Received 9/8/2020 4:12:27 PM Commonwealth Court of Pennsylvania

Filed 9/8/2020 4:12:00 PM Commonwealth Court of Pennsylvania
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,	:	
v.	:	**ANSWER TO RESPONDENT'S PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW**
PENNSYLVANIA BOARD OF PROBATION AND PAROLE	:	
Respondent.	:	**ELECTRONICALLY FILED**

ANSWER TO RESPONDENT'S PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW

Petitioners, through their counsel and pursuant to Rules 1516(b) and 1517 of the Pennsylvania Rules of Appellate Procedure, and Rules 1028 and 1029 of the Pennsylvania Rules of Civil Procedure, hereby submit the following responses to the averments in Respondent's Preliminary Objections to the Petition for Review.

INTRODUCTION

Petitioners 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) prohibiting Petitioners from being considered for release on parole. The Petition asserted that this prohibition on parole as applied to Petitioners, none of whom took a life or intended to take a life, violates the Pennsylvania Constitution's prohibition on cruel punishments based on two distinct theories: first, that the state's anti-cruelty clause provides at least as much protection as the Eighth Amendment, which would prohibit the prohibition on parole at issue here and, second, even if the federal

constitution does not provide such protection, that the Court is required under *Com. v. Edmunds*, 586 A.2d 887 (Pa. 1991) to independently determine whether the state's clause provides greater protection than its federal counterpart.

In its Preliminary Objections to the Petition, Respondent, the Pennsylvania Board of Parole ("the Board"), raises four primary objections—to jurisdiction, the timeliness 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—which is the prohibition on parole under the parole code, and which is not Petitioners' sentences under the sentencing code, as Respondent erroneously, repeatedly, suggests. The argument that Petitioners' claims, concerning an ongoing 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 argument on the merits perhaps most obviously ignores that the 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. None of Respondent's objections should be allowed to stand, and Petitioners' meritorious claims, rooted in one of the most fundamental legal safeguards of basic human dignity, should proceed to an evidentiary hearing.

RESPONSES TO SPECIFIC AVERMENTS

Response to Procedural and Factual History

1. Denied. Respondent inaccurately describes the Petition in paragraph 1 of its Preliminary Objections. Petitioners are serving sentences of *life*, as stated clearly in the paragraphs cited by Respondent from the Petition. The life sentences imposed by the trial court were pursuant to 18 Pa.C.S. § 1102(b) of the sentencing code. The statute prohibiting parole eligibility for those serving life sentences, which is the statute Petitioners are challenging in this action, is found in the parole code—*not* the sentencing code—at 61 Pa.C.S. § 6137(a), and is enforced by Respondent, not imposed by the trial court. If Petitioners prevail in this action and are granted parole eligibility—which is the central issue at bar—they will still be serving life sentences, even if they are granted parole sometime in the future, as explained more fully below. *See infra* ¶ 11.
2. Denied. Respondent's averments in paragraph 2 are inaccurate and misleading. As explained in the preceding paragraph, the *sentence* imposed by the trial court upon Petitioners' convictions for felony-murder pursuant to 18 Pa.C.S. § 1102(b) was life, not life-without-parole. The preclusion on parole eligibility regulates the manner in which the life sentence will be carried out, but it is not part of the sentence *per se*.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. Denied. Respondent again inaccurately describes Petitioners' sentences in paragraph 5 of its Preliminary Objections, which are *life* sentences. *See supra* ¶¶ 1-2. While Petitioners *may* be released via commutation, in practice commutation for those serving life sentences is a remote possibility that has become exceedingly rare, is governed by no

articulated criteria, and does not provide an opportunity for release based on demonstrated rehabilitation and lack of risk to public safety. *See* Petition , ¶¶ 13-14, 18, 48-49, 125.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

Response to Preliminary Objection I – Alleged Lack of Jurisdiction

8. Paragraph 8 does not require a response.

9. Denied. Respondent mischaracterizes the Petition in paragraph 9 of its Preliminary Objections. Petitioners are challenging 61 Pa.C.S. § 6137(a) as applied by Respondent, not the "second-degree murder/felony-murder statute," which would presumably be 18 Pa.C.S. § 1102(b). Petitioners repeatedly and explicitly indicated in the Petition the specific statute at issue in this case. *See* Petition, Introduction, at 4-5 & ¶¶ 8, 20, 33, 49, 63, 75, 85, 95, 133, 140, 145, 147-48. Respondent tellingly omits reference to these paragraphs when it mischaracterizes Petitioners' claims in service of its meritless jurisdictional objection. Further, Petitioners do not bring any claims pursuant to the United States Constitution, *id*. at ¶¶ 133-144, although the Petition does argue that the Eighth Amendment prohibition against cruel and unusual punishment provides at least the floor for the protections afforded by the prohibition against cruel punishments under the Pennsylvania Constitution. *Id*. at 87-95, 134-138.

10. Paragraph 10 is admitted.

11. Admitted in part, denied in part. The quoted passage in paragraph 11 of Respondent's Preliminary Objections is accurately stated. Petitioners deny that the jurisdictional restriction in Section 761 of the Judicial Code cited by Respondent is relevant. Petitioners

do not seek post-conviction relief, as their convictions and life sentences imposed by the trial court would remain undisturbed if they prevail in this action. Nor does habeas corpus provide the applicable remedy because Petitioners do not seek release from custody via this litigation, but instead mere parole eligibility. 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." *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. Cmwlth. 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). 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 result in Petitioners' release, since Respondents would only be required to *consider* Petitioners for parole.

12. Admitted in part, denied in part. Petitioners admit that they "seek to challenge their lack of eligibility for parole," but deny that they "by extension" challenge or seek to challenge

"their underlying criminal sentence" as stated by Respondent in paragraph 12. Tellingly, Respondent cites no textual support from the Petition for its assertion that Petitioners are challenging their life sentences imposed pursuant to 18 Pa.C.S. § 1102(b), because there is no such support. Relatedly, Respondent cites no legal authority for its assertion that a challenge to 61 Pa.C.S. § 6137(a) must be brought pursuant to a Post Conviction Relief Act (PCRA) or habeas corpus petition, nor does any such legal authority exist. To the contrary, the Commonwealth Court and Pennsylvania Supreme Court have exercised jurisdiction on challenges to this very statute based on statutory construction arguments, including recently. *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. Cmwlth. Ct. 1989) (same).

13. Denied. The case referenced by Respondent in paragraph 13, *Cook v. Wolf*, 2020 WL 2465123 (Pa. Cmwlth. Ct. 2020), did not involve a challenge against the Parole Board or to the enforcement of 61 Pa.C.S. § 6137. Instead, the petitioner in that case challenged 18 Pa.C.S. § 1102(a)-(b) as unconstitutionally vague in a lawsuit that named the Governor, the President Pro 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.
14. Denied. As stated above, the petitioner in *Cook* challenged his sentence under 1102(a)-(b) and sought release. He did not challenge the statute at issue here, 61 Pa.C.S. § 6137(a), nor did he seek parole eligibility. *Id*. The distinction between a challenge to § 1102(a)-(b) and § 6137 is highlighted by this Court's resolution of *Cook*. In *Cook* the Commonwealth

Court transferred the matter to the court of common pleas, as required when jurisdiction is improper, 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, 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.

15. Admitted in part, denied in part. Petitioners admit that the petitioner in *Cook* recognized the plain meaning of 61 Pa.C.S. § 6137(a), but deny that *Cook* is relevant to Petitioner's claims. The acknowledgment by the petitioner in *Cook* that 61 Pa.C.S. 6137 prevented his release is merely recognition that the statute means what it says. It does not render his claim or that case similar to this one. The petitioner in *Cook* sued different defendants and, again, challenged his sentence under 18 Pa.C.S. § 1102(a)-(b), unlike Petitioners.

16. Admitted in part, denied in part. Petitioners admit that the petitioner in *Cook* sought "release," *Cook*, 2020 WL 2465123, *2, which, as Respondent states in paragraph 16, requires a PCRA or habeas corpus filing, but deny any implication that this is similar or relevant to Petitioners' claims. Here, in contrast to *Cook*, Petitioners seek *parole eligibility*, which may or may not result in release, and is therefore a distinct remedy that does not challenge Petitioners' underlying convictions or sentences, nor seeks a court order requiring Petitioners to be released from confinement. 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).[1] 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. This decision was supported by *Wilkinson v. Dotson*, 544 U.S. 74 (2005), in which the U.S. Supreme Court also permitted challenges to "state procedures used to deny parole eligibility and parole suitability" that did not seek immediate release from confinement to 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 is not appropriate or required.

17. Denied. Respondent's assertion in paragraph 17 that the analysis in *Cook* applies here is entirely incorrect. As explained above, the petitioner in *Cook* brought a different claim against different defendants, challenged a different statute, and sought different relief

[1] 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).

from the Petitioners in the case *sub judice*. Indeed, far from supporting Respondent, the ways in which *Cook* is distinguishable from the case at hand illustrates why this Court *does* have jurisdiction to consider the claims brought by Petitioners in this challenge to 61 Pa.C.S. § 6137(a), as it did in *Castle* and *Hudson*.

18. Denied. Respondent presents no legal authority for its argument that this Court lacks jurisdiction to consider a challenge against the Board for enforcement of 61 Pa.C.S. § 6137(a), and ignores key cases in which this Court has in fact entertained legal challenges to enforcement of 61 Pa.C.S. § 6137(a). *See Hudson,* 204 A.3d 392; *Castle*, 554 A.2d 625. Petitioners' "true" sentences are and will remain life sentences in the event they prevail in this action and are granted parole eligibility. *Supra* ¶ 11. And Petitioners are not guaranteed release from custody if they become parole eligible, thus *precluding*, as opposed to requiring, that the claim be brought as a habeas corpus action. *See Dotson*, 544 U.S. 74; *Hill*, 878 F.3d 193.

Response to Preliminary Objection II – Staleness Demurrer

19. Paragraph 19 does not require a response.

20. Denied. Respondent's assertion in paragraph 20 about the date on which 18 Pa.C.S. § 1102(b) was enacted is irrelevant. Petitioners are not challenging the enactment or application of 18 Pa.C.S. § 1102(b). Instead, as is unambiguously stated in the Petition, Petitioners are challenging the enforcement of 61 Pa.C.S. § 6137(a) by the Board against each of them. Such enforcement occurred on May 20, 2020,[2] thus presenting no question

[2] In the Petition for Review counsel for Petitioners inadvertently stated that the parole applications of each petitioner were denied in June 2020. In fact, they were denied on May 20, 2020. The error does not, however, affect the timeliness of this action challenging the denials of parole review pursuant to enforcement of 61 Pa.C.S. § 6137(a) by the Board.

about the timeliness of this action. Petitioners also amply explain their reasons for challenging 61 Pa.C.S. § 6137(a) in their Petition.

21. Denied. Respondent purports in paragraph 21 to analogize Petitioners' claims with the holding of *Sernovitz v. Dershaw*, 127 A.3d 783 (Pa. 2015), a case which is not remotely similar to Petitioners' claims. *Sernovitz* concerned a challenge to the procedure by which a statute was enacted; Petitioners' claims involve a substantive challenge to an ongoing constitutional violation.

22. Admitted in part, denied in part. Petitioners admit that the Court in *Sernovitz* did make the finding cited by Respondent, but deny that this finding is of any relevance. 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. If Petitioners prevail, there will be no interference with any person's life sentence, or any criminal sentence imposed by any court whatsoever. *Supra* ¶ 11. If, however, enforcement of the state constitutional prohibition on cruel punishment would be disruptive of a status quo that is not justified by legitimate penological interests and has staggering racial disparity among those impacted, then such disruption is welcome and overdue.

23. Denied. Again, Petitioners are not seeking invalidation of 18 Pa.C.S. § 1102(b) as implied in paragraph 23, nor is *Sernovitz* relevant for the reasons stated above, as it challenged the procedure by which a statute was enacted and was, indeed, *based on* actions from decades ago. Petitioners here challenge a contemporaneous act of Respondent that amounted to a constitutional violation based on evolving constitutional standards and application of the analysis required under *Com. v. Edmunds*, 586 A.2d at

894. *See* Petition, ¶¶ 19-20 (alleging June 2020 enforcement of 61 Pa.C.S. § 6137(a))[3], ¶¶ 86-132 (explicating legal framework for Petitioners' claims).

24. Admitted in part, denied in part. Petitioners admit that paragraph 24 correctly states that the Commonwealth Court rejected a challenge to the enactment of 18 Pa.C.S. § 1102(b) in *Howell v. Wolf*, 340 M.D. 2019, 2020 WL 2187764 (Pa. Cmwlth. May 6, 2020). Petitioners deny, however, that *Howell* involved a challenge to "life-without-parole" for second degree murder and it has no relevance to Petitioners' claims. The petitioner in *Howell* claimed that the procedures by which 18 Pa.C.S. § 1102(b) was enacted were constitutionally deficient. As Petitioners stated repeatedly and unambiguously in their Petition, they are challenging the ongoing *enforcement* of 61 Pa.C.S. § 6137(a) by Respondent; they do not seek to challenge 18 Pa.C.S. § 1102(b) at all. Respondent conspicuously neglects to cite to the passage in which this Court explains both the Pennsylvania Supreme Court's ruling in *Sernovitz,* 127 A.3d 783, and this Court's reason for applying *Sernovitz* and finding the petition was stale in *Howell*: "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

[3] *See supra*, footnote 2. Parole denial actually occurred in May 2020, though this correction has no legal significance.

court found that a substantive constitutional challenge to the ongoing enforcement or implementation of a statute was "stale."

25. Admitted in part, denied in part. Petitioners admit that the Court in *Howell* did note the time periods stated in paragraph 25 of Respondent's Preliminary Objections, but deny that the cited passages have any relevance here. As detailed above, Petitioners are not challenging the procedure by which 61 Pa.C.S. 6137(a) was enacted. They are challenging its ongoing enforcement by Respondent.

26. Admitted in part, denied in part. Petitioners admit that the quoted passages in paragraph 26 of Respondent's Preliminary Objections do appear in this Court's opinion in *Howell*, but deny that they have any relevance to Petitioners' claims. Petitioners are not challenging their life sentences under 18 Pa.C.S. § 1102(b), and they are not challenging the procedure by which any statute was enacted. Relief for Petitioners will not upset their life sentences, nor the life sentence of any person incarcerated in Pennsylvania. Rather, Petitioners seek an opportunity to be considered for future parole.

27. Denied. Respondent's assertion in paragraph 27 is misleading. While the Court did sustain the staleness objection in *Howell*, that has no bearing on the matter here, as Petitioners are challenging acts of Respondent that occurred in May 2020, and their claims are based on evolving constitutional standards and a multi-factor analysis under the state constitution that requires an evidentiary record to be developed to assess whether enforcement of 61 Pa.C.S. § 6137(a) with respect to those who did not take a life or intend to take a life is constitutionally permissible.

28. Denied. Respondent asserts in paragraph 28 that *Howell* is applicable to Petitioners' claims, and that eligibility for parole consideration for people serving life sentences for

second-degree murder is foreclosed by 18 Pa.C.S. § 1102(b), both of which are inaccurate. Respondent again displays a misunderstanding of Petitioners' claims and Pennsylvania law. Petitioners bring a challenge to the application and enforcement of 61 Pa.C.S. § 6137(a), which precludes the Board from granting parole to anyone sentenced to life imprisonment. 18 Pa.C.S. § 1102(b) itself is silent as to whether individuals sentenced to life imprisonment may be granted parole. In addition, the reasoning of a panel of this Court in *Howell* is not applicable to the claims raised by Petitioners. As detailed above, *Howell* applied the Pennsylvania Supreme Court's ruling in *Sernovitz,* which dealt only with a procedural challenge to the enactment of a statute. Petitioners bring a substantive challenge based on recent developments in constitutional law to the enforcement of 61 Pa.C.S. § 6137(a) in May 2020, well within the statute of limitations for a challenge. Respondent cites no cases which foreclose such a challenge based on the "staleness" of the claim.

29. Denied. Respondent again mischaracterizes the Petition and its effect in paragraph 29. Petitioners seek declaratory and injunctive relief striking down 61 Pa.C.S. § 6137(a) as applied to those who did not take a life or intend to take a life. Accordingly, no sentence will be affected, as the sentence for the offense of felony-murder is provided under 18 Pa.C.S. § 1102(b) and, again, is not being challenged here. The sentence for felony-murder will remain life, whether there is or is not parole eligibility. *Supra* ¶ 11.

30. Denied. Respondent's assertion in paragraph 30 is a misrepresentation of relevant case law and Petitioner's claims, and a scare tactic to deter review of Petitioner's meritorious constitutional claims. This Court is obligated to apply constitutional standards to claims when they are properly raised. See *Robinson Tp., Washington County v. Com.*, 83 A.3d

901, 945 (Pa. 2013) (recognizing that "state court judges have an obligation to make some independent assessment of state constitutional provisions.") (internal quotations and citations omitted). While Respondent attempts to frighten away judicial review, the truly frightening reality is that more than 1,100 human beings are being subject to a penalty so lacking in penological justification and so enormous in the suffering it causes as to violate the supreme law of the Commonwealth of Pennsylvania.

31. Denied. The Petition is properly before the Court, Respondent's preliminary objections are unavailing as stated in paragraph 31, and Petitioners' request for an evidentiary hearing should be granted.

Response to Preliminary Objection III – Improper Party

32. Paragraph 32 does not require a response.

33. Admitted. However, given that Respondent alone is tasked with enforcement of 61 Pa.C.S. § 6137(a) as indicated by paragraph 33, it is perplexing that Respondent would raise such a spurious objection. Respondent is "the government official who implements the law" here.

34. Admitted in part, denied in part. Petitioners admit that Respondent is solely responsible for granting parole as stated in paragraph 34, but deny that this responsibility is the sole reason for Petitioners bringing these claims against Respondent. The Board is also subject to suit in this matter because of its enforcement of 61 Pa.C.S. § 6137(a). Petition, ¶ 8.

35. Admitted in part, denied in part. Petitioners admit that they challenge Respondent's enforcement of 61 Pa.C.S. § 6137(a) as stated in paragraph 35 of Respondent's

Preliminary Objections. However, Petitioners deny the assertion that Respondent's denial of Petitioners for parole consideration is any form of "concession."

36. Admitted. Petitioners raise constitutional challenges to the enforcement of 61 Pa.C.S. § 6137(a) by Respondent at stated in paragraph 36.

37. Denied. The Board can determine a date on which Petitioners can be reviewed for parole in the event this Court finds that 61 Pa.C.S. § 6137(a) is unconstitutional as applied to them. The Board has exclusive authority to consider incarcerated people for release on parole whether serving "definite or flat sentences," 61 Pa.C.S. § 6132(a). Respondent also has the authority to create "reasonable rules and regulations . . . for the presentation and hearing of applications for parole." 61 Pa.C.S. § 6139(a)(4). The issue Respondent raises is paragraph 37, however, is a question for the remedial aspect of the litigation, and 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.

38. Denied. Respondent's example in paragraph 38 is hypothetical and irrelevant. If the Board enforced 61 Pa.C.S. § 6137(a)(3) against the applicant because she had not reached the minimum sentence for eligibility, the Board would still be the proper party to a lawsuit challenging that denial of parole consideration. The hypothetical posited by Respondent has no bearing on the constitutional claims raised by Petitioners, nor does it have any relevance to whether the agency tasked with enforcing a statute can be sued when its enforcement violates the state constitution, as claimed here.

39. Denied. Respondent again misstates Petitioners' court-imposed sentences in paragraph 39. Petitioners have been sentenced to life pursuant to 18 Pa.C.S. § 1102(b). While state statutory law precludes Petitioners from being considered for parole pursuant to 61

Pa.C.S. § 6137(a), enforcement of this provision runs afoul of the prohibition on cruel punishments under the Pennsylvania Constitution for the reasons detailed here and in the Petition, and which require the development of an evidentiary record.

40. Denied. Petitioners do not challenge their sentences, as the life sentence imposed by the trial court for each Petitioner is the maximum sentence, and as such shall remain the "true sentence" and the only sentence with "legal validity." Neither parole eligibility nor release on parole will affect the sentence imposed or being served, but instead merely determines whether that sentence may be served on parole. *See supra* ¶¶ 11.

41. Denied. Respondent's citation to *1st Westco Corp. v. Sch. Dist. Of Philadelphia*, 6 F.3d 108, 116 (3d Cir. 1993), in paragraph 41 is inapposite and provides no support for Respondent's assertion. 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.

42. Denied. For all the aforementioned reasons, Respondent's third objection has no merit and should have no bearing on the Petition.

Response to Preliminary Objection IV – Demurrer

43. Paragraph 43 does not require a response.

44. Denied. Petitioners state two distinct constitutional claims, first, that the Pennsylvania Constitution's cruel punishments clause provides at least as much protection as the Eighth Amendment, which prohibits the parole prohibition at issue here, and second, under *Edmunds*, that the 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, as Petitioners argue it does. Respondents erect a false barrier to Petitioners' first claim by overstating the holding and effect of *Harmelin v. Michigan*, 501 U.S. 957 (1991), and miss the point of Petitioners' second claim: not that *Edmunds* has already held that the state's anti-cruelty provision provides greater protection than the Eighth Amendment, but that it requires the court to undertake an analysis of whether it does. Respondents completely fail to address that central argument in paragraph 44 or elsewhere in its Preliminary Objections.

45. Denied. Respondent's statement in paragraph 45 misrepresents the holding and effect of *Harmelin*, which does not bar Petitioners' claims.[4] Indeed, if *Harmelin* stood for as broad a proposition as Respondent states, *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012) would not have been possible. Rather, as the Supreme Court in *Graham* stated, *Harmelin* dealt with a challenge to a particular defendant's sentence, not a categorical challenge to a sentencing practice, as in *Graham* and here. *See Graham*, 560 U.S. at 48, 61–62. Moreover, *Harmelin* did not negate 80 years of Supreme Court jurisprudence recognizing a proportionality principle inherent in the Eighth Amendment. *See Graham*, 560 U.S. at 59-60. As *Graham* and *Miller* reaffirmed and further developed, the concept of proportionality is central to the Eighth Amendment,

[4] Contrary to Respondent's assertion, the Supreme Court did not "explicitly h[o]ld that a sentence of life *without parole* does not constitute cruel and unusual punishment . . . for non-homicide offenses" in *Rummel v. Estelle*. Respondent's Preliminary Objections, ¶ 45 (emphasis added). Rather, the Court upheld an individual's life sentence noting that the petitioner would have *the possibility of parole* in twelve years, thereby specifically distinguishing life *without* parole sentences. *Rummel*, 445 U.S. 263, 280–81 (1980) ("[A] proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life."); *see also Ewing v. California*, 538 U.S. 11, 22 (2003) ("We specifically noted the contrast between that sentence and the sentence in *Rummel*, pursuant to which the defendant was eligible for parole."). Thus, *Rummel* is of no consequence to Petitioners' claims here.

"and we view that concept less through a historical prism than according to evolving standards of decency." *Miller*, 564 U.S. at 469-70.

46. Denied. Respondent's characterization in paragraph 46 ignores the principles and reasoning of *Graham*, *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) on which Petitioners' claim is based. *See Miller*, 567 U.S. at 471. While Respondent would limit *Graham* and its progeny to youth, the principles reaffirmed by the Supreme Court and the analysis it undertook have broader reach. In applying proportionality review, the Court in *Graham* was weighing the culpability of the defendants against the severity of the punishment, and the Court's discussion of culpability was premised on a long line of precedent, including outside the juvenile context, recognizing that certain categories of defendants and crimes possess diminished culpability rendering the most severe punishments cruel and unusual. On the other side of the ledger, the Court recognized life without parole as among the harshest of punishments, akin to the death penalty in its severity and irrevocability. *See Miller*, 567 U.S., at 474–476 ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences."); *Graham*, 560 U.S., at 69–70. The lack of legitimate penological justifications were also relevant to the Court's Eighth Amendment analysis, *See Graham*, 560 U.S. at 67–68, about which Respondents have nothing to say in seeking to preclude Petitioners' from mere parole eligibility. In addition, while *Graham*, *Miller* and *Montgomery* concerned sentencing practices, the proportionality and fairness limitations in these cases and their predecessors in the capital case context provide the relevant principles to ensure that parole processes that produce unduly cruel punishments are also subject to limitation in appropriate circumstances such as here.

47. Denied. Respondent's description in paragraph 47 ignores the Supreme Court's own reliance on *Enmund v. Florida*, 458 U.S. 782 (1982), in its recent decisions outlawing life without parole under the Eighth Amendment. In *Graham*, the Court cited *Enmund* in its discussion of diminished culpability, which "recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of those most serious forms of punishment." *Graham*, 560 U.S. at 48, 61, 69–74. While *Enmund* did indeed deal with the death penalty, a key aspect of the Court's reasoning in *Graham* and *Miller*, as stated above, was in recognizing life without parole sentences as among the harshest of punishments. *See also Campbell v. Ohio*, 138 S.Ct. 1059, 1059–60 (2018) (cert. denied) (Sotomayor, J., concurring) ("Our Eighth Amendment jurisprudence developed in the capital context calls into question whether a defendant should be condemned to die in prison without an appellate court having passed on whether that determination properly took account of his circumstances, was imposed as a result of bias, or was otherwise imposed in a 'freakish manner.'").

48. Denied. Respondent's assertion in paragraph 48 cites cases that either pre-dated or fail entirely to contend with the evolution of the law under *Graham* and *Miller*, and fail to contend with the analysis under *Com. v. Edmunds*, 586 A.2d 887 (Pa. 1991). Like *Harmelin, Commonwealth v. Middleton*, 467 A.2d 841 (Pa. Super. 1983), challenges an individual sentence, relies heavily on assertions that "death is different", and predates *Graham* and *Miller* by decades. 467 A.2d, 841, 843, 846–47 (Pa. Super. 1983). Respondent's citation to *Middleton* exemplifies their failure to address recent jurisprudence that recognizes the particular severity of life without parole and provides an alternative analysis for challenges to *categorical sentencing practices*. *See Miller*, 567

U.S. at 470. Similarly, Respondent cites two unpublished decisions to support their bald and misleading assertions. *Michaels v. Harry*, No. 1:20-cv-00324, 2020 WL 1984205 (M.D. Pa. Apr. 27, 2020) was a habeas corpus petition challenging an individual sentence. *Id*. at *3. Relying heavily on *Harmelin*, as well as *Middleton*, the federal court found that the defendant's individual sentence was not unconstitutional. *Id*. at *3–5. And *Craig v. Frank*, 2004 WL 875500 (E.D. Pa. Mar. 18, 2004) is of even less import. The *Craig* court did not engage in any Eighth Amendment analysis, instead finding that the petitioner in that case fashioned a statutory claim as a constitutional one. *See id*. at *2.

49. Denied. Respondent's argument in paragraph 49 overstates past jurisprudence based on *Edmunds*. *See* 586 A.2d at 894. In *Edmunds*, the Court noted 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." *Edmunds*, 586 A.2d at 894–95 (emphasis added). Both cases cited by Respondent fail to conduct this rigorous analysis in finding that the Pennsylvania Constitution is coextensive with its federal analog. Moreover, Respondents omit case law that has acknowledged, "with increasing frequency," the importance of undertaking such an analysis, *see, e.g.*, *Commonwealth v. Swinheart*, 664 A.2d 957, 961 (Pa. 1995), particularly when presented with a "compelling reason to do so." *See Person v. Penn. State Police Megan's Law Section*, No. 222 M.D.2013, 2015 WL 6790285 at *13 (Pa. Cmwlth. Ct. Nov. 3, 2015) (citing *Commonwealth v. Gaffney*, 702 A.2d 565, 569 (Pa. Sup. Ct. 1997). Indeed, state courts have noted that "the need for . . . a comparative approach is clear" in cases where there is specific federal analog, such as here. *Jubelirer v. Rendell*, 953 A.2d 514, (Pa. 2008) (declining to conduct "the traditional *Edmunds* analysis" given the lack of a federal

counterpart to Section 16 of the Pennsylvania Constitution."); *accord, Jones v. City of Philadelphia,* 890 A.2d 1188, 1194 (Pa. Cmwth. Ct. 2006) (conducting an *Edmunds* analysis because it "provides structure and a consistent means to analyze" constitutional issues); *Commonwealth v. Swinehart*, 664 A.2d 957, 961 (Pa. 1995) ("[W]e find that the four-pronged method of analysis established in *Edmunds* to be the most thorough manner of accomplishing our task."); *United Artists' Theater Circuit, Inc.*, 635 A.2d 612, 615 (Pa. 1993) (conducting an *Edmunds* analysis in the eminent domain context because "it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution."); *Commonwealth v. Glass*, 718 A.2d 804, (Pa. Super. Ct. 1998) (conducting an *Edmunds* analysis in the search and seizure context and "not[ing] with approval that appellant . . . has complied with the requirements of *Edmunds*.").

50. Denied. Respondent's argument in paragraph 50 fails to understand Petitioners' second claim, which requires the court to undertake an independent analysis here. It is of no moment that the court in *Edmunds* did not itself make that determination.

51. Denied. Respondent's assertion in paragraph 51 is readily explained by Pennsylvania's status as a national outlier in imposing life without parole. For example, only Pennsylvania and Louisiana impose mandatory life without parole sentence for felony murder.[5] Thus, there is only one valid comparator in this particular case. Misleading assertions by Respondent, such as this, highlight the critical need for a hearing that will develop a full evidentiary record so that the Court can make an informed decision on the relevant *Edmunds*' factors.

[5] This claim is based on independent research and will be presented during an evidentiary hearing.

52. Denied. Respondent's argument in paragraph 52 fails to understand that Petitioners cited comparative state constitutional provisions in their complaint as part of their discussion of the *Edmunds* analysis, which asks for comparative interpretations of similar state constitutional provisions.

53. Denied. Respondent's question in paragraph 54 fails, again, to account for the rarity of mandatory life without parole for felony murder in these jurisdictions and Pennsylvania's outlier status.[6]

54. Denied. Respondent's point in paragraph 54 fails to understand that Petitioners make policy arguments in support of their second claims because the *Edmunds*' analysis specifically requires an assessment of the various policy considerations in determining whether the Pennsylvania Constitution provides broader protections. *See Edmunds*, 586 A.2d at 894 .

55. Denied. Respondent's argument in paragraph 55 again ignores the duty of this court under *Edmunds* to conduct an independent analysis of whether the punishment at issue here, which condemns people to die in prison notwithstanding that they did not kill or intend to kill, is cruel in violation of the state constitution, as Petitioners argue it is. *Supra* at ¶ 49.

56. Denied. Respondent's position in paragraph 56 is erroneous for all the reasons stated herein.

[6] Notably, however, the Michigan Supreme Court, the state implicated in *Harmelin*, ultimately overruled *Harmelin* on grounds that the Michigan Constitution afforded additional protections in barring cruel or unusual punishments. *People v. Bullock*, 485 N.W.2d 866, 878 (Mich. 1992). Relying on the dissent in *Harmelin* to reach its conclusion, the Michigan court further concluded "that the most appropriate remedy under the circumstances [life without parole for possession of 650 grams of cocaine] is to ameliorate the no-parole feature of the penalty." *Id.* at 878.

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,

/s/ Bret Grote
Bret D. Grote, Esq.
PA ID No. 317273
/s/ Quinn Cozzens
Quinn Cozzens, Esq.
PA ID No. 323353
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
T: (412) 654-9070
bretgrote@abolitionistlawcenter.org
qcozzens@alcenter.org

*/s/ Pardiss Kebriaei**
Pardiss Kebriaei
*/s/ Guadalupe V. Aguirre**
Guadalupe v. Aguirre
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6452
pkebriaei@ccrjustice.org
laguirre@ccrjustice.org

*Pro Hac Vice pending

/s/ Ashley Henderson
PA I.D. No. 313492
/s/ Deneekie Grant
PA I.D. No. 314220
Amistad Law Project
P.O. Box 9148
Philadelphia, PA 19139
Telephone: (215) 310-0424
ashley@amistadlaw.org
nikki@amistadlaw.org

CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Answer to Respondent's Preliminary Objections to Petition for Review 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/ Quinn Cozzens
Quinn Cozzens
PA I.D. No. 323353
Abolitionist Law Center
P.O. Box 8654
(717) 419-6583
qcozzens@alcenter.org

Dated: September 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, this Answer to Respondent's Preliminary Objections to Petition for Review was served via E-service to the following:

Caleb Curtis Enerson
Office of Attorney General
Deputy Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
cenerson@attorneygeneral.gov

Ronald M. Eisenberg
Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
reisenberg@attorneygeneral.gov

/s/ Quinn Cozzens
Quinn Cozzens
PA I.D. No. 323353
Abolitionist Law Center
P.O. Box 8654
(717) 419-6583
qcozzens@alcenter.org

Dated: September 8, 2020