

IN COMMONWEALTH COURT OF PENNSYLVANIA

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

NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED to file a written response to the enclosed Preliminary Objections within thirty (30) days of service or within such other period of time as the Court may direct, whichever is shorter, or a judgment may be entered against you.

Respectfully submitted,

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PRELIMINARY OBJECTIONS TO THE PETITION FOR REVIEW

Petitioners, in a dangerous attempt to circumvent the normal rules of jurisdiction, the Rules of Criminal Procedure, and the General Assembly, have commenced an action in this Court, seeking to overturn duly-enacted legislation that has been on the books for over four decades. Because this Court lacks jurisdiction over the Petitioner's claims, because the challenge to the statute in question is too stale to be cognizable, and because the Petitioners' challenge fails on the merits, this Petition should be dismissed.

PROCEDURAL AND FACTUAL HISTORY

1. 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.
2. 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).
3. 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.

4. All six Petitioners sought consideration for parole, but were denied by the Board, due to the statutory prohibition against being considered for parole. Petition, ¶ 20.
5. The Petitioners, being sentenced to life-without-parole, may be released from incarceration through the state's commutation system. *Id.* at ¶ 13.
6. The Petitioners filed their Petition with this Court on July 8, 2020.
7. The Respondent now files the instant Preliminary Objections to the Petition for Review.

PRELIMINARY OBJECTION I

PA. R.CIV.P. 1028(a)(1) – LACK OF JURISDICTION/IMPROPER VENUE

8. Respondent incorporates the foregoing paragraphs as if set forth at length.
9. The Petition challenges the constitutionality of the second-degree murder/felony-murder statute, arguing that life-without-parole constitutes cruel and unusual punishment in violation of the United States and Pennsylvania Constitutions.
10. Petitioners purport to bring this case pursuant to 42 PA. CON. STAT. § 761 in this Court's original jurisdiction.
11. However, 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).

12. In this case, the Petitioners all seek to challenge their lack of eligibility for parole, and by extension, their underlying criminal sentence. Indeed, if that were not the case, they would have no standing here.
13. This Court recently considered a similar challenge to Pennsylvania’s life-without-parole sentence for second-degree murder, and rejected such a challenge.
14. In *Cook v. Wolf*, 472 M.D. 2019, 2020 WL 2465123 (Pa. Cmwlth. May 13, 2020),¹ the petitioner raised a challenge to his sentence of life-without-parole following a plea to second-degree murder. *Id.* at * 1.
15. Similar to the Petitioners here, the petitioner in that case conceded that 61 PA. CON. STAT. § 6137 prevented his being released from imprisonment. *Id.*
16. The Court noted that the petitioner was seeking *habeas corpus* relief, as he was attempting “to test the legality of his commitment and detention.” *Id.* at * 3 (citation omitted).

¹ This case, being an unpublished opinion, is not binding, but is cited to for its persuasive value, pursuant to Internal Operating Procedure Rule 414.

17. The facts presented by Petitioners are subject to the same analysis as this Court applied in *Cook*.
18. Thus, because this Court lacks jurisdiction over this matter, the Petition cannot be entertained here and should be dismissed.

PRELIMINARY OBJECTION II
PA. R.CIV.P. 1028(a)(4) – DEMURRER

19. Respondent incorporates the foregoing paragraphs as if set forth at length.
20. Petitioners concede that the penalty for second-degree murder was enacted by statute in 1974—forty six years ago—but fail to explain why they waited until now to file this lawsuit.²
21. The Supreme Court of Pennsylvania addressed a similar situation in *Sernovitz v. Dershaw*, 127 A.3d 783 (Pa. 2015), when it rejected a challenge to legislation brought 22 years after the legislation had been enacted.
22. The Court noted the severe disruption that would be caused by invalidating legislation over two decades since its enactment, stating, “Invalidating all of these provisions retroactive to 1988 would be unduly

² All of the Petitioners, except for Petitioner Marie Scott, were sentenced pursuant to 18 PA. CON. STAT. § 1102(b), which set the penalty for second-degree murder as life-without-parole. Petition, fn. 1. The statute was amended in 1974 to mandate such a penalty. *Id.*

- disruptive to the orderly administration of justice in Pennsylvania. Doing so would . . . ‘cause greater harm to the public weal than the alleged constitutional transgression itself.’” *Id.* at 793 (citation omitted).
23. Herein, the Petitioners apparently seek to have this Court strike down legislation that has been in existence *twice as long* as the legislation upheld in *Sernovitz*.
24. Indeed, the Court recently considered—and rejected—a constitutional challenge to the life-without-parole penalty for second-degree murder, albeit a challenge relating to the law’s enactment. *See Howell v. Wolf*, 340 M.D. 2019, 2020 WL 2187764 (Pa. Cmwlth. May 6, 2020); *appeal filed*, June 4, 2020.
25. In *Howell*, the panel, while considering a challenge to the enactment of 18 PA. CON. STAT. § 1102(b), noted that the challenge occurred “46 years after the statute’s enactment” and “36 years before [the petitioner] declared his challenge to the procedure of the statute’s enactment.” *Id.* at * 3.
26. The Court recognized that “thousands of criminal cases have passed through Pennsylvania’s judicial system in the interim, with both the government and the public relying on the authority of the statute” and concluded striking down the statute at this juncture “would cause greater

- harm than the original alleged constitutional transgression.” *Id.* (citation omitted).
27. As such, the Court sustained the preliminary objection asserting the staleness of the petitioner’s challenge. *Id.*
 28. Applying the reasoning of the *Howell* panel to the case at bar, the Petitioners here seek to obtain eligibility for parole consideration, when such an avenue for relief has been squarely and indisputably foreclosed by statute since at least 1974, when the statute was amended.³
 29. Petitioners seek a declaration that mandatory life-without-parole for second-degree murder is unconstitutional, meaning that over one *thousand* sentences would be overturned. *See* Petition, Introduction (noting that approximately 1,100 individuals are serving felony-murder sentences in Pennsylvania); *see also id.* at ¶ 145 (requested relief).
 30. The Court should not precipitate this massive upending of the criminal justice system, given the extreme length of time that has passed between the statute being enacted and the Petitioners bringing this suit. *See Howell, supra.*
 31. Thus, the Petition for Review should be dismissed.

PRELIMINARY OBJECTION III

³ As to Petitioner Marie Scott, she was convicted prior to 18 PA. CON. STAT. § 1102(b)’s amendment, so her challenge is even more stale.

PA. R.Civ.P. 1028(a)(5) –IMPROPER PARTY

32. Respondent incorporates the foregoing paragraphs as is set forth at length.
33. “[T]he interest in enforcing and defending the act in question belongs to the government official who implements the law.” *Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 355 (Pa. Cmwlth. 2002), *aff'd sub nom. Allegheny Cty. Sportsmen's League v. Rendell*, 860 A.2d 10 (Pa. 2004).
34. Petitioners name the Board as the sole Respondent in this matter, since the Board is the entity responsible for granting individuals parole.
Petition, ¶ 8.
35. As Petitioners concede, however, the Board has rejected the Petitioners’ applications for parole, since 61 PA. CON. STAT. § 6137(a) expressly forbids the Petitioners from being granted parole. *Id.*
36. In other words, the Petitioners are not arguing that they are, in fact, eligible for parole under the statute, but are being improperly rejected the opportunity to seek parole by the Board; rather, they are arguing that the Board should be required to consider them for parole eligibility *in spite of* the statute, due to their constitutional claims.
37. As such, the Petitioners’ claim against the Board cannot stand, as the Board is not responsible for setting the date on which the Petitioners

- would first be eligible for parole.
38. By way of example, if the Petitioners had all been sentenced to ten to twenty years in prison, but the Board refused to consider them for parole at five years, a challenge against the Board for not considering the Petitioners for parole would clearly be inappropriate, since the Petitioners would not yet be eligible for parole.
 39. Here, the Petitioners have been sentenced to sentences of life-without-parole, so the Board is never required to consider them for parole.
 40. Again, this is because the Petitioners are, ultimately, challenging their *sentences*, as opposed to any erroneous *conduct* made by the Board.
 41. The mere fact that the Board enforces the Petitioners' prohibition against being considered for parole is insufficient to make the Board a proper party in this case. *See, e.g., Ist Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 116 (3d Cir. 1993) ("If we were to allow [Petitioners] to join the Commonwealth Officials in this lawsuit based on their general obligation to enforce the laws of the Commonwealth, we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it.").

42. Therefore, the Petition against the Board should be dismissed.

PRELIMINARY OBJECTION IV
PA. R.CIV.P. 1028(a)(4) –DEMURRER

43. Respondent incorporates the foregoing paragraphs as if set forth at length.

44. Even if the Court proceeds to the merits of the Petitioners' claims, binding precedent precludes their assertion that a life sentence without parole for felony murder committed by an adult is cruel and unusual punishment under the United States and Pennsylvania Constitutions.

45. The United States Supreme Court has explicitly held that a sentence of life without parole does not constitute cruel and unusual punishment, *even for non-homicide offenses. Harmelin v. Michigan*, 501 U.S. 957 (1991); *Rummel v. Estelle*, 445 U.S. 263 (1980).

46. Cases cited by Petitioners do not contradict, but instead confirm, this result. *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Graham v. Florida*, 560 U.S. 48 (2010), are all explicitly premised on the principle that “children are constitutionally different from adults for purposes of sentencing” to life imprisonment without parole. 567 U.S. at 471. Petitioners argue that children and adults must now be treated the same for purposes of life without parole. That argument does not “extend” the *Miller* principle; it

- nullifies the *Miller* principle.
47. Petitioners cite one case, *Enmund v. Florida*, 458 U.S. 782 (1982), that does not involve the special status of juveniles. Nor, however, did *Enmund* involve life sentences; it was a death penalty case. *Enmund* predates *Harmelin*, which upheld life without parole sentences even in a non-homicide case.
 48. Every state and federal court in Pennsylvania to address Petitioners' claim has rejected it. *See, e.g., Commonwealth v. Middleton*, 467 A.2d 841 (Pa. Super. 1983) (citing *Enmund* and *Rummel*); *Michaels v. Harry*, 2020 WL 1984205 (M.D. Pa. 2020) (citing *Middleton*, *Harmelin*, and *Rummel*); *Craig v. Frank*, 2004 WL 875500 (E.D. Pa. 2004).
 49. Lacking a federal constitutional claim, Petitioners assert a violation of the Pennsylvania Constitution. But it is well settled that “[t]he 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).

50. While the Petitioners cite to *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) and its test for analyzing whether a Pennsylvania constitutional provision provides greater protection than its federal counterpart (Petition, ¶ 113), *Edmunds* only explains *how to make* such a determination; it does not hold that such a determination *has been made* for Article I, Section 13 of the Pennsylvania Constitution in comparison to the Eighth Amendment to the United States Constitution when analyzing cruel and unusual punishment claims.
51. Notably, Petitioners point to no case, from any jurisdiction, holding that life-without-parole for adult offenders for homicide is unconstitutional.
52. While the Petitioners point to several states with supposedly-similar constitutional provisions that have been interpreted as being broader than the Eighth Amendment’s provision (Petition, ¶¶ 120-22), their analysis only shows, at best, that *other states* (not Pennsylvania) have interpreted their similar provisions as being broader than the Eighth Amendment’s protections.

53. Left unanswered, however, is the next question: have any of these states then expanded their understanding of increased protection against cruel and unusual punishment to also conclude that life-without-parole for adult offenders who have been found guilty of felony-murder been found to be unconstitutional? The answer, of course, is no.
54. Lacking a federal or state constitutional claim, Petitioners devote most of their petition to policy arguments. Should the Petitioners desire to have the law rewritten, they should present their case to the General Assembly, not this Court.
55. “If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation.” *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting); *see also* Petition, ¶¶ 123-132 (setting forth policy considerations for why life-without-parole for felony-murder should be abolished).
56. Because the Petition fails as a matter of law, the Petition for Review should be dismissed.

CONCLUSION

The Petitioners present arguments in a procedurally-improper fashion, rendering this Court without the ability to grant their requested relief. But even if this Court could grant their requested relief, their arguments are squarely

foreclosed by decades of case law to the contrary. For all of these reasons, the
Petition for Review should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 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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