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397 MD 2020

IN THE COMMONWEALTH COURT OF PENNSYLANIA

MARIE SCOTT, NORMITA JACKSON, MARSHA SCAGGS, REID EVANS, WYATT EVANS, TYREEM RIVERS	:	**No. 397 MD 2020**
Petitioners,	:	**BRIEF IN OPPOSITION TO RESPONDENT'S PRELIMINARY OBJECTIONS**
v.	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE	:	
Respondent.	:	**ELECTRONICALLY FILED**

BRIEF IN OPPOSITION TO RESPONDENT'S PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW

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STATEMENT OF JURISDICTION

Petitioners' Petition for Review in the Nature of a Complaint was filed pursuant to this Court's original jurisdiction under 42 Pa.C.S. § 761(a)(1)(i).

COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When considering preliminary objections, all material facts set forth in the pleadings and any reasonable inferences deducible from these facts must be accepted as true. *Robinson Twp. v. Commonwealth,* 83 A.3d 901, 917 (Pa. 2013). Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint and must be overruled unless "it is clear and free from doubt that the facts pled are legally insufficient to establish a right to relief." *Dotterer v. Sch. Dist. of City of Allentown,* 92 A.3d 875, 880 (Pa. Commw. Ct. 2014). Preliminary objections should only be sustained where the law says with certainty that no recovery is possible. *Doheny v. Commonwealth, Dept. of Trans., Bur. of Driver Licensing,* 171 A.3d 930, 934 n. 10 (Pa. Commw. Ct. 2017).

The Court's inquiry is limited to whether any valid claim has been alleged, and if "any theory of law will support a claim, preliminary objections are not to be sustained." *Goodheart v. Thornburgh,* 522 A.2d 125, 128 (Pa. Commw. Ct. 1987). Moreover, Petitioners need only plead facts constituting the cause of action and are

not required to specify the entire legal theory underlying the complaint. *See Milton S. Hershey Med. Ctr. v. Commonwealth of Pa. Med. Prof'l Liab. Catastrophe Loss Fund,* 763 A.2d 945, 952 (Pa. Commw. Ct. 2000); *Heinly v. Commonwealth,* 621 A.2d 1212, 1215 n.5 (Pa. Commw. Ct. 1993).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Petition filed in the case *sub judice*, which challenges the constitutionality of the Pennsylvania Board of Parole's enforcement of 61 Pa.C.S. § 6137(a)(1) as applied to Petitioners, fall under this Court's original jurisdiction at 42 Pa.C.S. § 761(a)(1)(i)?

   Suggested Answer: Yes.

2. Are the claims presented by Petitioners, which raise substantive challenges to the Respondent's recent enforcement of a statutory provision as unconstitutional, too "stale" to be cognizable?

   Suggested Answer: No.

3. Is the Pennsylvania Board of Parole, the sole agency charged with enforcing the statutory provision challenged by the Petitioners, the proper party for this suit?

   Suggested Answer: Yes.

4. Do the claims presented by Petitioners, which allege substantial facts that would render their preclusion from consideration for parole unconstitutional based on developments in U.S. Supreme Court jurisprudence and considerations unique to Pennsylvania, each state a claim for relief?

   Suggested Answer: Yes.

PROCEDURAL AND FACTUAL HISTORY

On July 8, 2020, Petitioners, six people convicted of felony-murder and serving life sentences, filed a Petition for Review in the Nature of a Complaint challenging Respondent's enforcement of the Pennsylvania parole code under 61 Pa.C.S. § 6137(a), which prohibits Petitioners from being considered for release on parole. Petition for Review in the Nature of a Complaint (hereafter "Petition"), ¶¶ 133-44. Petitioners allege that Respondent's enforcement of § 6137(a) violates the Pennsylvania Constitution's cruel punishments clause under Article I § 13. *Id.* The Petition sets forth substantial factual and legal support for their claims that the cruel punishments clause prohibits life sentences with no meaningful opportunity for release for those who do not kill or intend to kill based on 1) the development of U.S. Supreme Court Eighth Amendment jurisprudence relating to categories of defendants with diminished culpability and mandatory life-without-parole sentencing practices, with which Pennsylvania's cruel punishments clause is at

least co-extensive, and the lack of any legitimate penological purpose to denying meaningful opportunity for parole to Petitioners; and 2) an argument under the test established in *Com. v. Edmunds,* 586 A.2d 887, 894 (Pa. 1991), demonstrating that Pennsylvania's cruel punishments clause provides greater protection than its federal counterpart in the specific context of denying meaningful opportunity for release to people convicted of offenses for which they did not kill or intend to kill. *Id.*

Petitioners were each convicted of felony-murder in Pennsylvania for offenses in which they neither took a life nor intended to take a life. Petition, ¶¶ 33, 49, 63, 75, 85. Each has been incarcerated for decades and, during this time, committed to bettering themselves and those around them. Each has demonstrated remarkable rehabilitation and commitment to pro-social activities. Petition, ¶¶ 21-85. And each has attained educational and vocational achievements, completed numerous rehabilitative programs, and participated in and led programs and initiatives in service to others, and poses no safety risk if released from prison. *Id.*

In May 2020, Petitioners each applied for parole, requesting the opportunity to present evidence that they are rehabilitated and pose no risk to public safety, and asserting that denial of consideration for parole violates the Pennsylvania and U.S. Constitution. Petition, ¶ 19. Respondent, the Pennsylvania Board of Parole, denied

each Petitioner's application, citing 61 Pa.C.S. § 6137(a)(1)'s prohibition on parole consideration for anyone serving a life sentence. *Id.* at ¶ 20.

In the Petition they filed, Petitioners set forth numerous factual allegations demonstrating that their denial of parole consideration is unconstitutional and lacking in penological purpose in light of their offenses. The Petition alleges that the denials do not serve the purpose of deterrence, as lengthy periods of incarceration do not increase the deterrent effect of a penalty. *Id.* at ¶ 98. Furthermore, because Petitioners are being punished for a killing they did not commit or intend, the basic requirement that individuals must be aware of the penalty associated with an act to serve a deterrent effect fails in their case. *Id.* at ¶ 99. The Petition also alleges that incapacitation cannot serve as a rationale to permanently incarcerate Petitioners due to their mature or elderly ages, low risk of reoffending based on their offense, and rehabilitation since incarceration. *Id.* at ¶¶ 100-08. Retribution is likewise not served by punishing those who neither kill nor intend to kill with the same severity as individuals whose culpability is greater. *Id.* at ¶ 109. And finally, the Petition alleges that the purpose of rehabilitation cannot be served since prohibiting any meaningful opportunity for release, ever, "forswears altogether the rehabilitative ideal." *Id.* at ¶ 110 (citing *Graham v. Florida*, 560 U.S. 48, 74 (2010)).

The Petitioners also situate their lack of parole eligibility within a broader context in Pennsylvania. The Petition alleges that Pennsylvania is an outlier in both the United States and the world in sentencing people to die in prison. *Petition*, ¶¶ 9-12. People serving life sentences in Pennsylvania, all of whom are statutorily prohibited from consideration for parole, may only be released through commutation, which has become virtually non-existent since the 1980s. *Id.* at ¶ 13. As commutations have decreased, deaths of people serving life sentences in Pennsylvania have increased substantially. *Id.* at ¶ 14. The population of people serving life sentences with no possibility of parole are also characterized by stark racial disparities, an increasingly aging and elderly population, and serious and costly public health concerns associated with such an aging population. *Id.* at ¶¶ 15-17.

Petitioners presented all of these facts in support of their legal claims that their denial of consideration for parole violates Pennsylvania's prohibition on cruel punishments under Article I § 13, which is at least co-extensive with the Eighth Amendment's prohibition on cruel and unusual punishments. *Id*. at ¶ 87. The U.S. Supreme Court's Eighth Amendment jurisprudence on life-without-parole sentences has evolved in the past decade. *Id.* at ¶ 88. Beginning with *Graham v. Florida*, 560 U.S. 48 (2010), the Court has applied heightened scrutiny to life-without-parole sentencing and prohibited certain categories of defendants with

diminished culpability from being sentenced to life with no meaningful opportunity for release. *Id.* at ¶¶ 88-91. The Court has long established that one category of defendants with diminished culpability under its Eighth Amendment jurisprudence comprises persons, like Petitioners, who did not take a life or intend to take a life in the course of their crime. *Id.* at ¶ 94. In determining whether the harshest punishments, such as life-without-parole, can be imposed on persons with diminished culpability, the Court has routinely analyzed whether legitimate penological purposes are served by imposing these punishments. *Id.* at ¶ 96. Taking the law together with the facts alleged in the Petition regarding the lack of penological purpose in denying parole consideration to Petitioners, enforcement of 61 Pa.C.S. § 6137(a)(1) is unconstitutional. *Id.* at ¶ 111.

The Petition also claims that the state constitution's cruel punishments clause in this context provides even greater protection than the Eighth Amendment. *Id*. at ¶ 112. Under the four-factor test set forth by the Pennsylvania Supreme Court in *Com. v. Edmunds,* 586 A.2d 887 (Pa. 1991), the text of the cruel punishments clause, the history of the provision, related case law from other states, and important policy considerations unique to Pennsylvania, including its outlier status, all weigh heavily in favor of interpreting the clause to provide greater protection than the Eighth Amendment. *Id.* at ¶¶ 114-32.

On August 7, 2020, Respondents filed Preliminary Objections, asserting 1) lack of jurisdiction; 2) demurrer due to staleness of the petition; 3) improper party; and 4) demurrer for failure to state a claim. On September 8, 2020, Petitioners filed an Answer to Respondent's Preliminary Objections. On September 11, 2020, this Court issued a briefing schedule on Respondent's Preliminary Objections. On October 13, 2020, Respondent filed its Brief in Support of Preliminary Objections.

SUMMARY OF THE ARGUMENT

In its Preliminary Objections to the Petition, Respondent, the Pennsylvania Board of Parole ("the Board"), raises four objections—to jurisdiction, the purported "staleness" of this suit, the party being sued, and the merits of Petitioners' claims—all of which are unavailing. Respondent's argument against jurisdiction is based on a fundamental mischaracterization of the nature of Petitioners' claims and the statute being challenged here—the prohibition on parole eligibility under the parole code, *not* Petitioners' sentences under the sentencing code, as Respondent erroneously suggests. The argument that Petitioners' claims, which challenge an ongoing substantive constitutional violation, are somehow "stale" cites irrelevant caselaw, concerning challenges to the enactment of statutes, not their enforcement. Respondent's argument to the proper party being sued is confounding, given that the Board is the sole entity

charged with enforcement of the statutory provision Petitioners are challenging. And Respondent's sparse argument on the merits ignores the substantial factual allegations presented in the petition and the legal theories presented by Petitioners which entitle them to relief.

On the merits, Respondent argues solely that, because a higher court has not already granted the relief to which Petitioners claim they are entitled, this Court is without authority to do so. Respondent fails to engage with Petitioners claims that, when the facts alleged in the Petition are applied to the U.S. Supreme Court's Eighth Amendment jurisprudence, the prohibition on parole eligibility is unconstitutional. Respondent also ignores Petitioners' claim that this Court is obligated to conduct an independent inquiry, under *Edmunds*, into whether the state constitution's prohibition on cruel punishments provides more protection than its federal counterpart, separate and apart from whether the Eighth Amendment itself would prohibit the action here, based on factors specific to Pennsylvania and which are supported by substantial factual allegations alleged in the Petition. All of Respondent's preliminary objections should be overruled, and Petitioners' meritorious claims should proceed to an evidentiary hearing.

ARGUMENT

I. Petitioners' Challenge to the Pennsylvania Board of Parole's Enforcement of 61 Pa.C.S. § 6137(a)(1) as Applied to Individuals Serving Life Sentences Who Did Not Take a Life or Intend to Take a Life Falls Under This Court's Original Jurisdiction

Petitioners filed applications for parole, each of which was denied by the Board pursuant to 61 Pa.C.S. § 6137(a)(1), which prohibits individuals serving life sentences from parole eligibility, and is the statutory provision they challenge. Petition, Introduction, at p. 4-5 & ¶¶ 8, 20, 33, 49, 63, 75, 85, 95, 133, 140, 145, 147-48. Critically, this statute is located in the parole code and not the sentencing code. Like other aspects of the parole code, the statute regulates the manner in which the sentence imposed by a trial court may be served, without disturbing the legality or the fact of the sentence itself. Despite the clarity of the Petition in repeatedly stating that this is an action challenging the Board's enforcement of § 6137(a) of the parole code against each Petitioner, Respondent falsely asserts that this is a challenge pursuant to 18 Pa.C.S. § 1102(b), the statute in the Crimes and Offenses title that lays out the *sentence* for felony-murder. Resp't Br. 3-6

Respondent's blatant misrepresentation is necessary for its first objection – that as a challenge to their sentences (which this is not), Petitioners' action is in the nature of post conviction relief, over which this court lacks jurisdiction. Respondent cites 42 Pa.C.S. § 761(a)(1)(i), which provides that this Court does not have jurisdiction over "habeas corpus or post conviction relief not ancillary to proceedings with the appellate jurisdiction of the court." Post conviction relief in Pennsylvania is governed by the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 et seq., which "provides for an action by which persons convicted of crimes

they did not commit and persons serving illegal sentences may obtain collateral relief." *Id*. at § 9542. If the PCRA provides a potential remedy, then habeas corpus is subsumed under it. 65 Pa.C.S. § 6503(b). Habeas is still available for claims seeking relief from a conviction or release from incarceration that are not covered by the PCRA, *Com. v. Peterkin*, 722 A.2d 638, (Pa. 1998) ("the writ continues to exist only in cases in which there is no remedy under the PCRA"). Post conviction relief is irrelevant to this case, however, because Petitioners are not challenging their sentences or seeking release from custody, but rather challenging a *condition* on their sentence – lifetime preclusion of parole – and seeking mere parole eligibility. That Petitioners are not seeking post conviction relief, and have presented claims which are properly before this court, is illustrated by two dispositive facts: 1) the claims raised by Petitioners are not cognizable under the PCRA or in a habeas action, as the cases cited by Respondent demonstrate, and 2) should this court rule in Petitioners' favor, neither their convictions nor their sentences will be disturbed.

First, Respondent undermines its own argument that Petitioners' challenge should have been brought under the PCRA by citing three cases involving challenges to lifetime parole preclusion under the PCRA. In each case, which involved statutory construction arguments distinct from Petitioners' constitutional arguments, the court held that a challenge to lifetime parole preclusion was not

cognizable under the PCRA. *Com v. Lewis*, 718 A.2d 1262, 1265 (Pa. Super. 1998) (statutory construction argument that life-sentenced prisoners were entitled to minimum date for parole eligibility not cognizable under § 9543(a)(2)(vii) of the PCRA); *Com. v. Latham*, No. 3122 EDA 2016, 2019 WL 180191, at *4 (Pa. Super. Jan. 14, 2019) (same) (citing *Lewis*); *Com. v. Boyd*, No. 2014 EDA 2017, 2018 WL 3616364, at *8 (Pa. Super. July 30, 2018) (same). This is because the PCRA only allows challenges to a sentence when a petitioner alleges "[t]he imposition of a sentence greater than the lawful maximum," 42 Pa.C.S. § 9543(a)(2)(vii), and the petitioners' true challenge was to a condition – preclusion of parole – on their sentence. Similarly, here, Petitioners are not challenging "the lawful maximum," which is and shall remain a life sentence even if they are successful, but are instead challenging their lifetime preclusion of parole eligibility. This preclusion is effectuated by 61 Pa.C.S. § 6137(a), which is exclusively enforced by the parole board, and is not cognizable in a post-conviction challenge under 18 Pa.C.S. § 1102(b), despite Respondent's insistence about the only way to raise this claim. Respondent's own authorities – *Lewis, Latham, and Boyd* – belie this assertion and undermine the basis for its jurisdictional objection.

Second, more than 100 years of state court jurisprudence in Pennsylvania unequivocally establishes that the maximum sentence imposed by a trial court is the "true sentence" and the only sentence with "legal validity." The relief

Petitioners seek in this case will leave their court-imposed "true sentence" of life fully intact. *See, e.g.*, *Hudson v. Pennsylvania Board of Probation and Parole*, 204 A.3d 392, 396 (Pa. 2019) ("the actual sentence of a prisoner subject to total confinement is his maximum sentence"); *Martin v. Pennsylvania Board of Probation and Parole*, 840 A.2d 299, 302 (Pa. 2003) ("the maximum sentence represents the sentence imposed for a criminal offense"); *Gundy v. Pennsylvania Board of Probation and Parole*, 478 A.2d 139, 141 (Pa. Commw. Ct. 1984) (recognizing parole proceedings as administrative in nature and "not part of a criminal prosecution" and that "[t]he sentence imposed for a criminal offense is the maximum sentence"); *Com. v. Daniel*, 243 A.2d 400, 403 (Pa. 1968) ("the maximum sentence is the real sentence" and "the maximum sentence is the only portion of the sentence which has legal validity") (internal quotation and citations omitted); *Com. ex rel. Carmelo v. Smith*, 32 A.2d 913, 914 (Pa. 1943) ("the maximum sentence is the only portion of the sentence which has legal validity, and [] the minimum sentence is merely an administrative notice by the court to the executive department"); *Com. v. Kalck*, 87 A. 61, 64 (Pa. 1913) (same); *Com. ex rel. v. McKenty*, 52 Pa. Super. Ct. 332 (Pa. Super. Ct. 1912) (real sentence is the maximum sentence). Respondent ignore the entirety of this case law.

This jurisprudence further recognizes that release on parole does not affect the sentence imposed or being served, but instead merely determines whether that

sentence may be served on parole. *See Hudson*, 204 A.3d at 396 ("prisoner on parole is still in the legal custody of the state . . . and is under the control of the warden and of other agents of the Commonwealth until the expiration of the term of his sentence"); *Martin*, 840 A.2d at 303 ("offenders released from confinement on parole remain in the legal custody of the Commonwealth and remain under the control of the Commonwealth until the expiration of the maximum sentence"); *Com. ex rel. v. Russell*, 169 A.2d 884, 885 (Pa. 1961) ("[parole] does not set aside or affect the sentence and the convict remains in the legal custody of the state"; "A prisoner on parole is still in the legal custody of the warden of the institution from which he was paroled and he is under the control of the warden until the expiration of the term of his sentence."); *Com. ex rel. Banks v. Cain*, 28 A.2d 897, 902 (Pa. 1942) ("The sentence is in no wise interfered with" by a granting of parole, because "the parolee is not discharged, but merely serves the reminder of his sentence" on parole. . . . "While this is an amelioration of punishment, it is in legal effect imprisonment.") (quoting *Anderson v. Corall*, 263 U.S. 193, 196 (1923)); *Kalck*, 87 A. at 64 (describing parole as a matter of "penal administration" or "prison discipline" distinct from the fact or duration of a criminal sentence). Accordingly, Petitioners' claims, which challenge Respondent's enforcement of the parole code statute prohibiting parole *eligibility*, do not and cannot affect their convictions or sentences, which remain life sentences whether or not those

sentences are being served in prison or on parole. Nor would the relief they seek necessarily result in Petitioners' release, since Respondent would only be required to *consider* Petitioners for parole. As the Pennsylvania Supreme Court put the matter explicitly and concisely, in granting parole "the sentence is in no wise interfered with." *Com. ex rel. Banks*, 28 A.2d at 902.

Further, both the Commonwealth Court and Pennsylvania Supreme Court have exercised jurisdiction in challenges to the same statute being challenged here. In *Hudson* and *Castle*, the Commonwealth and Supreme Courts, respectively, ruled on challenges to lifetime parole eligibility preclusion brought by petitioners serving life sentences for felony-murder convictions, who raised statutory construction arguments. *See Hudson*, 204 A.3d 392 (considering and dismissing the petitioner's claim that the Parole Board was required to consider him for parole despite his life sentence based on statutory construction argument); *Castle v. Pennsylvania Board of Probation and Parole*, 554 A.2d 625 (Pa. Commw. Ct. 1989) (same). Respondent, perhaps in realizing that the courts' prior exercise of jurisdiction over legal challenges to 61 Pa.C.S. § 6137(a) is fatal to its jurisdictional objection, flagrantly misstates the holdings of these cases to fit its false characterization of Petitioners' claims. Resp't Br. at 5. Respondent asserts that the decisions "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." *Id*. But neither *Castle* nor *Hudson* states that parole preclusion is "part of the sentence itself," nor does either case indicate that the petitioners' claims challenging § 6137(a) were not brought in the proper court. While it is true that these courts found that the Board did not have authority to release the petitioners, their findings were based on the merits of the claims presented. Critically, the courts in both cases reached their determinations after they exercised jurisdiction over the petitioners' challenges to § 6137(a).[1] Likewise, this Court must consider Petitioners' distinct constitutional challenges to § 6137(a) and rule on them, just as the courts did with respect to the statutory construction challenges to § 6137(a) in *Hudson* and *Castle*.

Respondent's argument that *Cook v. Wolf*, 2020 WL 2465123 (Pa. Commw. Ct. 2020), is "a directly applicable precedent" is also false. Resp't Br. 5. *Cook* did not involve a challenge against the Parole Board or a challenge to the enforcement of 61 Pa.C.S. § 6137(a). Instead, the petitioner in that case challenged 18 Pa.C.S. § 1102(a)-(b) (relating to sentencing for first and second degree murder) as unconstitutionally vague in a lawsuit that named the Governor, the President Pro

[1] Here and in the following paragraph Respondent argued that jurisdiction is not proper because 61 Pa.C.S. § 6137(a) does not give the Board authority to consider Petitioners for parole. This is a tautology asserting that Petitioners cannot challenge the constitutionality of § 6137(a) when that statute is enforced against them because § 6137(a) does not allow Petitioners to be considered for parole. There is no rule of law, nor any legal authority cited, however, which states that the Board must have some measure of discretion in enforcing a statute as a prerequisite to that statute's constitutionality being challenged in court. No such rule could be cited, of course, because it does not exist.

Tempore of the Pennsylvania State Senate, and the Speaker of the Pennsylvania House of Representatives as defendants, and sought release from prison—not parole eligibility—as his remedy. *Cook*, 2020 WL 2465123, *1-2. The distinction between a challenge to § 1102(a)-(b) and § 6137(a) is highlighted by this Court's disposition of *Cook*. In *Cook*, the Commonwealth Court transferred the matter to the court of common pleas, as is required when the court lacks jurisdiction and the case should have been filed in another court of the Commonwealth. *Id*. at 3. Although there were certainly legal grounds for summarily dismissing the petitioner's claims in *Cook*, including his naming of improper parties in challenging his criminal sentence, this Court could not and did not reach those questions due to lack of jurisdiction. This is in marked contrast to *Castle* and *Hudson*, where the petitioners challenged the enforcement of 61 Pa.C.S. § 6137(a), as here, and the Court exercised jurisdiction and made judicial determinations of the claims on the merits. *Hudson*, 204 A.3d 392; *Castle*, 554 A.2d 625.

A similar challenge from the Sixth Circuit, although addressing questions of federal jurisdiction, is persuasive in this regard. In *Hill v. Snyder*, the Sixth Circuit considered an analogous jurisdictional question in federal law: whether certain legal claims were cognizable in a civil action brought pursuant to 42 U.S.C. § 1983, or whether those claims must be raised in a federal habeas corpus action. 878

F.3d 193 (6th Cir. 2017).[2] The Sixth Circuit discussed at length why the changes to parole procedures sought by the plaintiffs, which were based on establishing a meaningful opportunity for parole pursuant to *Miller v. Alabama*, 567 U.S. 469 (2012), were permissible in a § 1983 action, and did not require a habeas action, notwithstanding the *Heck* doctrine. The court found that the challenge to the parole procedures was cognizable under section 1983 "because the Michigan Parole Board retains discretion to deny parole to those who are or become eligible," and thus success on their claims "would not automatically spell speedier release for Plaintiffs." *Hill*, 878 F.3d at 211. The U.S. Supreme Court reached a similar conclusion in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), holding that challenges to "state procedures used to deny parole eligibility and parole suitability" that did not seek immediate release from confinement may proceed via § 1983 rather than in a habeas corpus action. Here, as in *Hill* and *Dotson* and unlike in *Cook*, Petitioners seek parole eligibility, not immediate or certain release, and thus habeas or post conviction relief is not appropriate or required.

II. Petitioners' As-Applied Substantive Constitutional Challenges to Agency Enforcement of a Statute Are Not Stale

[2] This is referred to as the *Heck* doctrine, which states that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement [in federal court] and seeks immediate or speedier release, even though such a claim may come within the literal terms of [a] 1983 [claim]." *Hill,* 878 F.3d. at 207 (quoting *Heck v. Humphrey,* 512 U.S. 477 (1994).

Respondent's arguments and cited case law in support of its second objection, on the purported staleness of Petitioners' claims, provide no basis for dismissing the claims. Respondent cites two cases in its Preliminary Objections, discussing only one of them in its supporting brief, for the proposition that Petitioners' claims should have been raised earlier and, due to delay, cannot be raised now. Neither case supports Respondent's position; indeed, they are irrelevant to determining whether Petitioner's claims should proceed.

First, Respondent relies on *Sernovitz v. Dershaw,* 127 A.3d 783 (Pa. 2015), which involved claims that are not remotely similar to Petitioners' claims. *Sernovitz* concerned a challenge to the procedure by which a statute was enacted; Petitioners claims involve substantive challenges to administrative enforcement of a statute that is unconstitutional as-applied to Petitioners. In *Sernovitz,* the Supreme Court of Pennsylvania determined that a procedural challenge to the enactment of a statute, which, if successful, would have invalidated several other statutes, was stale because it was brought 22 years after the statute's enactment. *Id.* at 794. The petitioners in *Sernovitz* asserted that the enactment of the statute at issue violated the Pennsylvania Constitution's single-subject rule under Article III § 3. *Id.* at 788. In addition to the statute at issue in *Sernovitz,* a successful procedural challenge on this basis would have invalidated several other statutes, as the court noted. *Id.* at 789. The *Sernovitz* court found that a procedural challenge brought decades after

the statute's enactment, during which time courts and the public relied on not only the challenged statute, but also several others that would have been invalidated, could not be entertained because a successful challenge would be "unduly disruptive." *Id.* at 793-94.

The second case relied on by Respondent in its preliminary objection is *Howell v. Wolf*, 340 M.D. 2019, 2020 WL 2187764 (Pa. Commw. Ct. May 6, 2020), which also involved a procedural challenge to the enactment of a statute. Like in *Sernovitz*, the petitioner in *Howell* asserted that the procedures by which a different statute – 18 Pa.C.S. § 1102(b) – was enacted were constitutionally deficient. In finding that the petitioner could not challenge the process by which § 1102(b) was enacted 46 years after its enactment, this Court applied the ruling in *Sernovitz*: "Our Supreme Court concluded in *Sernovitz* that a *procedural challenge* to the constitutionality of a statute that is substantially belated is foreclosed because the passage of time renders the statute immune from such an attack." *Howell*, 340 M.D. 2019, *6 (emphasis added). Thus, this Court made clear in *Howell* that the argument now advanced by Respondent in this matter applies to procedural challenges to a statute's enactment, not enforcement. Respondents do not, nor could they, cite to a single case in the Commonwealth in which a court found that a substantive constitutional challenge to the enforcement or

implementation of a statute was "stale," and the only cases cited in support of its objection undermine their argument.

In contrast to the claims at issue in *Sernovitz* and *Howell*, Petitioners do not raise a procedural challenge to 61 Pa.C.S. § 6137(a). Although this distinction is crucial and dispositive, it is ignored in Respondent's Preliminary Objections and its supporting brief. Both the *Sernovitz* and the *Howell* courts explicitly recognized that their rulings dealt with challenges to the process by which a statute was enacted. Petitioners in the case *sub judice* raise no challenge to the process by which § 6137(a) was enacted. Rather, they challenge the *enforcement* of this statute as unconstitutional when applied to those who did not kill or intend to kill. Furthermore, unlike the claims at issue in *Sernovitz* and *Howell*, there is no danger that, if Petitioner's challenge is successful, there will be any disruption to the orderly administration of justice or undo any reliance on the statute since its enactment. The disruption Respondent suggests would occur here as in *Sernovitz* is based on the patently erroneous assertion that Petitioners are challenging 18 Pa.C.S. § 1102(b). They are not. Petitioners do not challenge their sentences, and their success will not result in the invalidation of either their sentences, any other criminal sentences in Pennsylvania, or any judicial decision. The relief sought by Petitioners is entirely prospective in nature. It will only affect their *future* eligibility for parole.

Petitioners here neither raise a procedural challenge, nor a challenge to the enactment of 61 Pa.C.S. § 6137(a). Petitioners' claims raise as-applied substantive constitutional challenges to the enforcement of a statute precluding them from parole eligibility. Respondent's arguments in support of its Preliminary Objection that Petitioners' claims are stale are meritless and lack any legal authority. Petitioners' claims are properly before this Court, and Respondent's staleness objection should be overruled.

III. The Pennsylvania Board of Parole, as the Exclusive Agency That Enforces 61 Pa.C.S. § 6137(a)(1), is the Proper Party Being Sued

Respondent's objection that the parole board is not the proper party in this suit is in equal measure perplexing and erroneous. Suing a state agency or official who enforces a statute is a conventional and proper manner to challenge the legality of a statute, and it is one that is utilized routinely. *See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com.*, 877 A.2d 383 (Pa. 2005) (petitioners sued the Commonwealth of PA, certain Commonwealth officials, and the Pennsylvania Gaming Control Board alleging numerous facial constitutional challenges employed by the Pennsylvania Race Horse Development and Gaming Act); *South Union Twp. v. Com.*, 839 A.2d 1179 (Pa. Commw. Ct. 2003) (petitioners brought suit in PA state court against the Commonwealth of PA, the Department of Environmental Protection, the Secretary of Environmental Protection, and the Pennsylvania Waste Industry Association (as intervenor)

seeking to have certain provisions of the Environmental Resources Code declared unconstitutional and their enforcement enjoined); *Germantown Cab Company v. Philadelphia Parking Authority*, 206 A.3d 1030 (Pa. 2019) (petitioners appealed the constitutionality of annual assessments by city parking authority pursuant to Act 94); *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205 (Pa. Commw. Ct. 2018) (fireworks company brought action against governor and Commonwealth agencies, challenging the constitutionality of legislation which authorized fireworks sales at certain temporary structures); *Yocum v. Commonwealth Pennsylvania Gaming Control Board*, 161 A.3d 521 (Pa. 2017) (petitioner challenged as unconstitutional certain restrictions imposed on attorneys who are employed by the Pennsylvania Gaming Control Board by bringing suit against the Commonwealth Pennsylvania Gaming Control Board); *Pennsylvania Independent Oil & Gas Ass'n v. Com., Dept of Environmental Protection*, 135 A.3d 1118 (Pa. Commw. Ct. 2015) (oil and gas association brought declaratory judgment actions to preclude Department of Environmental Protection from applying and enforcing provisions of Oil and Gas Act relating to issuance of well permits); *Marcellus Shale Coalition v. Department of Environmental Protection*, 193 A.3d 447 (Pa. Commw. Ct. 2018) (non-profit, natural gas membership organization brought action against Environmental Quality Board and Department of Environmental Protection, requesting declaratory relief and pre-enforcement

review of regulations relating to surface activities associated with the development of unconventional wells); *Peake v. Com.*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (petitioners brought suit against the Commonwealth of Pennsylvania, the Department of Human Services, the Department of Aging, and the Department of Health challenging the constitutionality of provision of Older Adults Protective Services Act); *Pennsylvania Retailers' Associations, Reliable, Inc. v. Lazin*, 426 A.2d 712 (Pa. Commw. Ct. 1981) (petitioners brought suit against the Bureau of Consumer Protection and the Attorney General of Pennsylvania challenging the constitutionality of regulations on debt collectors).

Given that Respondent alone is tasked with enforcement of 61 Pa.C.S. § 6137(a), Respondent's objection is entirely spurious. Respondent is "the government official who implements the law" at issue here, and accordingly the proper party for a lawsuit challenging the constitutionality of that statute. *Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 355 (Pa. Commw. 2002), *aff'd sub nom. Allegheny Cty. Sportsment's League v. Rendell*, 860 A.2d 10 (Pa. 2004) (cited in Respondent's Preliminary Objections at ¶ 33).

Respondent appears to argue that it is not a proper party since, even if Petitioners prevail, the Board will not be able to consider them for parole due to their not having a minimum date upon which they are eligible for parole, which is required under 61 Pa.C.S. § 6137(a)(3). This argument, however, is incorrect and

has no bearing on the Board being the proper party. The question as to when the Board would be obligated to consider Petitioners for parole eligibility in the event that Petitioners prevail in this action is for the remedial phase of the litigation, and its answer flows from the constitutional question presented in the Petition for Review; it has no bearing on the question whether the Board, the sole agency tasked with enforcement of 61 Pa.C.S. § 6137(a)(1), is the proper party. Obviously, it is.

Respondent's citation to *1st Westco Corp. v. Sch. Dist. Of Philadelphia*, 6 F.3d 108, 116 (3d Cir. 1993) in their Preliminary Objections, which they fail to raise at all in their supporting brief, is inapposite and provides no support for its position. The parenthetical quotation cited by Respondent is ripped from its context and thrust into this scenario where it does not apply, as the Board does not have an "attenuated" connection to 61 Pa.C.S. § 6137(a). Rather, they are the explicit and sole state agency tasked with enforcing it, which they have done against each Petitioner. Accordingly, this action is not only properly raised against the Board, but it is *necessarily* raised against it, as it is the sole agency who can, and in this case did, enforce the challenged statute against Petitioners.

IV. Petitioners' Constitutional Claims State Claims for Relief and Require an Evidentiary Hearing

Petitioners argue that their categorical preclusion from consideration for parole as a mandatory condition on their life sentences for felony-murder violates

the Pennsylvania Constitution's prohibition on "cruel punishments," both because (1) the state prohibition is at least coextensive with the Eighth Amendment, which requires proportionality in punishment and prohibits the most severe punishments for certain offenders with diminished culpability, and (2) the state prohibition on cruel punishments provides even broader protection than the federal standard under the four-factor test laid out in *Edmunds*, 586 A.2d 887. Respondent fails entirely to engage with Petitioner's first argument, insisting only that there is no U.S. Supreme Court case holding the very outcome that Petitioners seek, even as it ignores that the *principles* underlying the Court's Eighth Amendment jurisprudence support Petitioners' claim. And Respondent's summary dismissal of Petitioner's second argument ignores the obligation of this court under *Edmunds* to undertake an independent analysis "each time" a provision of the Pennsylvania Constitution is implicated. 586 A.2d at 894-95.

First, under the U.S. Supreme Court's evolving Eighth Amendment jurisprudence in the death penalty and life-without-parole contexts, Pennsylvania's categorical bar on parole eligibility for defendants serving life, who did not kill or intend to kill as part of their crime, amounts to excessive punishment under the Eighth Amendment. Petitioners rely on the reasoning and long-standing principles underlying the Court's decisions in this area, namely: (a) that the concept of proportionality is central to the Eighth Amendment, and one that is continually

being reevaluated according to evolving norms of decency rather than remaining fixed and historical, *Miller v. Alabama*, 567 U.S. 460, 469 (2012); (b) that sentences of life without the possibility of parole are among the harshest punishments in our system, akin to the death penalty in their severity and irrevocability, and thus deserving of enhanced constitutional scrutiny, *Graham v. Florida*, 560 U.S. 48, 69-70 (2010); *Campbell v. Ohio*, 138 S.Ct. 1059, 1059-1060 (2018) (cert. denied) (Sotomayor, J., concurring); (c) that, in evaluating whether life without parole amounts to excessive punishment under the Eighth Amendment, the defendant's culpability, in light of their crime and characteristics, is part of the analysis, *Graham*, 560 U.S. at 67; (d) that defendants who do not kill or intend to kill are among classes of individuals with diminished culpability – "categorically less deserving" of the most serious forms of punishment, *Graham*, 560 U.S. at 69 (citing *Enmund v. Florida*, 458 U.S. 782 (1982)); and (e) that life without parole punishment must also serve legitimate penological goals to pass constitutional muster, *Graham*, 560 U.S. at 71-75.

Together, these findings make clear that 61 Pa.C.S. § 6137(a), by categorically denying Petitioners any possibility of release, and operating to condemn them to die in prison despite crimes in which they did not take a life or intend to take a life, amounts to excessive punishment under the Eighth Amendment and thus violates Article I, § 13, which prohibits at least as much as its

federal counterpart. *Edmunds*, 586 A.2d at 894. As Petitioners articulated in their Petition for Review, their punishment also serves no legitimate penological purpose, *see* Petition, ¶¶ 96-110 – not deterrence or retribution, since they are being punished for killings they did not commit or intend to commit; not rehabilitation, since life without parole "forswears altogether the rehabilitative ideal," *Graham*, 560 U.S. at 74; and not incapacitation, since aging and changed people like Petitioners, who have spent decades in prison, even for violent crime, present a negligible risk public safety. *See* Petition ¶ 129

Respondent devotes a single paragraph to addressing this argument, asserting only that the absence of a U.S. Supreme Court decision already holding that life without parole for homicide by adults violates the Constitution should end the inquiry. Resp't Br. at 9. It does not. The Supreme Court does not merely issue narrow holdings, but sets forth legal principles and rationale which are designed to guide lower and state courts to apply those principles, with reason and analysis, to factual situations that were not necessarily before the Court. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (explaining that "well-established rationale" and "portions of the opinion necessary to [the] result" are binding). When an Indeed, if a specific holding about the very question at issue here were required, there would be no work for the parties or the court to do. Respondent disputes in passing, in a parenthetical, that *Graham* and its progeny are not limited to juveniles, but it

makes no argument, and has nothing to say, *inter alia*, about the *Graham* Court's explicit discussion about the defendants "twice diminished" culpability, not just on the basis of age, but also the nature of their offense.[3] *Graham*, 560 U.S. at 69. That discussion relied on a long line of precedent, including outside the juvenile context, and specifically cited *Enmunds*. *Id*. Nor does Respondent even attempt to proffer any penological reason – as the Supreme Court requires – for the categorical denial of parole eligibility for people like Petitioners, because, as Petitioners' actual criminal intent and conduct, ages, and records over decades in prison show, there is no legitimate penological justification for incarcerating them until they die.[4]

Respondent's argument against Petitioner's second claim, that the state constitution's anti-cruelty provision in fact provides even greater protection against excessive punishment than its federal counterpart, is also meritless. Contrary to Respondent's perspective, Pennsylvania constitutional law – especially law

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[3] Indeed, in *Miller*, the government itself underscored the importance of this part of the Court's reasoning to the outcome of *Graham*. *Miller*, 567 U.S. 460 (oral argument transcript) (government counsel arguing, "[t]he reason why *Graham* came out as it did, the reason why life without parole was not permissible, was because Graham himself had not committed murder.").

[4] It bears noting that while Respondent argued in its Preliminary Objections that *Harmelin v. Michigan*, 501 U.S. 957 (1991) bars Petitioners' claims, it appears to abandon that argument here, as it should. As Petitioners explained in their Response to the Preliminary Objections, *Harmelin* dealt with a challenge to a particular defendant's sentence, not a categorical challenge to a sentencing practice, as in *Graham* and here. *Graham*, 560 U.S. at 61. The proper standard for assessing a categorical practice for a class of defendants is set by *Graham* and *Miller*, which post-dated *Harmelin*.

surrounding evolving standards of proportionality – is not stuck in amber. In *Edmunds*, the Pennsylvania Supreme Court underscored: "we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, *each time* a provision of that fundamental document is implicated." 586 A.2d at 894–95 (emphasis added). The Court outlined a four-part test for that analysis, requiring inquiry into (1) the text of the state constitutional provision; (2) its history; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern. Taking these factors together, the prohibition on "cruel punishments" under Article I, § 13 can and should be interpreted to afford broader protection than the Eighth Amendment's prohibition on "cruel and unusual punishments," as Petitioners demonstrated in their Petition for Review. *See* Petition, ¶¶ 112-132. The serious policy considerations alone warrant further inquiry into the matter. Pennsylvania is an outlier in the country and in the world in the number of people it condemns to die in prison for crimes in which they did not kill or intend to kill. *See id*. Introduction. Disproportionately, those affected are Black people or people of color. *Id*. The current population is also on the whole elderly or aging, having already spent decades in prison, and poses low risk to public safety. *Id.* Introduction & ¶ 129. The human, racial, public health, and economic costs of the death-by-incarceration scheme in Pennsylvania for felony-

murder, together with Petitioners' argument with respect to the other *Edmunds* factors, presents more than "a compelling reason" to interpret Article I, § 13 as affording greater protection than the Eighth Amendment, *Person v. Penn. State Police Megan's Law Section*, 2015 WL 6790285 at *13 (Pa. Commw. Ct. 2015) (citing *Com. v. Gaffney*, 702 A.2d 565, 569 (Pa. 1997)). At the very least these factors require development of a full evidentiary record before the court may pass judgment on Petitioners' claims.

Respondent's response to Petitioners' detailed and persuasive allegations regarding the *Edmunds* test is summarily to conclude that the question of whether the state constitution's anti-cruelty provision provides greater protection than the Eighth Amendment has already been asked and answered in the negative, citing two cases that did not conduct the rigorous analysis required by *Edmunds,* Resp't Br. at 10; this argument does not in any event obviate the duty of this court to conduct its own independent analysis in *each* case—this case—claiming a violation of a state constitutional provision. While Respondent points to the absence of case law from other jurisdictions holding that mandatory life without parole sentences for felony-murder are unconstitutional, *id*. at 11, this is readily explained by the rarity of such harsh sentences for felony-murder outside this jurisdiction. Pennsylvania's status as a national outlier does not undermine Petitioners' argument; it only gives it more urgency.

CONCLUSION

Wherefore, Petitioners respectfully request this Court overrule the Respondent's Preliminary Objections and grant Petitioners' request for an evidentiary hearing on their claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petitioners' Brief in Opposition to Respondent's Preliminary Objections consists of 7,395 words, excluding the title page, table of contents, table of authorities, and signature blocks and thus complies with the Pennsylvania Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Petitioners' Brief in Opposition to Respondent's Preliminary Objections 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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CERTIFICATE OF SERVICE

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