

IN COMMONWEALTH COURT OF PENNSYLVANIA

MARIE SCOTT, NORMITA :
 JACKSON, MARSHA SCAGGS, :
 REID EVANS, WYATT EVANS *and* :
 TYREEM RIVERS :
 Petitioners : No. 397 MD 2020
 v. :
 :
 PENNSYLVANIA BOARD OF : Electronically Filed Document
 PROBATION AND PAROLE, :
 Respondent :

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
TO THE PETITION FOR REVIEW**

Respectfully submitted,

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Petitioners are certainly free to disagree with the policy judgments made by the General Assembly about the appropriate sentences for murder. Good faith arguments may no doubt be possible. But because Petitioners' real beef is a fundamental challenge to policy judgments, they are not legal claims cognizable in this Court. For the reasons contained herein, as well as in its original objections, the Respondent respectfully requests that this Court dismiss the Petition for review.

STATEMENT OF THE SCOPE AND THE STANDARD OF REVIEW

Scope of review: In reviewing preliminary objections, the Court may examine the entire record consisting of the complaint, the preliminary objections to the complaint, and the response thereto, if any.

Standard of review: The Court should accept all well pleaded facts in the Petition for Review as true. Furthermore, preliminary objections should be sustained only where it is certain and without any doubt that the law will not permit the petitioner to recover. *Allegheny County Sportsmen's League v. Rendell*, 860 A.2d 10, 14 (Pa. 2004).

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction over the Petitioners' claims?

Suggested Answer: Yes.

2. Are the Petitioners' claims too stale to be cognizable?

Suggested Answer: Yes.

3. Is the Respondent an improper party to these proceedings?

Suggested Answer: Yes.

4. Do the Petitioners' claims fail on the merits, as life-without-parole sentences for adult offenders are constitutional?

Suggested Answer: Yes.

PROCEDURAL AND FACTUAL HISTORY

The Petitioners are a group of individuals who are all serving a life-without-parole sentence following a conviction for felony-murder. Petition for Review, ¶¶ 2-7. Pursuant to 18 PA. CON. STAT. § 1102(b), life-without-parole is the mandatory sentence for any conviction of felony-murder. *Id* at ¶ 18; *see also* 18 PA. CON. STAT. § 2502(b) (defining second-degree murder). By statute, the Pennsylvania Board of Probation and Parole (“the Board”) may not consider for parole any offender sentenced to life imprisonment. 61 PA. CON. STAT. § 6137(a); *see also* Petition at ¶ 18. All six Petitioners sought consideration for parole, but were denied by the Board, because the sentences imposed at the time of trial did not permit parole. Petition, ¶ 20. The Petitioners, being sentenced to life-without-parole, may be released from incarceration through the state’s commutation system. *Id.* at ¶ 13. The Petitioners filed their Petition with this Court on July 8, 2020. The Respondent filed Preliminary Objections to the Petition, which this brief supports.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE PETITIONERS' CLAIMS, WHICH CHALLENGE THEIR CRIMINAL SENTENCES IMPOSED AT THE TIME OF TRIAL.

While the Petitioners purport to bring this case pursuant to 42 PA. CON. STAT. § 761, in this Court's original jurisdiction, this Court lacks jurisdiction to hear them. Section 761 of the Judicial Code expressly states that this Court lacks jurisdiction over "Actions or proceedings in the nature of applications for writ of habeas corpus or post conviction relief not ancillary to proceedings within the appellate jurisdiction of the court." 42 PA. CON. STAT. § 761(a)(1)(i). Petitioners attempt to justify this glaring deficiency by stating that they are challenging 61 PA. CON. STAT. § 6137(a), which prohibits the Respondent from considering the Petitioners for parole. Petitioners' Answer, ¶ 9. The argument is circular, however, because § 6137(a) itself makes clear that eligibility for parole is determined by the trial court at the time of sentencing, not by the parole board. Petitioners cannot properly dispute any action that the board took, or ever could have taken; instead their attack is on the sentence itself, which they were obligated to challenge at the time and through the criminal process, as § 761(a)(1)(i) requires.

The Petitioners assert that they are not seeking criminal sentencing relief, since they are not challenging their maximum sentence, but only their eligibility for parole. Answer, ¶ 11. However, they ignore the inescapable fact that, in

Pennsylvania, eligibility for parole is an element of the sentence. As § 6137(a)(1)(3) provides, the parole board has no powers at all until “after the expiration of the minimum term of imprisonment *fixed by the court in its sentence*” (emphasis supplied). When the sentence is life, the sentencing court is not permitted to set a lesser minimum term, and so the life-sentenced defendant cannot reach parole consideration. *E.g.*, *Commonwealth v. Yount*, 615 A.2d 1316, 1320-21 (Pa. Super. 1992). Eligibility, or ineligibility, is entirely a component of the sentence imposed.

As a result, and as the courts have repeatedly held, a sentence of life imprisonment under Pennsylvania law is “nothing other than a mandatory minimum sentence.” *Commonwealth v. Lewis*, 718 A.2d 1262, 1265 (Pa. Super. 1998); *Commonwealth v. Latham*, 2019 WL 180191, *4 (Pa. Super. 2019); *Commonwealth v. McCallum*, 2018 WL 6582989, *5 (Pa. Super. 2018).¹ A defendant convicted of second degree murder who asserts an entitlement to parole is “challenging the minimum sentence imposed.” *Commonwealth v. Boyd*, 2018

¹ See also *Craig v. Frank*, 2004 WL 875500, *2 (E.D. Pa. 2004) (“Pennsylvania courts ... have recognized that a sentence of life imprisonment for second degree murder is in itself a mandatory minimum sentence, and therefore prisoners sentenced to life imprisonment are ineligible for parole”); *Palmero v. March*, 2019 WL 5432072, *6 (E.D. Pa. 2019) (adopting state court’s characterization of Pennsylvania law: if “you are convicted of murder of the first degree or murder of the second degree, there is a mandatory minimum on both of those charges; that is, that the Court would be required to sentence you to life in prison without the possibility of parole”).

WL 3616364, *7 (Pa. Super. 2018). Under Title 42, challenges to a sentence as imposed by a criminal court fall under the jurisdiction of the Superior Court, rather than of this Court.

Petitioners insist that their challenge nonetheless belongs here, citing *Castle v. Pennsylvania Board of Probation and Parole*, 554 A.2d 625 (Pa. Cmwlth. 1989), and *Hudson v. Pennsylvania Board of Probation and Parole*, 204 A.3d 392 (Pa. 2019). But these cases contradict Petitioners' claim. Neither case contains any discussion of jurisdiction. Both, however, hold squarely that the parole board has no authority to consider parole for a life-sentenced prisoner. *Castle* and *Hudson* confirm that the prohibition on parole from a life sentence is a part of the sentence itself, and can therefore be challenged only by attacking the sentence itself, in the appropriate court.

Finally, Petitioners seek to distinguish *Cook v. Wolf*, 2020 WL 2465123 (Pa. Cmwlth. 2020), a directly applicable precedent that dismissed a challenge to the sentencing statute for second degree murder, 18 PA. CON. STAT. § 1102(b). Again, petitioners attempt to avoid dismissal by maintaining that they are challenging § 6137(a), not 1102(b); but again, as above, it is § 6137(a) that makes parole eligibility a function of the sentence, not a function of the Parole Board. Put another way, the Petitioners do not claim that § 6137(a) is being improperly applied to the Petitioners—that is, they are not claiming that they are, in fact,

eligible for parole but the Respondent is misreading the statute. Rather, they are claiming that the Respondent *should* consider them for parole, which necessarily requires challenging the sentence imposed by 18 PA. CON. STAT. § 1102(b). Thus, the reasoning in *Cook*—that this Court lacks jurisdiction over a challenge to 18 PA. CON. STAT. § 1102(b)—applies with equal force herein. Therefore, the Preliminary Objection should be sustained, and the Petition should be dismissed.

II. THE PETITIONERS' CHALLENGE IS STALE.

Petitioners' mischaracterization of the nature of their legal challenge spills over into their response to the second Preliminary Objection, which concerns the staleness of this Petition. Once more, they argue that they can escape the preliminary objection because they are challenging § 6137(a), rather than § 1102(b). But the purported distinction, even if it had significance, would hardly help them avoid staleness. The operative language in § 6137(a) – subsection (a)(1)(i), providing that no parole power exists unless and until expiration of the minimum term fixed by the court in its sentence – has been in the statute, under different numbering, since 1941, over thirty years *earlier* than enactment of § 1102(b). *See Castle*, 554 A.2d at 627 n.2.

Putting the Petitioners' challenge into the proper context, it becomes clear that their attack is decades late. Petitioners attempt to distinguish *Sernovitz v. Dershaw*, 127 A.3d 783 (Pa. 2015), on the ground that the challenge in that case

concerned enactment procedures rather than the substance of the law. But *Sernovitz* recognized general principles of laches, and reiterated that laches can be raised to a constitutional challenge where the challenger himself could have presented the claim earlier but instead sat on his rights. Despite Petitioners' contention that they are "challeng[ing] a contemporaneous act of Respondent that amounted to a constitutional violation[,]" (Answer, ¶ 23), they are, in reality, launching a challenge against the sentences that were imposed against them decades ago.

Not a thing has changed since that time. Petitioners point to their recent denials of parole. But they could have asked for parole the day after their sentences were imposed, or yesterday, or any day in between, and the result would have been exactly the same. Parole would have been denied, because their sentences precluded it. The way to challenge those sentences was by challenging the sentences, through the criminal appeal process. Petitioners either failed to do so, or did so and lost. Their current filing in this Court is forum-shopping.

Ironically, if the Petitioners actually had an established, valid constitutional claim (but see below), they would have no need of this Court's review. If the Pennsylvania or United States Supreme Court were ever to rule that life without parole is unconstitutional, and that this new rule is retroactive, then the Petitioners would be entitled to file a petition under the Post-Conviction Relief Act, 42 Pa.

C.S. § 9545(b)(iii). That is the path the law provides for criminal defendants like Petitioners – not an untimely demand that this Court declare their sentences invalid.

III. RESPONDENT IS NOT THE PROPER PARTY.

Petitioners attempt to lay the blame for lack of parole consideration on the feet of the Respondent, but that attempt is misplaced. True, the Respondent has rejected the Petitioners' being considered for parole, *as it must* under § 6137(a). But what Petitioners seek is to have the Respondent consider them for parole, in spite of this clear statutory prohibition; this, the Respondent cannot do. "There is no statutory authorization for the Board to grant parole to an individual sentenced to a mandatory life term." *Hudson v. PBPP*, 204 A.3d 392, 399 (Pa. 2019) (citation omitted). Petitioners' real quibble is not with the Board, which is merely operating within the confines of the statute; Petitioners' quibble is with the General Assembly, which set the penalty that the Petitioners seek to cast aside. Petitioners argue that the Respondent is the agency that enforces the statute, and its enforcement is what violates constitutional safeguards. Answer, ¶ 38. As noted above, however, the statute in question, § 6137(a), states explicitly that the board has no power to act under the statute before expiration of the minimum term fixed by the court in its sentence. In actuality, therefore, it is not the enforcement of the statute that the Petitioners claim is unconstitutional; it is the penalty itself (life

without parole) that the Petitioners challenge. Thus, the Petitioners have not sued the party actually responsible for their being ineligible for parole and the Petition should be dismissed against the Board.

IV. THE PETITION FAILS ON THE MERITS.

Should the Court consider the merits of the Petitioners' claims, notwithstanding the myriad procedural issues—which it should not—the claims still fail. Petitioner makes two arguments—first, that the Pennsylvania Constitution, which “provides at least as much protection as the Eighth Amendment,” prohibits life-without-parole sentences for felony murder, and second, that the Pennsylvania Constitution actually provides greater protection than its federal counterpart—neither of which afford relief to the Petitioners.

As to the Petitioners' first argument, if the Pennsylvania Constitution provides “at least as much protection as the Eighth Amendment,” then, logically, they should be able to point to a United States Supreme Court case holding that life without parole for a homicide offense for an adult offender violates the United States Constitution's protections against cruel and unusual punishment. They do not point to one, however, because none exists. While the Petitioners argue that the *Graham* line of cases is not limited to juvenile offenders (which is false), they point to no United States Supreme Court case that has since extended the reasoning of *Graham* and its progeny to even suggest, let alone hold, that life without parole

sentences for homicide offenses committed by adults are unconstitutional. Thus, the United States Constitution cannot provide them their requested relief.

The Petitioners' alternate argument fares no better. Perhaps recognizing that the United States Constitution does not provide the right they claim that it does, they also argue that "[this] court is required to conduct an independent analysis to determine whether in fact the state's anti-cruelty provision provides even greater protection than its federal counterpart." Petitioners' Answer, ¶ 44. This Court is not free to do so, however, as it has *already* considered the question of whether the Pennsylvania Constitution provides greater protection than its federal counterpart as to cruel and unusual punishment, and has concluded that it does not. "The guarantee against cruel and unusual punishment contained in the Pennsylvania Constitution provides no greater protections than that afforded under the Eighth Amendment to the United States Constitution." *Jochen v. Horn*, 727 A.2d 645, 649 (Pa. Cmwlth. 1999); *see also Commonwealth v. Elia*, 83 A.3d 254, 267 (Pa. Super. 2013) ("Pennsylvania courts have repeatedly and unanimously held that the Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments to the United States Constitution, and that the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.") (citations and quotation marks omitted). Thus, the question being

presented here has already been answered, in the negative.

Finally, even if Petitioners' *Edmunds* claim had not already been rejected, they fail to cite a single case, in any jurisdiction anywhere in the United States, holding that a life-without-parole sentence for murder is unconstitutional, either under the federal constitution or under a state constitution. What petitioners label as constitutional arguments are in fact policy arguments. Such policy arguments may well be worthy of due consideration by the appropriate policy-makers: *i.e.*, the legislative branch. They do not warrant a declaratory judgment from this Court.

CONCLUSION

The Petition for Review should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

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