr. Harvey's homicide conviction. Our Supreme Court tried to fill in that hole in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) ("*Batts I*"), and *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) ("*Batts II*"). But those cases violated the separation of powers doctrine by judicially creating a sentencing scheme that only the legislature is empowered to enact. And by imposing sentence on that judicially-created sentencing scheme, the lower court violated impermissibly applied a new law retroactively. As such, his sentence for homicide should be vacated in its entirety.

1. In Batts I and Batts II, our Supreme Court invented a novel statute that our legislature never implemented.

The United States Supreme Court held in *Miller v. Alabama*, 567 U.S. 460 (2012) that the Eighth Amendment's prohibition on "cruel and unusual

punishments" limits the types of punishments that may be imposed on children. Specifically, the High Court has barred mandatory life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citing *Miller*, 567 U.S. 460).

In *Batts I*, our Supreme Court dealt with the aftermath created by *Miller*. At the time, the only permissible sentence for a juvenile offender convicted of murder in the first degree was life imprisonment without the possibility of parole. *See* 18 Pa.C.S. § 1102(a)(1). According to the Pennsylvania Supreme Court, the remedy for a juvenile offender serving such a sentence is "the imposition of a minimum sentence" and the maximum sentence remaining life. *Batts I*, 66 A.3d at 297. The Court held that the portion of the statute mandating offenders receive no possibility of parole was severable from the portion mandating a life sentence. *Id.* at 295-96. And in doing so, the Court authorized a judicially-created sentencing scheme whereby juvenile offenders convicted of first-degree murder were to be sentenced to life imprisonment and an individualized hearing at which time the sentencing court would determine parole eligibility, if any, in accordance with factors described in *Miller*. *Id.* at 296-97. But the ruling in *Batts I* was seemingly limited; the Court was only determining the "appropriate remedy, on direct appeal, for the constitutional violation occurring when a mandatory life-without-parole sentence

has been imposed on a defendant convicted of first-degree murder, who was under the age of eighteen at the time of his offense." *Id.* at 288.

On October 25, 2015, the Governor signed into law what came to become 18 Pa.C.S. § 1102.1. That statute took effect immediately and set forth a new sentencing scheme for juveniles convicted of first-degree murder. But that statute expressly applied only to a juvenile offender "who has been convicted after June 24, 2012, of a murder of the first degree[.]" 18 Pa.C.S. § 1102.1(a). The question remained about the appropriate sentence for offenders – such as Mr. Harvey – convicted of first-degree murder as a juvenile before June 24, 2012. The legislature has remained silent on that issue.

The Supreme Court again filled in that gap. In *Batts II*, the Supreme Court dealt primarily with the fallout occasioned by the sentencing court reimposing life without the possibility of parole on that defendant. *Id.* at 415, 422-26. But the Court briefly revisited its holding in *Batts I* and held that "the severance decision in *Batts I* stands." *Id.* at 447. The Court thereby solidified a judicially-created sentencing scheme whereby juvenile offenders convicted of first-degree murder prior to June 24, 2012, "are subject to a mandatory maximum sentence of life imprisonment as required by [s]ection 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing[.]" *Batts II*, 163 A.3d at 421 (quoting *Batts I*, 66 A.3d at 297) (alteration in original).

2. By creating and authorizing the imposition of sentence on a judicially-created scheme, our Supreme Court violated the constitutional doctrine of separation of powers.

The Legislature purposely did not create a relevant sentencing scheme for juvenile offenders convicted of first-degree murder prior to June 24, 2012. It was not the Pennsylvania Supreme Court's job to do so. Indeed, by creating a sentencing scheme where the legislature chose not to, the Pennsylvania Supreme Court violated the separation of powers doctrine. As a result, Mr. Harvey respectfully requests that his sentence imposed for first-degree murder be vacated in its entirety.

The Pennsylvania Constitution grants all "legislative power of this Commonwealth" in the General Assembly. PA. CONST. art. II, § 1. That power means that the legislature – not the courts – determine the permissible ranges of punishment for crimes. "It is the province of the legislature to determine the punishment imposable for criminal conduct." *Commonwealth v. Wright*, 494 A.2d 354, 361 (Pa. 1985). Where the legislator leaves a gap in which no criminal punishment is authorized, it is not the courts' place to fill in that gap. *See Commonwealth v. Derhammer*, 173 A.3d 723, 733 (Pa. 2017) (Wecht, J. concurring) ("Since *Marbury v. Madison*, we have known that, from time to time, judicial decisions will leave a law in pieces. It is the legislators' (and not the

judges') job to put those pieces back together. We interpret the law. We do not make it.") (internal citation omitted).

"It is undisputed that a conviction based on an unconstitutional statute is a nullity." *Id.* at 728. A sentence based on an unconstitutional statute deserves no more favorable treatment. Indeed, the Pennsylvania Supreme Court recently reiterated that exact point. The Court held that it was "beyond our providence" to alter "sentencing commands . . . contrary to the express legislative intent to the contrary." *Commonwealth v. Hopkins*, 117 A.3d 247, 261 (Pa. 2015). See also *Commonwealth v. Wolfe,* 140 A.3d 651, 662 (Pa. 2016) (finding "simply beyond our constitutionally prescribed authority and purview" to amend sentencing provision "which the Legislature has specifically mandated"), and *United States v. Jackson,* 390 U.S. 570, 584-85 (1968) (leaving to Congress the task of devising a new procedure, after finding unconstitutional the capital sentencing provision of the federal kidnapping statute).

Pennsylvania has long recognized that the option of making life-sentenced prisoners eligible for parole is a legislative function, and **not** a judicial function. "[T]he legislature has the power to modify the law governing parole of persons sentenced to life imprisonment. [It is] a given fact of a democratic society: the law is always subject to change by the will of the people. . . . [T]he availability of

parole for a person sentenced to life imprisonment is a decision subject to change by the State Legislature." *Commonwealth v. Clark,* 710 A.2d 31, 37 (Pa. 1998).

The Legislature has not made parole available to Mr. Harvey. It explicitly passed a criminal sentencing statute that excluded offenders in Mr. Harvey's position. It is not fort he courts to fill in any gap. "[B]eing a penal statute" Section 1102 is "subject, of course, to the rule of strict construction." *Commonwealth ex rel. Varronne v. Cunningham,* 73 A.2d 705, 706 (Pa. 1950). As such, the sentence imposed on Mr. Harvey for first-degree murder with a minimum term is premised on an illegal statute and should be vacated completely.

3. Even if the judicially-created sentencing statute created in Batts I and Batts II was lawful, it was still unlawful to apply that sentencing statute to Mr. Harvey, as his direct appeal had long-since concluded.

Judge Geroff sentenced Mr. Harvey to life without the possibility of parole in March of 2003. And Mr. Harvey did not further pursue an appeal on that sentence. So, his judgments of sentence became final in 2003. Since Mr. Harvey's judgments of sentence had long-since been final when the Pennsylvania Supreme Court issued its rulings in *Batts I* and *Batts II*, those rulings could not be applied to Mr. Harvey's case. As a result, even if the sentencing scheme concocted in *Batts I* and *Batts II* was lawful (it is not), it would still not be applicable to Mr. Harvey. As

a result, he respectfully requests that this Court vacate his sentence on the homicide charge entirely.

> Simply stated, a new rule of law to which [the Pennsylvania Supreme Court] give[s] full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserver there, or . . . is non-waivable.

Commonwealth v. Gillespie, 516 A.2d 1180, 1183 (Pa. 1986). *See Commonwealth v. Riggins*, 542 A.2d 1004, 1010 (Pa. 1988) (retroactive application of new rule of law not appropriate for case on collateral attack). This Court has already ruled that the *Batts* decision announced a new rule of law. *See Commonwealth v. Stahley*, 201 A.3d 200, 220 (Pa. Super. Ct. 2018). But that rule of law does not apply to cases where direct review has concluded. Thus, the lower court had no constitutionally-permissible sentence authorized by the Legislature to use in imposing sentence on Mr. Harvey. As a result, Mr. Harvey respectfully requests that this Court vacate the sentence imposed on first-degree murder in its entirety.

IX. CONCLUSION

Mr. Harvey requests that this Court amend his sentence for attempted murder to a concurrent sentence with credit for time served from the time of his arrest. He further requests that this Court vacate his sentence for the homicide conviction in its entirety.

Respectfully submitted,

/s/ David M. Simon

David M. Simon, Esquire
Attorney for Derrick Harvey
Attorney ID No. 208044
330 Market Street
Camden, NJ 08102
267-606-9020
david@davidmsimon.com

X. CERTIFICATION OF WORD COUNT

The undersigned certified that the foregoing Brief for Appellant complies with the Rules of Appellate procedure because it contains 7,189 words.

Respectfully submitted,

/s/ David M. Simon

David M. Simon, Esquire
Attorney for Derrick Harvey
Attorney ID No. 208044
330 Market Street
Camden, NJ 08102
267-606-9020
david@davidmsimon.com

PROOF OF SERVICE

I certify that a true and correct copy of the attached Brief has been served on December 14, 2020, by electronic service on the following individuals:

Lawrence Goode, Esquire
Chief, Appeals Unit
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-5730

Respectfully submitted,

/s/ David M. Simon

David M. Simon, Esquire
Attorney for Derrick Harvey
Attorney ID No. 208044
330 Market Street
Camden, NJ 08102
267-606-9020
david@davidmsimon.com

Appendix A

LAW OFFICE OF DAVID M. SIMON, LLC
BY: DAVID M. SIMON, ESQUIRE
SUPREME COURT ID NO. 208044
330 MARKET STREET
CAMDEN, NJ 08102
(267) 606-9020
DAVID@DAVIDMSIMON.COM

COMMONWEALTH OF PENNSYLVANIA	:	Court of Common Pleas
	:	Philadelphia County
V.	:	Criminal Division
	:	
DERRICK HARVEY	:	CP-51-CR-0307631-1998

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

TO THE HONORABLE JEFFREY P. MINEHART, JUDGE OF THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION, FOR THE COUNTY OF PHILADELPHIA:

Appellant, Derrick Harvey, by his attorney, David M. Simon, Esquire, respectfully files the following Statement of Matters Complained of on Appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure:

1. This Court imposed an illegal sentence on Count 8 (attempted murder) in the following ways:
    a. The sentence violated Mr. Harvey's state and federal Double Jeopardy rights by imposing a new sentence after Mr. Harvey completed the initial sentence imposed by the Honorable Ricardo C. Jackson. *See generally North Carolina v. Pearce*, 395 U.S. 711, 715-16 (1969) (holding that "in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served"); and

b. At sentencing, this Court failed to properly give time credit pursuant to 42 Pa.C.S.A. § 9760, as Mr. Harvey's maximum sentence expired on this count (as well as Count 2 – robbery) on or about January 13, 2018, approximately eight months prior to this Court vacating his sentences. *See Commonwealth v. Nobles*, 198 A.3d 1101, 1106 (Pa. Super. Ct. 2018) (challenge to application of Section 9760 implicates legality of sentence and thus cannot be waived).

2. This Court imposed an illegal sentence and/or abused its discretion in imposing sentence on Count 1 (Murder) in the following ways:

   a. In *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), and *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017), our Supreme Court pronounced a new rule of law allowing for a sentence of life incarceration with the possibility of parole for certain offenders. This Court erred in applying that new rule of law to Mr. Harvey, as the new rule of law should only have applied to cases still on direct review from judgment of sentence.

   b. Under the Sentencing Code at the time Mr. Harvey committed his offenses, the only permissible sentence for this offense was life imprisonment without the possibility of parole or execution. By imposing a

sentence outside of those parameters, this Court violated Mr. Harvey's Due Process rights and his right to be free of *ex post facto* laws.

c. The legislature creates the laws. Pa. Const. art. II, § 1. The judiciary interprets the laws. Pa. Const. art. V, § 1. The trial court violated the Pennsylvania Constitution's Separation of Powers Doctrine by imposing a sentence pursuant to a judicial rewriting of a legislative enactment.

Counsel for Appellant respectfully requests the right to supplement this pleading with additional grounds should a change in circumstance arise.

LAW OFFICE OF DAVID M. SIMON, LLC
Attorney for Derrick Harvey

BY: */s/ David M. Simon*
DAVID M. SIMON, ESQUIRE

LAW OFFICE OF DAVID M. SIMON, LLC
BY: DAVID M. SIMON, ESQUIRE
SUPREME COURT ID NO. 208044
330 MARKET STREET
CAMDEN, NJ 08102
(267) 606-9020
DAVID@DAVIDMSIMON.COM

COMMONWEALTH OF PENNSYLVANIA	:	Court of Common Pleas
	:	Philadelphia County
V.	:	Criminal Division
	:	
DERRICK HARVEY	:	CP-51-CR-0307631-1998

AFFIDAVIT OF SERVICE

I hereby certify that today, July 31, 2020, I served via electronic service, a copy of the foregoing petition to the following parties:

Honorable Jeffrey P. Minehart
Court of Common Pleas
Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 19107

Lawrence Goode, Esquire
Chief, Appeals Unit
District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

LAW OFFICE OF DAVID M. SIMON, LLC
Attorney for Derrick Harvey

BY: */s/ David M. Simon*
DAVID M. SIMON, ESQUIRE

Appendix B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
VS.	:	CRIMINAL TRIAL DIVISION
	:	CP-51-CR-0307631-1998
DERRICK HARVEY	:	

OPINION

PROCEDURAL HISTORY AND FACTUAL HISTORY

Appellant, Derrick Harvey, has appealed from the judgment of sentence imposed on him by this Court on September 19, 2018. By way of background, after a waiver trial held before the Honorable Ricardo Jackson held in 1998, Judge Jackson found appellant guilty of first degree murder, attempted murder, robbery, aggravated assault, and possessing an instrument of crime, generally. On March 19, 1999, appellant appeared before Judge Jackson for a penalty hearing. Appellant waived his right to have a jury decide the penalty to be imposed on the first degree murder conviction. At the conclusion of the hearing Judge Jackson sentenced appellant to death after deciding that the three aggravating circumstances he found outweighed the single mitigating circumstance established by the evidence. Judge Jackson also imposed concurrent sentences of incarceration of ten to twenty years for attempted murder, ten to twenty years for robbery, and two to four years for possessing an instrument of crime.

Following the imposition of sentence, appellant appealed to the Pennsylvania Supreme Court. On December 20, 2002, the Supreme Court affirmed the convictions but vacated the death

sentence and remanded the matter for a new penalty hearing. Commonwealth v. Harvey, 812 A.2d 1190 (Pa. 2002). On March 28, 2003, appellant received a life sentence from the Honorable Steven R. Geroff on the murder conviction.

On September 3, 2003, appellant filed a timely *pro se* petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541, *et seq.*, following which counsel was appointed to represent him. The matter was assigned to Judge Jackson for review and on May 25, 2005, Judge Jackson dismissed appellant's petition without a hearing. Appellant appealed and on January 7, 2007, the Superior Court vacated Judge Jackson's order and remanded the matter because of procedural errors. Commonwealth v. Harvey, 919 A.2d 971 (Pa. Super. 2009) (Table).

On remand, on October 9, 2007, Judge Jackson again denied appellant's request for PCRA relief. Appellant appealed and on February 13, 2009, the Superior Court affirmed the order dismissing appellant's PCRA petition. Commonwealth v. Harvey, 970 A.2d 468 (Pa. Super. 2009) (Table). On October 7, 2009, the Pennsylvania Supreme Court denied a petition seeking allowance of appeal from the order affirming Judge Jackson's order denying PCRA relief. Commonwealth v. Harvey, 982 A.2d 64 (Pa. 2009) (Table).

On August 7, 2012, appellant filed another PCRA petition. That was followed by the filing of several additional petitions and the appointment of counsel. This Court was eventually assigned to review and rule upon that petition. On September 19, 2018, this Court granted the petition and vacated appellant's sentence pursuant to the decisions of the United States Supreme Court in Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). This Court then imposed sentences of twenty years to life imprisonment on the murder

conviction and a consecutive sentence of ten to twenty years' incarceration on the attempted murder conviction. Verdicts without further penalty were imposed on the remaining convictions.

After being re-sentenced, appellant filed an untimely post-sentence motion and then an untimely appeal docketed at docketed at 625 EDA 2019, that appellant thereafter withdrew. On October 10, 2019, Appellant filed a timely PCRA petition after which this Court granted the petition and reinstated appellant's right to file post-sentence motions from the judgment of sentence entered on September 19, 2018. Appellant filed a post-sentence motion on December 27, 2019. That motion was denied on May 18, 2020, by operation of law. Appellant filed notice of appeal from that order as well as a court-ordered Pa.R.A.P. 1925(b) Statement of Matters.

Briefly, the facts underlying appellant's conviction are that on January 10, 1998, Appellant, then sixteen years' old, entered his cousins' residence with his twenty-two year old cousin Shawn Wilkins. Both Appellant and Wilkins immediately went upstairs. At the time thirteen year old cousin Charity Wilkins and two of her siblings were home. Approximately thirty minutes later Charity heard gunshots and after retrieving her younger brother from the second floor of the residence she encountered appellant on the first floor. He had guns in both hands and ordered her to go upstairs. She complied with the request and was ushered into Shawn's bedroom where she observed Shawn standing in a corner and appellant removing a box from a dresser drawer. Appellant then ordered her to lay on the bed at which time he shot her three times in her head rendering her unconscious. She eventually awoke and saw that appellant had left. She then went downstairs when someone knocked on the door after which medical personnel were summoned. She was taken to a nearby hospital where she received life-saving treatment.[1]

[1] When appellant was re-sentenced, Charity was still suffering the effects of the shooting.

Police thereafter arrived at the residence and discovered Shawn had been fatally shot in the bedroom. They thereafter arrested appellant who agreed to give them a statement. In it, he claimed he acted in self-defense when he shot Shawn and admitted shooting Charity after she entered the bedroom after Shawn had been shot.[2]

DISCUSSION

In the first issue set forth in his 1925(b) Statement, appellant begins with a claim that asserts that the sentence of ten to twenty years' incarceration this Court imposed on the attempted murder conviction is illegal because it is violative of double jeopardy principles. According to appellant, the sentence violates double jeopardy because he received a sentence on that conviction from Judge Jackson and had completed serving it when this Court re-sentenced him thereon. He also argues that the sentence is illegal because this Court did not give him credit for time already served on attempted murder conviction in violation of 42 Pa.C.S. § 9760. It is suggested that the Honorable Court rule that both sub-claims lack merit for the following reasons.

Appellant's first sub-claim lacks merit because the law is clear that when a defendant successfully successfully challenges an illegal sentence, vacating the illegal sentence affects the entire sentencing scheme and thus, it is proper to vacate all of the sentences imposed with the illegal one. In Commonwealth v. McHale, 924 A.2d 664 (Pa. Super. 2007), the Court stated:

> Once formulated, the sentencing scheme must be considered as a whole, in its entirety. This principle is most relevant when the scheme has been designed to encompass multiple related offenses of which a defendant has been convicted. Because the individual components of such a sentencing scheme are interrelated, the removal of one component does not automatically or necessarily leave all the others precisely in place. As our Supreme Court has held, "[w]hen a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan."

[2] For a more complete recitation of the facts, please see Commonwealth v. Harvey, 812 A.2d 1190 (Pa. 2002).

> Commonwealth v. Goldhammer, 512 Pa. 587, 593, 517 A.2d 1280, 1283 (1986) (quoting United States v. Busic, 639 F.2d 940, 948 (3d Cir. 1981)).
>
> In applying this principle, the appellate courts of our Commonwealth have repeatedly held that, where a trial court errs with regard to the sentence imposed for one offense in a case involving several convictions, it is proper to vacate the sentences for all the convictions and to remand so that the sentencing court has the opportunity to restructure its entire sentencing scheme. See Commonwealth v. Williams, 871 A.2d 254, 266 (Pa. Super. 2005) (citing, inter alia, Goldhammer, supra, in remanding for re-sentencing because the trial court's overall sentencing scheme had been disrupted by the appellate court's determination that imposition of separate sentences under two different provisions of the motor vehicle code was improper in this driving under the influence case); Commonwealth v. Sutton, 400 Pa. Super. 291, 583 A.2d 500, 502 (1990) (citing Goldhammer, supra, for the proposition that "the proscriptions against double jeopardy do not prevent us from remanding for re [-]sentencing on all bills of information where our vacation of various related counts has upset the trial court's sentencing scheme"); Commonwealth v. Vanderlin, 398 Pa. Super. 21, 580 A.2d 820, 831 (1990) (reiterating that, where the appellate court cannot determine whether its vacation of sentence on one count would affect the trial court's sentencing on the remaining counts, the trial court must be given an opportunity on remand to reconsider sentencing).

McHale, 924 A.2d at 668-669. See also

In addition, the act of imposing sentence anew following the striking of an illegal sentence does not, by itself, implicate double jeopardy concerns. See Commonwealth v. Kratzer, 660 A.2d 102 (Pa. Super. 1995). Thus, "If a trial court errs in its sentence on one count in a multi-count case, then all sentences for all counts will be vacated so that the court can restructure its entire sentencing scheme." Commonwealth v. Bartrug, 732 A.2d 1287, 1289 (Pa. Super. 1999). Furthermore, because the aggregate sentence this Court imposed on appellant did not exceed the original sentence imposed on appellant, the new sentences, as imposed, do not violate double jeopardy. Commonwealth v. Sutton, 583 A.2d 500, 502–03 (Pa. Super. 1990), appeal denied 528 Pa. 610, 596 A.2d 156 (1991) (double jeopardy does not apply when the aggregate

sentence imposed during re-sentencing is not greater than the aggregate sentence originally imposed); Commonwealth v. Black, 531 A.2d 492 (Pa. Super.1987) (same); Commonwealth v. Ford, 461 A.2d 1281 (Pa. Super. 1983) (same). Finally upon re-sentencing, "a court is permitted to restructure ... sentence, as it sees fit, to preserve the integrity of the original sentence." See Commonwealth v. Fields, 197 A.3d 1217 (Pa. Super. 2018) (*en banc*) (plurality decision).

In Fields, it was argued, *inter alia,* on appeal that the sentencing court violated double jeopardy concerns when, upon re-sentencing, it imposed new sentences on convictions on which the sentences originally imposed had been served in their entirety. The opinion in support of affirmance, (Bender, P.J.E), indicated that the defendants' did not have a double jeopardy claim because, by challenging the original sentencing scheme, they " 'assumed the risk that [their] sentencing on the various counts would be adjusted insofar as was necessary to preserve the integrity of the original sentencing scheme.' Commonwealth v. Walker, 390 Pa.Super. 76, 568 A.2d 201, 208 (1989), disapproved of on other grounds by Commonwealth v. Robinson, 931 A.2d 15, 20-22 (Pa. Super. 2007) (*en banc*)." Fields, 197 A.3d at 1224.

In his opinion in support of affirmance, Judge Stabile also determined that double jeopardy concerns did not apply to the new sentences imposed on the convictions on which the original sentences had already been served. Judge Stabile reasoned that by successfully pursuing a claim that the original sentence was illegal, the defendants could not succeed on double jeopardy grounds because vacating part of the sentence as originally imposed permitted the sentencing court to vacate the entire sentence. Fields, 197 A.3d at 1233-1234

Based on the foregoing, it is clear that this Court did not commit a double jeopardy violation by imposing a sentence on a conviction on which appellant completed serving the sentence originally imposed.

Appellant's second sub-claim raising a credit for time served violation also should be denied because the time he already served was applied to the homicide conviction. The Superior Court has ruled as follows:

> This Court has held that a defendant is not entitled to 'receiv[e] credit against more than one sentence for the same time served.' Commonwealth v. Merigris, 681 A.2d 194, 195 (Pa. Super. 1996). We have acknowledged that such 'double credit' is prohibited both by the statutory language of Section 9760 and by the principle that a defendant be given credit only for 'time spent in custody... for a particular offense.' Commonwealth v. Hollawell, 604 A.2d at 723, 725 (Pa. Super. 1992).

Commonwealth v. Ellsworth, 97 A.3d 1255, 1257 (Pa. Super. 2014).

Accordingly, based on the foregoing, it is respectfully suggested that appellant be denied relief with respect to the claims raised in appellant's first issue.

In his second and final issue appellant contends that this court imposed an illegal sentence on the first-degree murder conviction for the following reasons:

> a. In Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013), and Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017), our Supreme Court pronounced a new rule of law allowing for a sentence of life incarceration with the possibility of parole for certain offenders. This Court erred in applying that new rule of law to Mr. Harvey, as the new rule of law should only have applied to cases still on direct review from judgment of sentence.
>
> b. Under the Sentencing Code at the time Mr. Harvey committed his offenses, the only permissible sentence for this offense was life imprisonment without the possibility of parole or execution. By imposing a sentence outside of those parameters, this Court violated Mr. Harvey's Due Process rights and his right to be free of *ex post facto* laws.
>
> c. The legislature creates the laws. Pa. Const. art. II, § 1. The judiciary interprets the laws. Pa. Const. art. V, § 1. The trial court violated the Pennsylvania Constitution's Separation of Powers Doctrine by imposing a sentence pursuant to a judicial rewriting of a legislative enactment.

Appellant's 1925(b) Statement.

Appellant's first sub-claim entitles him to no relief because he failed to articulate in his 1925(b) Statement why he believes that the current re-sentencing paradigm created by the Pennsylvania Supreme Court for juveniles whose original life sentences without parole are vacated applies only to such defendants whose cases are on direct review, thereby waiving review of the claim. Pa.R.A.P. 1925(b)(4)(ii) provides that an appellant's concise statement of errors complained of on appeal must "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge"). A Rule 1925(b) statement "must be sufficiently specific so as to afford the trial court the ability to draft a meaningful opinion without resorting to speculation regarding what issues or arguments appellant wishes to present." Kern v. Kern, 892 A.2d 1, 6 (Pa. Super. 2005), citing, Commonwealth v. Dowling, 778 A.2d 683 (Pa. Super. 2001). "[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." Lemon, 804 A.2d at 62, quoting Dowling, 778 A.2d at 686. Instantly, appellant violated these precepts and it is respectfully suggested the Court find that appellant waived review of this claim due to the lack of specificity in the way the issue was framed.[3]

Appellant's second sub-claim also entitles him to no relief. In Commonwealth v. Brooker, 103 A.3d 325 (Pa. Super. 2014), the defendant, a former juvenile lifer whose life sentence was declared to be unconstitutional pursuant Miller claimed that the application of 18

[3] If the issue is not deemed waived, it is suggested that no relief is due thereon. Our appellate courts have rejected numerous challenges to the re-sentencing of juvenile defendants previously sentenced to life imprisonment without the possibility of parole and have ruled consistently that the new sentences imposed on such juveniles, which are similar to the one imposed on appellant herein, are legal and constitutional. *E.g.* Commonwealth v. Batts, 163 A.3d 410, 421 (Pa. 2017); Commonwealth v. Olds, 192 A.3d 1188, 1193 (Pa. Super. 2018); Commonwealth v. Foust, 180 A.3d 416, 430 (Pa. Super. 2018); Commonwealth v. Seskey, 170 A.3d 1105, 1106 (Pa. Super. 2017). This Court has found no case that supports appellant's current claim.

Pa.C.S. § 1102.1 to him violated *ex post facto* clause because it"inflict[s a] greater punishment[ ] than the punishment available for the crime at the time it was committed." Brooker, 103 A.3d at 340.[4]

The Superior Court rejected the claim after providing an extensive discussion of the *ex post facto* clause and its historical underpinnings. Brooker, 103 A.3d at 340-343. The Court held that for there to be an *ex post facto* violation, the new law must inflict a greater punishment than allowed when the crime was committed. Brooker, 103 A.3d at 341-43 (Pa. Super. 2014). See also Disney v. United States, 567 U.S. 260, 275 (2012) (*ex post facto* clause dos not apply to all penalties; only higher penalties than applied at the time of the crime). Here, while the application of section 1101.1 is not in issue, the holding of Brooker applies because the Batts line of cases do not require the imposition of sentences greater than the sentence of life imprisonment without possibility of parole he received after the death sentence was vacated. Therefore, this claim does not entitle appellant to relief and it is respectfully suggested that it be deemed lacking in merit.

---

[4] 18 Pa.C.S. § 1102.1 provides, in pertinent part, the following:

> § 1102.1. Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer
>
> (a) First degree murder.--A person who has been convicted after June 24, 2012, of a murder of the first degree, first degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:
>
> (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.

Finally, appellant's last sub-issue should be rejected. In Commonwealth v. Johnson, 222 A.2d 835, 2019 WL 5212765 at **4-5 (Pa. Super. 2019) (Table), the defendant raised a claim identical to the one appellant raised here and the Court found that it lacked merit. Based on that holding it is respectfully suggested that appellant be denied relief with respect to this claim.

CONCLUSION

For the foregoing reasons, defendant's assertions of error should be dismissed for lack of merit and the judgment of sentence entered in this matter should be affirmed.

By the Court,

DATE: 9/2/20

Honorable Jeffrey P. Minehart

CERTIFICATE OF SERVICE

I, Stacy Bauer, secretary to the Honorable Jeffrey P. Minehart, hereby certifies that on the 2nd day of September, 2020, the below named individuals were sent copies of the opinion attached hereto:

David M. Simon, Esquire
1601 Cherry Street
Suite 1320
Philadelphia, PA, 19102

Lawrence J. Goode, Esquire
Chief-Appeals Unit Philadelphia
District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107

Stacy Bauer