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IN THE 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 PROBATION AND PAROLE,	:	**Electronically Filed Document**
Respondent	:	

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

Respectfully submitted,

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While the Petitioners raise numerous challenges to the Respondent's Preliminary Objections, none are availing. Thus, for the reasons contained in this reply brief, as well in their initial brief in support and preliminary objections, the Respondent respectfully requests that this Petition for Review should be dismissed.

I. Regarding jurisdiction, Petitioners contend that their claim is cognizable in this Court because it would not be cognizable under the PCRA. They assert that their constitutional challenge to a life sentence without parole is not a challenge to the legality of the sentence, and therefore cannot be raised in the criminal courts and appealed to the Superior Court. They cling to a purported distinction between the parole statute, 61 Pa. C.S. § 6137, and the sentencing statute, 18 Pa. C.S. § 1102. As Respondent has pointed out, however, the two statutes are inextricably intertwined, because § 6137(a)(3) explicitly provides that "the power to parole granted under this section" is entirely a function of "the minimum term of imprisonment fixed by the court in its sentence." That is why a sentence of life without parole is a *sentence*. An argument that the Constitution precludes such a sentence is necessarily a challenge to the legality of the sentence, and therefore belongs in Superior Court, rather than this Court.

Petitioners have no real answer to this point. Their position, however, disregards literally hundreds of counter-examples – that is, the "juvenile lifer" cases. After the United States Supreme Court held in *Miller v. Alabama,* 567 U.S.

460 (2012), that mandatory life without parole sentences for juveniles were unconstitutional, and further held in *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), that *Miller* applied retroactively, every juvenile offender in Pennsylvania received a new sentence, from a sentencing judge, setting a minimum term, *i.e.*, a date for parole eligibility. To the best of Respondent's knowledge, not a single one of these defendants received this relief as a result of any action in this Court. The juvenile offenders obtained relief—that is, new sentences—by filing timely PCRA Petitions in the Courts of Common Pleas and, where necessary, appeals to the Superior Court, *not* by filing anything before this Court. Now Petitioners argue that the very Supreme Court precedents at issue there, *Miller* and *Montgomery*, should be extended from juveniles to adults. Petitioners are utterly unable to explain why the juvenile murder cases went to post-conviction courts and the Superior Court, yet this case, involving adult murderers making the same claim and seeking the same relief, should go to this Court instead.

Even more concerning is that Petitioners themselves appear to recognize that the proper place for their claim is Superior Court, not this Court. In *Commonwealth v. Lee*, 206 A.3d 1 (Pa. Super. 2019), the defendant made exactly the contention that Petitioners make here: that the rationales of various United States Supreme Court cases, including *Miller*, *Montgomery*, *Roper*, and *Graham*,[1] must be applied

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[1] *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010).

to adults sentenced to life without parole, even if the holdings of those cases did not go that far. It was no accident that the defendant in *Lee* presented exactly the same contention as do Petitioners here: the defendant in *Lee* had exactly the same counsel as do Petitioners here.

The Superior Court, sitting *en banc*, rejected Lee's claim. "The critical issue before us is whether, at this time, Lee can avail herself of the *Miller* rationale, despite the express age limitation. Lee asks this Court to expand the holding in *Miller* to apply to her, as one over the age of 18 at the time of her offense." 206 A.3d at 7. After extensive review of the Supreme Court precedents, the Superior Court concluded that juvenile status was central, not merely incidental, to the result in *Miller*. "We decline to extend its categorical holding." *Id.* at 11.

And *Lee* is hardly the only Superior Court decision on this question; the court has repeatedly come to the same conclusion, both *en banc* and in panel. "Simply put, the holdings in *Montgomery* and *Miller* have no relevance to individuals who were over the age eighteen at the time they committed murder." *Commonwealth v. Casiano*, 2018 WL 3045800, *3 (Pa. Super. 2018). "Until the United States Supreme Court or the Pennsylvania Supreme Court recognizes a new constitutional right in a non-juvenile offender, we are bound by precedent." *Lee*,

206 A.3d at 11.[2]

These cases thus demonstrate the well-established mechanism for consideration of claims such as Petitioners'. A challenge to a sentence of life without parole may be raised with the sentencing court at the time of sentencing, on direct appeal from the judgment of sentence, in an initial timely post-conviction petition, or in a subsequent post-conviction petition if the United States or Pennsylvania Supreme Court has recognized a new constitutional right and held that the right applies retroactively. But criminal defendants may not secure collateral review by raising such a claim in this Court. "The action established in [the PCRA] shall be the *sole* means of obtaining collateral relief." 42 Pa. C.S. § 9542 (emphasis added).

By their filing here, Petitioners seek to circumvent their lack of success in the appropriate forum for their claim, which is the Superior Court. Indeed, the lead

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[2] *Accord Commonwealth v. Montgomery*, 181 A.3d 359, 366-67 (Pa. Super. 2018) (*en banc*); *Commonwealth v. Butler*, 2020 WL 3412727, *3 (Pa. Super. 2020); *Commonwealth v. Cintora*, 69 A.3d 759, 764 (Pa. Super. 2013); *Commonwealth v. Culberson*, 2019 WL 1220728, *1 (Pa. Super. 2019); *Commonwealth v. Furgess*, 149 A.3d 90, 93-94 (Pa. Super. 2016); *Commonwealth v. Hare*, 2016 WL 6995424, *1 (Pa. Super. 2016); *Commonwealth v. Martinez*, 2017 WL 4816911, *3 (Pa. Super. 2017); *Commonwealth v. Merritt*, 2020 WL 6806319, *4-*5 (Pa. Super. 2020); *Commonwealth v. Milligan*, 2017 WL 4616475, *3-*4 (Pa. Super. 2017); *Commonwealth v. Rivera*, 2020 WL 1673314, *2-*3 (Pa. Super. 2020); *Commonwealth v. Rosado*, 2017 WL 4231832, *1-*2 (Pa. Super. 2017); *Commonwealth v. Ross*, 2018 WL 5262374, *3-*4 (Pa. Super. 2018); *Commonwealth v. Turner*, 2020 WL 90033, *2 (Pa. Super. 2020); *Commonwealth v. Wilson*, 2017 WL 1406005, *1-*2 (Pa. Super. 2017); *Commonwealth v. Woods*, 179 A.3d 37, 43-44 (Pa. Super. 2017).

petitioner in this case, Scott, herself previously filed a PCRA petition and a Superior Court appeal attempting to extend *Miller* and *Montgomery* to adults. *Commonwealth v. Scott*, 2017 WL 6505366, *1 (Pa. Super. 2017). But the distinct roles of Pennsylvania's intermediate appellate courts do not permit them to be solicited sequentially, like parents whose children did not like the answer they got the first time they asked. This Court has many important functions, but they do not include post-conviction review of criminal sentencing challenges.[3]

II. Regarding laches, Petitioners attempt to distinguish *Sernovitz v. Dershaw,* 127 A.3d 783 (Pa. 2015), contending that the case is limited to challenges to the enactment of a statute. But the law of laches as explicated by the Supreme Court in *Sernovitz* was plainly not limited in such a fashion. Indeed, the Court noted that the "laches" argument raised in that case "is not, strictly speaking, a laches defense" at all. *Id.* at 791. The Court was careful to contrast the argument there with "a traditional laches defense," which arises when a party who was

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[3] Petitioners seek to distinguish *Cook v. Wolf,* 2020 WL 2465123 (Pa. Cmwlth. 2020), which they point out was not dismissed with prejudice, but was rather transferred to the Court of Common Pleas. However, Respondent does not ask for dismissal with prejudice under *Cook.* Rather, Respondent merely notes that this Court lacks jurisdiction over the Petitioners' claims. Petitioners are free to request a transfer of this matter to Common Pleas Court, where it would be construed as a PCRA Petition. Such a petition would not be successful, given Superior Court precedent, but that outcome does not entitle Petitioners to come to this Court instead. Moreover, if and when the United States or Pennsylvania Supreme Court ever holds that *Miller* applies to adults, and that the new rule is retroactive, Petitioners will be entitled to secure relief through new PCRA petitions, just as the juvenile lifers did.

personally subjected to an allegedly invalid law fails to challenge that law even after years and decades have passed. *Id.* at 792.

As they acknowledge, the Petitioners have all been imprisoned for at least two and as many as four decades. They do not, and could not, claim that they had no way of knowing until now that they were not eligible for parole. Yet now they come to this Court seeking to overturn every second degree murder sentence in this Commonwealth, hundreds of sentences, imposed since the mid-1970s, if not earlier. In the meantime, each of the petitioners could have sought relief in the appropriate court (as at least one has done). Their failure to prevail at the appropriate time and place does not entitle them to this Court's review.

III. Regarding the proper party, Petitioners insist that the Board can be sued here because the Board is "enforcing" the statute by not considering them for parole. But this is simply another way of avoiding the fundamental reality that an attack on LWOP sentences is indeed a sentencing attack. A lawsuit against the Board for failing to parole during a life sentence is as misplaced as a lawsuit against the Board for failing to parole during the course of any other mandatory minimum sentence. Petitioners are ineligible for parole solely as a result of the sentences imposed by the sentencing court at the time of sentencing. The proper party in a challenge to the legality of such a sentence is the proper party for any other kind of challenge to the legality of a sentence – not the Parole Board.

IV. Finally, regarding *Edmunds,* Petitioners insist that relevant precedent can be disregarded because *Edmunds* supposedly requires “an independent assessment,” “each time” a litigant puts forth an *Edmunds* claim. Petitioners’ Brief, p. 26. But, naturally, *Edmunds* did not actually abolish the doctrine of *stare decisis* in state constitutional litigation. What the Supreme Court said was simply that “we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated, ”*Com. v. Edmunds,* 586 A.2d 887, 894–95 (1991) – meaning each time an additional constitutional provision is raised, not each time a litigant decides to challenge a provision that has already been addressed. The constitutional provision at issue in this case is cruel and unusual punishment. As Respondent noted in its initial brief, both this Court and the Superior Court have held that Pennsylvania’s cruel and unusual punishment clause is coextensive with the United States Constitution.

In any case, Petitioners do not really argue that the Pennsylvania Constitution goes farther than the federal constitution regarding no-parole life sentences. Rather, Petitioners argue that the “rationales” of the United States Supreme cases go farther than the holdings of those cases, and thus that all courts, both state and federal, are required to interpret those cases as abolishing life without parole. But this is exactly the “rationale versus holding” argument that Petitioners’ counsel made, unsuccessfully, in *Commonwealth v. Lee*.

Petitioners suggest that inconvenient precedents like *Lee* should be disregarded because Pennsylvania is an "outlier" that imposes too many life-without-parole sentences. They imply that other jurisdictions have not addressed the question at issue here because such sentences are so rare elsewhere. But that is not correct. "[A] majority of states mandate life without the possibility of release for adult offenders convicted of some defined set of crimes." *Nelson v. State*, 947 N.W.2d 31, 37 n.6 (Minn. 2020). And in the federal system, parole is not permitted for any crime, meaning that every federal life sentence is a sentence of life without parole. *Wright v. United States*, 902 F.3d 868, 870 n.2 (8th Cir. 2018).

As a result, many courts throughout the United States, both federal and state, have addressed Petitioners' legal claim – and have rejected it, holding that *Miller* and *Montgomery* cannot be extended to adult murderers. *See, e.g, United States v. Sierra*, 933 F.3d 95, 97-99 (2nd Cir. 2019); *United States v. Chavez*, 894 F.3d 593, 608-09 (4th Cir. 2018); *In re Frank*, 690 Fed. Appx. 146 (5th Cir. 2017); *United States v. Marshall*, 736 F.3d 492, 497-500 (6th Cir. 2013); *Nelson v. State*, 947 N.W.2d 31, 35-40 (Minn. 2020)[4]; *People v. Hill*, 2017 WL 4082072, *4-*6 (Cal. Ct. App. 2017).

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[4] The *Nelson* court, reviewing decisions in other jurisdictions, was able to identify only one court, a federal district court, holding that *Miller* could be applied to adult murderers. *Nelson*, 947 N.W.2d at 37 n.6, *citing Cruz v. United States*, 2018 WL 1541898 (D. Conn. 2018). On further review, however, that district court decision

In declining to extend *Miller* and *Montgomery* to adults, these courts negate Petitioners' "rationale versus holding" theory. *Miller*'s holding, after all, was not confined to its facts; the defendant there was only 14. Yet the Supreme Court chose to create a broader rule that applied to all defendants under 18 – *but not to any defendants 18 and over*. Similarly, in *Roper*, the Supreme Court made clear that lines based on age are always, to a degree, both under- and over-inclusive. Yet the Court there too chose to draw such a line, and to explicitly exclude those whose age was over that line. There is simply no rational way to read these cases as meaning that, when the United States Supreme Court said "under 18," it actually meant "19," or "25," or "50."

Petitioner's constitutional arguments are contrary to Pennsylvania precedent on the scope of the cruel-and-unusual clause, contrary to Superior Court precedent on applying *Miller* to non-minors, and contrary to precedent in other jurisdictions. Petitioners thus have no viable legal claim. Their policy concerns are appropriately addressed to the legislature, not to this Court.

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was summarily reversed by the federal court of appeals. *Cruz v. United States*, 826 Fed. Appx. 49 (2nd Cir. 2020).

CONCLUSION

The Petition for Review should be dismissed.

Respectfully submitted,

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Attorney General

By: ***s/ Caleb Curtis Enerson***

CALEB CUTRIS ENERSON

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2020, I caused to be served a true and correct copy of the foregoing document to all counsel of record via PACFile.

s/ Caleb Curtis Enerson
CALEB CURTIS ENERSON
Deputy Attorney General

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.

s/ Caleb Curtis Enerson
CALEB CURTIS ENERSON
Deputy Attorney General