IN THE SUPREME COURT OF PENNSYLVANIA

NO. 16 WAP 2021

MARIE SCOTT, NORMITA JACKSON, MARSHA SCAGGS, TYREEM RIVERS
Appellants,
v.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE
Appellee

BRIEF FOR APPELLANTS

Appeal from the Order of Dismissal entered on May 28, 2021 by the Commonwealth Court of Pennsylvania at No. 397 MD 2020

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 723(a), Pa. RAP 1101 and Article V, § 9 of the Constitution of Pennsylvania, because this is an appeal from a final order of the Commonwealth Court dismissing a petition which was originally commenced in the Commonwealth Court pursuant to its original jurisdiction and was not an appeal from another court, judge, or government unit. The Commonwealth Court sustained Appellee's preliminary objection and held that the claims raised by Appellants were not within the court's original jurisdiction.

ORDER IN QUESTION

Appellants seek reversal of the order entered by the Commonwealth Court in this matter on May 28, 2021, which states:

> AND NOW, this 28th day of May, 2021, the preliminary objection raising lack of jurisdiction filed by the Pennsylvania Board of Probation and Parole is hereby SUSTAINED, and the "Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief" is DISMISSED.
>
> _____
>
> P. KEVIN BROBSON, President Judge

A complete copy of the opinion and order issued by the Commonwealth Court is appended as Appendix A.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The standard of review for a question of subject matter jurisdiction is *de novo* and the scope of review is plenary. *Commonwealth v. Bethea*, 828 A.2d 1066, 1071 n.5 (Pa. 2003).

STATEMENT OF QUESTIONS PRESENTED

1. Did the Commonwealth Court err in finding that Appellants' challenge to Appellee's enforcement of Section 6137(a)(1) of the Parole Code was in fact a collateral attack on Appellants' sentences and must be brought under the Post-Conviction Relief Act (PCRA)?

   Suggested answer: *Yes.*

2. Did the Commonwealth Court err in determining that Appellants' challenge to the enforcement of a statute delineating the Parole Board's authority to release incarcerated people on parole is cognizable under the PCRA, which does not permit challenges to actions by the Parole Board?

   Suggested answer: *Yes.*

3. Did the Commonwealth Court err in finding that it did not possess sufficient remedial powers to provide relief for an unconstitutional application of Section 6137(a)(1) of the Parole Code?

   Suggested answer: *Yes.*

STATEMENT OF THE CASE

I. PARTIES

Appellants are four people convicted of felony-murder and serving life sentences in the Pennsylvania Department of Corrections. Each Appellant is prohibited from being considered for parole pursuant to 61 Pa.C.S. § 6137(a).

Appellant Marie Scott is incarcerated at State Correctional Institution ("SCI") Muncy. She had been incarcerated for 47 years and was 67 years old at the time of the filing of the petition in this matter. Ms. Scott was convicted of felony-murder and given a mandatory life sentence for her role in a robbery in which her co-defendant killed another person. She did not kill or intend to kill the victim. Ms. Scott was 19 years old at the time of the offense. Reproduced Record (hereafter "RR"), 6a at ¶ 2. Ms. Scott is a survivor of repeated childhood physical and sexual abuse. She began using drugs and alcohol to cope with her trauma at the age of 9. RR, 11a at ¶ 22. She was heavily under the influence of drugs when she served as the lookout to a robbery of a gas station. Her co-defendant, who was 16 years old at the time and has since been released from prison, killed the gas station attendant without her knowledge. RR, 12a at ¶¶ 23-24. During her nearly half-century of incarceration, she has completed numerous educational, rehabilitative and therapeutic programs, served as a mentor and advocate, and serves as a peer facilitator in a drug and alcohol treatment program. RR, 12a-13a at ¶¶ 27-30. Ms.

Scott feels deep remorse for the harm that her actions caused and, upon her release from prison, will strive to assist other women who struggle with similar issues as she did as an adolescent and an adult. RR, 12a at ¶26; 14a at ¶ 32.

Appellant Normita Jackson is incarcerated at SCI Cambridge Springs and had been incarcerated for 23 years and was 43 years old at the time of filing of the petition. When Ms. Jackson was 19 years old, she participated in a robbery in which her co-defendant committed a homicide. Ms. Jackson did not commit or intend the killing. She was convicted of felony-murder and sentenced to life. RR, 7a at ¶ 6. At the request of Ms. Jackson's co-defendant, she invited a man to her residence so that her co-defendant could rob him. Ms. Jackson remained on the second floor of her home while her co-defendant attempted to rob, then eventually shot and killed the victim. RR, 20a at ¶ 66. Ms. Jackson survived substantial sexual abuse as a child. *Id.* at ¶ 68. During her nearly 25 years of incarceration, Ms. Jackson has completed numerous rehabilitative programs, therapeutic programs, and educational courses. She has also served as an instructor, mentor, and medical aide for incarcerated women in need of hospice care. RR, 20a-21a at ¶¶70-72. Ms. Jackson hopes to work with young adults and children and participate in various pro-social endeavors upon her release from prison. RR, 21a at ¶ 73.

Appellant Marsha Scaggs is incarcerated at SCI Cambridge Springs. She had been incarcerated for 32 years and was 56 years old at the time of filing. Ms. Scaggs

was convicted of felony-murder for an offense that occurred when she was 23 years old and given the mandatory sentence of life. Ms. Scaggs did not kill or intend to kill the victim. RR, 7a at ¶ 5. Ms. Scaggs was present after an altercation over an attempt to buy drugs went wrong. Her co-defendant believed the victim to be a police informant and handed Ms. Scaggs a gun, ordering her to shoot the victim. When Ms. Scaggs refused, her co-defendant took the gun and shot the victim. RR, 17a at ¶ 51. Ms. Scaggs also survived physical and sexual abuse as a child and as an adolescent, then began using drugs. She had a dysfunctional and traumatic home environment where she regularly witnessed her father's physical abuse of her mother. *Id.* at ¶ 54. Over more than three decades of incarceration, Ms. Scaggs has participated in and completed many rehabilitative, educational, and therapeutic programs. RR, 17a-18a at ¶¶ 56-58. She has dedicated herself to mentoring others and community service. RR, 18a at ¶ 58-59; 61. Ms. Scaggs hopes to mentor youth and spend time with family and friends upon her release from prison. RR, 19a at ¶ 62.

Appellant Tyreem Rivers is incarcerated at SCI Dallas and had been incarcerated for 23 years and was 42 years old at the time of filing. Mr. Rivers was 18 years old when he robbed a woman of her purse. RR, 7a at ¶ 7. Mr. Rivers attempted to take the purse of an elderly woman, who fell and was subsequently hospitalized as a result of the fall. Two weeks later, she passed away after contracting pneumonia in the hospital. RR, 22a at ¶ 78. He was convicted of felony-murder and

sentenced to life. Mr. Rivers has served as a teacher's aide and peer educator during his incarceration. RR, 23a at ¶ 80. He has completed numerous educational and rehabilitative programming. *Id.* at ¶ 81-82. Mr. Rivers feels deeply remorseful for the actions that led to his conviction and the harm that he caused. Upon his release from prison, Mr. Rivers would like to continue to be an educator. RR, 24a at ¶ 84.

Appellee is the Pennsylvania Board of Parole ("the Board").[1] The Board is a state agency responsible for determining whether people serving sentences of incarceration in the Pennsylvania Department of Corrections will be granted parole. The Board enforces 61 Pa.C.S. § 6137(a), which prohibits the consideration of incarcerated people serving sentences of life for release on parole. The Board has enforced this provision against each Appellant. RR, 7a-8a at ¶ 8.

II. THE PETITION

On July 8, 2020, Appellants filed a Petition for Review in the Nature of a Complaint in the Commonwealth Court of Pennsylvania, pursuant to that court's original jurisdiction, challenging the Pennsylvania Board of Parole's enforcement of 61 Pa.C.S. § 6137(a) of the Pennsylvania parole code. Under § 6137(a), Appellants may not be considered for release on parole due to their life sentences. RR, 37a-39a at ¶¶ 133-44. Appellants allege that Appellee's enforcement of §

[1] Shortly before the petition in this matter was filed, the Board was named the "Pennsylvania Board of Probation and Parole." That name is reflected in the caption of this appeal.

6137(a) violates the Pennsylvania Constitution's cruel punishments clause under Article I § 13. *Id.*

Appellants argue that under Article I, § 13 of the Pennsylvania Constitution, which provides at least as much protection as the Eighth Amendment to the United States Constitution, failure to provide a meaningful opportunity for release from prison to people who did not take a life or intend to take a life is unconstitutional pursuant to an application of the evolving standards found in *Enmund v. Florida,* 458 U.S. 782 (1982), *Graham v. Florida,* 560 U.S. 48, 69 (2010), *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), as well as considerations unique to Pennsylvania pursuant to the factors outlined in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *See* RR, 24a – 37a.

Under the U.S. Supreme Court's Eighth Amendment jurisprudence, which provides a minimum standard for Article I, § 13 of the Pennsylvania Constitution, the death penalty may not be imposed on individuals with categorically diminished culpability: those who did not take a life or intend to take a life, those with intellectual disability, and those whose youth rendered them categorically less culpable. RR, 26a (citing *Enmund v. Florida,* 458 U.S. 782 (1982); (holding capital punishment for individuals who did not kill, attempt to kill, or intend to kill unconstitutional); *Atkins v. Virginia,* 536 U.S. 304 (2002) (holding capital punishment for individuals with an intellectual disability unconstitutional); *Roper v.*

Simmons, 543 U.S. 551 (2005) (holding that the death penalty was an unconstitutional punishment for offenses committed by children younger than 18)). In *Graham*, *Miller*, and *Montgomery*, the U.S. Supreme Court applied this line of precedent in the context of punishments that failed to provide a meaningful opportunity of release from prison. RR, 25a-26a. Appellants seek an analogous application of the longstanding jurisprudence designating those who did not take a life or intend to take a life as having categorically diminished culpability to Pennsylvania's complete prohibition on any meaningful opportunity for release from prison. RR, 39a-40a.

Even if straightforward application of this Eighth Amendment jurisprudence did not compel this result, Article I § 13 of the Pennsylvania Constitution provides even greater protections in this context. RR, 30a-37a. Under *Edmunds*, Pennsylvania courts are required to conduct a four-part inquiry to determine whether a clause in the Pennsylvania Constitution provides greater protection than its federal counterpart: (1) the text of the state constitutional provision; (2) the history of the provision; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern. RR, 30a-31a.

The balance of these factors weigh substantially in Appellants' favor. The text of Article I, § 13 prohibits "cruel punishments," which is broader in scope than the federal prohibition on "cruel and unusual punishments." RR, 31a. Pennsylvania's

cruel punishments clause was ratified a year after the Eighth Amendment, suggesting that the omission of "unusual" was intentional and serves a distinct purpose. RR, 32a. Several other states with comparable constitutional provisions have interpreted them as providing greater protection than the Eighth Amendment. *See State v. Bassett*, 482 P.3d 343 (Wash. 2018) (recognizing that prohibition on "cruel" punishments provides greater protection than Eighth Amendment); *People v. Carmony* 26 Cal. Rptr. 3d 365, 378 (2005) (referring to the distinction as "purposeful and substantive rather than merely semantic"); *Armstrong v. Harris*, 773 So.2d 7,17 (Fla. 2000) (deciding that, within its state constitutional provision, "cruel" and "unusual" were to be defined "individually and disjunctively"); *State v. Mitchell* 577 N.W.2d 481, 488 (Minn. 1998) (referring to the textual difference as "not trivial"); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (describing the textual difference as "not appear[ing] to be accidental or inadvertent"). RR, 32a-33a.

Finally, there are ample policy considerations that support interpreting Article I, § 13 as Appellants suggest. Pennsylvania is an extreme outlier both in sentencing people to die in prison and not affording any opportunity for meaningful release to people convicted of felony-murder. Commutation has become virtually non-existent, particularly in consideration of the approximately 1,100 people convicted of second degree murder in Pennsylvania. Pennsylvania sentencing law provides no discretion to judges when a person is convicted of felony-murder: a life sentence is

mandatory, and the parole code ensures that no meaningful opportunity for release is afforded. Pennsylvania prisons are confining an increasingly aging and elderly population of thousands of people who never took a life or intended to take a life and pose little to no public safety risk. RR, 33a-37a.

Appellants were each convicted of felony-murder in Pennsylvania for offenses in which they neither took a life nor intended to take a life. RR, 14a at ¶ 33; RR, 16a at ¶ 49; RR, 19a at ¶ 63; RR, 22a at ¶ 75; RR, 24a at ¶ 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, RR, 11a-24a at ¶¶ 21-85. Each has attained educational and vocational achievements, completed numerous rehabilitative programs, and participated in and led programs and initiatives in service to others. And none of the Appellants poses a safety risk if released from prison. *Id.*

In May 2020, Appellants 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 would violate the Pennsylvania and U.S. Constitution. RR, 10a-11a at ¶ 19. Appellee, the Pennsylvania Board of Parole, denied each Appellant's application, citing 61 Pa.C.S. § 6137(a)(1)'s prohibition on parole consideration for anyone serving a life sentence. RR, 11a at ¶ 20.

In their Petition in this matter, Appellants set forth numerous factual allegations demonstrating that Appellee's 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. RR, 27a at ¶ 98. Furthermore, because Appellants are each 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. RR, 28a at ¶ 99. The Petition also alleges that incapacitation cannot serve as a rationale to permanently incarcerate Appellants due to their mature or elderly ages, low risk of reoffending based on their offense, and rehabilitation since incarceration. RR, 28a-29a at ¶¶ 100-08. Retribution is likewise not served by punishing those who neither kill nor intend to kill. RR, 30a 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)).

Appellants also situate their lack of parole eligibility within a broader context in Pennsylvania. The Petition alleges that Pennsylvania is an extreme outlier in both the United States and the world in sentencing people to die in prison. RR, 8a-9a at ¶¶ 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. RR, 9a 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, as nearly 70% of those serving life sentences for felony-murder are Black, including three of the four appellants; an increasingly aging and elderly population, and serious and costly public health concerns associated with such an aging population. RR, 9a-10a at ¶¶ 15-17.

Appellants 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 to the United States Constitution's prohibition on cruel and unusual punishments. RR, 25a 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 without a meaningful opportunity for release. RR, 25a-26a at ¶¶ 88-91. The Court has long established that a category of defendants with diminished culpability under

its Eighth Amendment jurisprudence includes persons, like Appellants, who did not take a life or intend to take a life in the course of their crime. RR, 26a at ¶ 94. In determining whether the harshest punishments, such as a life sentence with no meaningful opportunity for release, can be imposed on persons with diminished culpability, the Court has routinely analyzed whether legitimate penological purposes are served by imposing these punishments. RR, 27a at ¶ 96. Taking the law together with the facts alleged in the Petition regarding the lack of penological purpose in denying parole consideration to Appellants, enforcement of 61 Pa.C.S. § 6137(a)(1) is unconstitutional under Article I § 13. RR, 30a at ¶ 111.

The Petition also argues 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 *Commonwealth 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. RR, 31a-37a at ¶¶ 114-32.

III. PROCEEDINGS IN THE COMMONWEALTH COURT

On August 7, 2020, Appellees 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. Preliminary Objections. RR, 42a-59a. On September 8, 2020, Appellants filed an Answer to Appellee's Preliminary Objections. RR, 60a-86a. On September 11, 2020, the Commonwealth Court issued a briefing schedule on Appellee's Preliminary Objections. RR, 88a. On October 13, 2020, Appellee filed its Brief in Support of Preliminary Objections. RR, 89a-107a. Appellants filed their Brief on November 12, 2020. RR. 108a-150a. Appellee filed a Reply Brief on November 30, 2020. RR, 151a-167a. Oral Argument was held on February 8, 2021. RR, 169a.

On May 28, 2021, a split three-judge panel of the Commonwealth Court issued an opinion and order sustaining Appellee's preliminary objection on jurisdictional grounds and dismissing Appellants' petition. Appendix A, 20. Judge Brobson, writing for the two-judge majority, opined that Appellants' claims challenging the enforcement of § 6137(a) of the parole code were, in fact, an attack on their sentences and therefore could not be challenged through a petition in the Commonwealth Court's original jurisdiction. Appendix A, 13. The court also found that it could not order the relief requested by Appellants because the Board would not have the authority to consider Appellants for parole until the expiration of their minimum sentences, and the Commonwealth Court does not have the authority to impose a new minimum sentence. *Id.* at 16-17.

SUMMARY OF THE ARGUMENT

Appellants filed a Petition for Review in the Nature of a Complaint against Appellee, the Pennsylvania Board of Parole in the Commonwealth Court pursuant to that court's original jurisdiction at 42 Pa.C.S. § 761(a)(1). Appellants are four people who have been incarcerated for decades, serving life sentences that were mandatorily-imposed following their convictions for felony-murder. Citing 61 Pa.C.S. § 6137(a)(1), the Board refused to consider Appellants for parole, as that provision of the statute precludes parole eligibiliy for people serving life sentences. Appellants challenge the Board's enforcement of that provision as applied to them. By virtue of the Board's enforcement of § 6137(a)(1), Appellants are denied a meaningful opportunity for release from prison. Appellants claim that this denial violates the cruel punishments clause at Article I, § 13 of the Pennsylvania Constitution for individuals, like Appellants, who did not take a life or intend to take a life.

A split three-judge panel of the Commonwealth Court sustained the Board's preliminary objection asserting that the court lacked jurisdiction. The court found that Appellants, despite their explicit representations to the contrary in the Petition and briefing, were in fact challenging their sentences under 18 Pa.C.S. § 1102(b), despite the fact that the challenged parole statute is distinct from § 1102(b) and had no role in their criminal trials. Thus, the court found that Appellants' claims were in

the nature of post-conviction relief or habeas corpus, thereby depriving the court of jurisdiction under 42 Pa.C.S. § 761(a)(1)(i).

The Commonwealth Court did not acknowledge or address over one century of jurisprudence that Appellants directed its attention toward, which unequivocally and uniformly establishes that the maximum sentence is the only "true" sentence with legal validity, thus any challenge to parole eligibility, like Appellants', that does not disturb the maximum sentence is not in fact an attack on the sentence itself. This Court reiterated that longstanding principle recently in a case with a remarkably similar procedural history in which neither the Commonwealth Court nor this Court found that the Commonwealth Court lacked jurisdiction. In *Hudson v. Pennsylvania Board of Probation and Parole*, 204 A.3d 392 (Pa. 2019), an incarcerated person serving a life sentence for felony-murder invoked the Commonwealth Court's original jurisdiction in a petition challenging 61 Pa.C.S. § 6137(a)'s prohibition on parole eligibility for people convicted of second degree murder on statutory construction grounds. Although this Court ultimately ruled against the petitioner's statutory construction argument, it again clarified that the maximum sentence is the only sentence with legal validity, and that consideration for parole does not affect the sentence. Neither the Commonwealth Court nor this Court found that the *Hudson* petition improperly invoked the Commonwealth Court's original jurisdiction. Neither court suggested that the petitioner's challenge was a veiled attempt to

collaterally attack his sentence. Yet, in disposing of Appellants' Petition challenging the exact same statute and invoking the exact same source of jurisdiction, that is precisely what the Commonwealth Court found. This was erroneous.

Furthermore, Appellants' claims are not cognizable as either habeas or post-conviction relief claims. Appellants are not challenging the legality of their sentences, nor are they seeking to compel their immediate or eventual release from custody. They are seeking the mere opportunity to be considered for parole. Pennsylvania courts have repeatedly ruled that challenges to parole are distinct from post-conviction challenges. Contrary to the Commonwealth Court's finding, that court has the power to address the constitutional violations raised by Appellants. Courts are empowered to strike down and sever statutes that violate constitutional rights, as well as fashion remedies to ensure those rights are protected. The Parole Board is itself given statutory authority to prescribe regulations for considering parole applications, and the Commonwealth Court has the authority to order a remedy to constitutional violation that involve operations of an administrative agency. Appellants' claims were properly raised in the original jurisdiction of the Commonwealth Court, and this matter should be remanded.

ARGUMENT

Appellants are four individuals serving life sentences mandatorily imposed following their convictions for felony-murder. Appellants do not challenge the

imposition or continued viability of these sentences. Instead, they are challenging the constitutionality Appellee's enforcement of a provision of the parole code against them, which prevents Appellants from ever being considered for parole by virtue of their life sentences, and virtually ensures that they will die in prison. Appellants are four of approximately 1,100 people serving life sentences in Pennsylvania for second degree murder who will never be considered for parole due to this provision of the parole code.

Marie Scott was a lookout in a robbery in which her co-defendant killed a man without her knowledge. Normita Jackson participated in planning a robbery in which her co-defendant killed a man with no warning. Marsha Scaggs was present during a drug deal gone wrong in which she refused to take a life, only to see her co-defendant carry out a killing. Tyreem Rivers attempted to steal a purse, which tragically led to a woman falling and injuring herself, then dying after contracting pneumonia in the hospital. For these offenses, they were mandatorily given life sentences. Due to their life sentences, they will never be considered for parole. Pennsylvania is an extreme outlier in the United States and the world in both how many people it prevents from seeking a meaningful opportunity to be released from prison. Despite never taking a life or intending to take a life, Appellants were condemned to die in prison. No matter what they do while in prison, Appellants will never be considered for parole. Appellants' post-incarceration rehabilitation and pro-

social commitments are substantial and compelling. No reasonable argument can be made that they pose any public safety risk, nor that their continued incarceration serves any legitimate purpose. Their accomplishments include completion of numerous rehabilitative programs, involvement in community organizations, mentoring and leadership positions, educational and vocational training, and personal growth. Appellants seek an opportunity to demonstrate to the Board that they should be released from prison and return to their communities to continue this work.

Appellants filed a Petition for Review in the Nature of a Complaint in the Commonwealth Court of Pennsylvania pursuant to that court's original jurisdiction under 42 Pa.C.S. § 761(a)(1). The Commonwealth Court has original jurisdiction of all civil actions "[a]gainst the Commonwealth government." *Id.* The jurisdictional statute provides several exceptions to this general rule, including "actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court." 42 Pa.C.S. § 761(a)(1)(i). In sustaining the Board's preliminary objection in this matter, the Commonwealth Court ruled that Appellants' claims were in the nature of habeas corpus or post-conviction relief, and thus the court did not have jurisdiction to consider Appellants' claims. Appendix A, 20.

I. THE COMMONWEALTH COURT ERRED IN FINDING THAT APPELLANTS' CONSTITUTIONAL CHALLENGE TO ENFORCEMENT OF A PROVISION OF THE PAROLE CODE WAS A CHALLENGE TO THEIR JUDICIALLY-IMPOSED SENTENCES.

The Commonwealth Court found Appellants' challenge to the Board's enforcement of 61 Pa.C.S. § 6137(a), which prohibits the Board from considering people sentenced to life imprisonment for parole, to be an "attack [on] their sentences," and therefore in the nature of post-conviction relief available at 42 Pa.C.S. § 9541 *et seq*. Appendix, 13. Judge Brobson characterized Appellants' claims as a "thinly veiled attempt to forum shop through pleading." *Id.* at 13. The Court erred in this finding. Appellants do not challenge their sentences of life imprisonment under 18 Pa.C.S. § 1102(b). As discussed below, Appellants are challenging the constitutionality and enforcement of the statutory prohibition on parole consideration for people convicted of felony-murder under 61 Pa.C.S. § 6137(a).

More than 100 years of Pennsylvania state court jurisprudence, primarily promulgated by this Court, unequivocally establishes that the maximum sentence imposed by a trial court is the "true sentence" and the only sentence with "legal validity," and that parole is merely a condition on that sentence. The relief Appellants seek in this case will thus leave their court-imposed "true sentence" of life imprisonment fully intact. This Court recently reiterated this longstanding

principle in another case involving a challenge to 61 Pa.C.S. § 6137(a). *See Hudson v. Pennsylvania Board of Probation and Parole*, 204 A.3d 392 (Pa. 2019). In *Hudson,* an incarcerated person serving a life sentence challenged the statutory prohibition on consideration for parole on statutory construction grounds. This Court reiterated the long-standing principle that "the actual sentence of a prisoner subject to total confinement is his maximum sentence." *Hudson,* 204 A.3d at 392; *see also 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"); *Commonwealth v. Sutley,* 378 A.2d 780, 786 (Pa. 1977) ("we have frequently stated that the legal sentence is the maximum sentence" and "while the minimum sentence determines parole eligibility...the maximum sets forth the period of time that the state intends to exercise its control over the offender for his errant behavior."); *Commonwealth 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"); *Commonwealth v. Kalck*, 87 A. 61, 64 (Pa. 1913) (same); *Com. ex rel. v. McKenty*, 52 Pa. Super. Ct. 332 (Pa. Super.1912) (real sentence is the maximum sentence). Here, Appellants' maximum sentence of life is the only sentence with legal validity and is the true sentence.

This jurisprudence further recognizes that release on parole is separate from and 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).

That the maximum sentence is the "real sentence" and the "only portion of the sentence which has legal validity" means that this sentence remains intact and in effect until its expiration, whether or not a person is on parole. Therefore, if Appellants prevail and the Parole Board must consider them for review, even if they are granted parole in the future their maximum sentence of life – the "real" and "only" sentence they are serving – will remain intact. Since relief would not, and could not, disturb the sentence imposed by the criminal court in their respective cases, this action could not be brought pursuant to the PCRA.

In *Sutley,* this Court endorsed the argument set forth here by Appellants. The *Sutley* Court found that a change to the parole code which does "not alter the judicial decision as to the length of time of state control over the offender [does] not alter or modify the judicial sentence[.]" *Sutley,* 378 A.2d at 786.[2] Similarly, Appellants' claims challenging Appellee's enforcement of the parole code statute prohibiting

[2] While *Sutley* dealt with a legislative enactment that required courts to resentence incarcerated people in accord with the newly reduced maximum sentence for certain offenses, its analysis of the effect of a change to the parole code is directly applicable to the instant matter.

parole *eligibility* do not alter the judicial decisions in their cases sentencing them to life: even *if* parole is granted, their sentences remain life sentences – they remain in the legal custody of the state – whether they are serving their sentences in prison or on parole. Nor would the relief they seek necessarily result in Appellants' release, since, again, Appellants' claims are challenging only their denial of *consideration* for parole. As this 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 the 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 appellants serving life sentences for felony-murder convictions, who raised statutory construction arguments. *See Hudson*, 204 A.3d 392 (considering and dismissing the appellant'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).

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 regarding parole procedures 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). Under the *Heck* doctrine, federal courts do not have jurisdiction over claims brought pursuant to 42 U.S.C. § 1983 if the relief sought would call into question the validity of a criminal conviction or sentence. Rather, "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). 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*, were permissible in a § 1983 action and did not require a habeas action, notwithstanding the *Heck* doctrine. The Sixth Circuit 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*, Appellants

seek parole eligibility, not immediate or certain release, and thus habeas or post-conviction relief is not appropriate or required.

The Commonwealth Court did not address any of this preceding state or federal authority in its opinion supporting its decision to sustain the Board's preliminary objection. The Commonwealth Court relied on this Court's decision in *Stackhouse v. Commonwealth,* 832 A.3d 1004 (Pa. 2003) in finding that Appellants' claims are in fact challenges to their criminal sentences. Appendix A, 8-11. The Commonwealth Court did not address the substance of Appellants' claims or arguments, but instead focused its analysis on the notion that Appellants engaged in forum shopping through pleading. *Id.* at 10, 13.

In *Stackhouse,* this Court considered whether a civil suit filed in the court of common pleas against the Pennsylvania State Police and state police officers fell under the Commonwealth Court's exclusive original jurisdiction. *Stackhouse,* 832 A.3d at 1005-06. At issue was whether the inclusion of one count seeking declaratory and injunctive relief brought the complaint, which also sought monetary damages for tort claims in the nature of trespass falling under the exception to the Commonwealth Court's jurisdiction at 42 Pa.C.S. § 761(a)(1)(v),[3] was sufficient to

[3] 42 Pa.C.S. § 761(a)(1)(v) excepts "actions or proceedings in the nature of trespass as to which the Commonwealth government formerly enjoyed sovereign or other immunity and actions or proceedings in the nature of assumpsit relating to such actions or proceedings in the nature of trespass.

vest the Commonwealth Court with exclusive jurisdiction. *Id.* at 1007-08. This Court held that, because the claim for declaratory or injunctive relief was premised upon the same events as the claims for monetary damages, and therefore "the core of Appellant's complaint [was] an action in trespass," the Court of Common Pleas had original jurisdiction over the complaint. *Id.* at 1008-09. The *Stackhouse* court distinguished its ruling from *Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987), which held that the Commonwealth Court had original jurisdiction over actions seeking equitable or declaratory relief for civil rights violations by state officials. *Id.* at 1008. The *Stackhouse* court reasoned that, while the plaintiffs in *Fawber* sought injunctive and declaratory relief regarding enforcement of an allegedly invalid administrative regulation, the plaintiff's claims in *Stackhouse* were "explicitly predicated upon the lack of any regulatory or other legal foundation" and were based on allegations of defamation and invasion of privacy, which are in the nature of trespass. *Id.*

The claims presented by Appellants in the matter *sub judice* are readily distinguishable from *Stackhouse* and are analogous to those presented in *Fawber*. In *Fawber*, this Court held that a civil rights action seeking only declaratory and injunctive relief was not in the nature of trespass, which pursuant to 761(a)(1)(v) the Commonwealth Court does not have jurisdiction to hear, and was therefore in the original jurisdiction of the Commonwealth Court. *Fawber*, 532 A.2d at 434. Although both *Stackhouse* and *Fawber* dealt with the exception to the

Commonwealth Court's jurisdiction under § 761(a)(1)(v) instead of § 761(a)(1)(i), both decisions make clear that the relevant inquiry is the nature of the challenged conduct by Commonwealth entities or officials, and the type of relief sought. Here, Appellants do not seek to challenge the imposition of their sentences to life imprisonment under 18 Pa.C.S. § 1102(b). They do not allege that their maximum sentence – their life sentence – is illegal. Rather, they are challenging only the validity of the statutory prohibition on consideration for parole, and the Board's enforcement of that prohibition. Appellants do not seek monetary damages, but solely seek declaratory and injunctive relief. Similar to the plaintiffs in *Fawber*, Appellants are challenging the validity and enforcement of a statute dictating the actions of a Commonwealth agency, which Appellants allege is unconstitutional. *Stackhouse* does not support the Commonwealth Court's ruling in this case, and is instead indicative of how far afield it had to stretch to dismiss a properly filed petition.

Furthermore, there is no meaningful distinction for determining whether the Commonwealth Court has original jurisdiction between the claims raised by Appellants and those raised in *Hudson* and *Castle.* Both *Hudson* and *Castle,* like Appellants, challenged the validity of § 6137(a) of the parole code and sought solely equitable relief. In neither the Commonwealth Court nor the Supreme Court did the

parties in those cases or the courts raise lack of jurisdiction as a possible issue.[4] This Court should rule in line with over a century of precedent, including similar challenges to the exact statute and type of relief at issue in this matter, and find that the Commonwealth Court has original jurisdiction over challenges to the validity of § 6137(a) of the parole code.

II. THE COMMONWEALTH COURT ERRED IN FINDING THAT APPELLANTS' CHALLENGE TO ENFORCEMENT OF A PROVISION OF THE PAROLE CODE IS COGNIZABLE UNDER THE PCRA OR HABEAS CORPUS

In ruling that Appellants' claims could not be brought under the Commonwealth Court's original jurisdiction, the lower court found that the claims were in the nature of habeas corpus or post-conviction relief. 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).

[4] As the Commonwealth Court has long recognized, it is the obligation of the court to determine its own jurisdiction whether raised by any party to the litigation, meaning that the exercise of jurisdiction in *Castle* and *Hudson* was intentional and proper. *See e.g. Lashe v. Northern York Cty. School Dist*., 417 A.2d 260, 262 (Commw. Ct.1980) (finding sua sponte that equity did not have jurisdiction where there was an adequate statutory remedy, noting that equity often has jurisdiction where a constitutional challenge is contained and that the duty of a court to determine its own jurisdiction cannot be removed by the inaction of the parties.).

The writ of habeas corpus is subsumed by the PCRA with respect to remedies offered by the PCRA. *Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998). If Appellants are indeed attacking their sentences as the Commonwealth Court found, then their challenges must be brought under the PCRA. However, the Superior Court of Pennsylvania has repeatedly held that challenges to lifetime parole preclusion are not cognizable under the PCRA. *Commonwealth 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); *Commonwealth v. Latham*, No. 3122 EDA 2016, 2019 WL 180191, at *4 (Pa. Super. Jan. 14, 2019) (same) (citing *Lewis*); *Commonwealth 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 challenges to parole preclusion are rather challenges to a condition on the true sentence, not a challenge to the true sentence itself. Similarly, here, Appellants are not challenging "the lawful maximum," which is and shall remain a life sentence, even if they are successful on their claims, but 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. Similarly, because Appellants are not seeking release

from incarceration or from a conviction, but are merely seeking an opportunity to be considered for parole, habeas is not an available remedy.

III. THE COMMONWEALTH COURT ERRED IN FINDING THAT IT DOES NOT HAV REMEDIAL POWERS TO PROVIDE RELIEF FOR CONSTITUTIONAL VIOLATIONS

The Commonwealth Court, through its original jurisdiction, has the power – and obligation – to engage in judicial review of the constitutionality of statutes. That power, firmly enmeshed within the Pennsylvania system of governance, includes the corollary power to issue a remedy when the enforcement of an unconstitutional statute violates a person's rights.[5] Further, the court has the authority to issue remedies that compel executive agencies to alter their procedures to satisfy constitutional requirements.

These avenues for relief are entrenched in our constitutional jurisprudence. However, in its opinion, the Commonwealth Court found that "direct[ing] the Board to consider Petitioners' eligibility for parole despite their unchallenged 'life' sentences, granting such relief would, in effect, equate to this Court and/or the Board imposing new minimum sentences upon Petitioners." Appendix A, 16. For the reasons already discussed in this brief, Appellants are not challenging their

[5] This Court said as much in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) ("When, however, the legislature is unable or chooses not to act, it becomes the judiciary's role…Specifically, while statutes are cloaked with the presumption of constitutionality, it is the duty of this Court as a co-equal branch of government to declare, when appropriate, certain acts unconstitutional…Further, our Court possesses broad authority to craft meaningful remedies when required.") *Id*. at 822.

maximum sentences of life; again, their challenge is to the constitutionality of § 6137(a) of the parole code – a *condition* on their sentence. The term "minimum sentence" in Pennsylvania law is a term of art that this Court has said "is merely an administrative notice," and not part of the actual sentence. *Com. ex rel. Carmelo*, 32 A.2d at 914. Accordingly, for the Parole Board to establish a number of years that must be served prior to reviewing those convicted of felony-murder for parole would not interfere with the true sentence imposed by the trial court. *See Sutley*, 378 A.2d at 786. The Commonwealth Court, in its original jurisdiction, has the power to remedy the unconstitutional application of § 6137(a)(1) and require the Parole Board to create a mechanism that enables Appellants to seek parole.

As an initial matter, the Commonwealth Court has the authority to sever § 6137(a)(1) from the constitutional portions of the Parole Code. Indeed, the Commonwealth Court in its original jurisdiction has exercised its authority to review or strike down unconstitutional portions of statutes dealing with administrative action. In those cases, this Court did not find that the Commonwealth Court lacked jurisdiction. *Pittman v. Pa. Board of Parole*, 159 A.3d 466 (Pa. 2017) (holding that Article 5, § 9 of the Pennsylvania Constitution, which grants a right of appeal from administrative agencies to courts of record, requires the Parole Board to issue a statement explaining its rationale for its decision to grant or deny credit to a person convicted while out on parole. *W. Shore Sch. Dist. v. Pa. Labor Relations Bd*., 626

A.2d 1131, 1135-36 (Pa. 1993) (holding that § 7(b) of Sunset Act section violated state constitutional provision and therefore requiring the Governor's approval in order to reestablish an agency set for termination); *Robinson Township v. Commonwealth*, 147 A.3d 536, 576 (Pa. 2016) (holding that provision of legislative act requiring Department of Environmental Protection to notify only public, not private drinking water facilities in the event of chemical spill, was an unconstitutional special law violative under Pa. Const. Art. III, § 32); *Pa. Fed'n of Teachers v. Sch. Dist. of Phila*, 484 A.2d 751, 753 (Pa. 1984) (holding Act increasing basic contribution rate for employees who were members of Public School Employee's Retirement System unconstitutional as applied to those who were PSERS members prior to the effective date of the Act as impairment of contract and ordering refund); *Pa. Envtl. Def. Found. v. Commonweatlth*, 161 A.3d 911, 937-38 (Pa. 2017) (holding that statutes allocating oil and gas royalties to general fund are facially unconstitutional). These decisions are echoed by the Statutory Construction Act and Pennsylvania public policy recognizing the judiciary's ability to sever statutes containing unconstitutional provisions. See *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205 (Pa. Commw. Ct. 2018). This power includes invalidating unconstitutional statutes and ordering remedies that involve administrative agency procedures. Indeed, Pennsylvania courts have ordered wide-

ranging and substantive remedies requiring agencies to alter their procedures to conform to constitutional standards.[6]

The remedy sought by Appellants here is straightforward. First, if the Commonwealth Court exercises its appropriate jurisdiction and addresses the merits of one or both of Appellants' constitutional claims in favor of Appellants, then the Parole Board will be precluded from enforcing 61 Pa.C.S. § 6137(a) against individuals serving life sentences who did not take a life or intend to take a life. Next, the statutory provision requiring that an incarcerated person not be considered for parole until their minimum sentence is served, 61 Pa.C.S. § 6137(a)(3), would also have to be nullified in relation to everyone serving life sentences because of an identical constitutional analysis. When constitutional rights are at issue, statutes must be stricken to safeguard those rights. *See e.g. Commonwealth v. Omar,* 981 A.2d 179 (Pa. 2009) (striking down statute as overbroad in criminalization of protected speech). In the absence of these provisions, the Parole Board is empowered to parole "all persons sentenced by any court at any time to imprisonment in a State correctional institution", including "inmates sentenced to definite or flat sentences."

[6] For example, in *League of Women Voters v. Commonwealth,* 178 A.3d 737 (Pa. 2018), an action brought on behalf of voters challenging a congressional redistricting plan, this Court held that the redistricting plan offered in the Congressional Redistricting Act of 2011 violated the state's free and equal elections clause. Recognizing its authority and obligation to create a remedy when the Legislature is unable or unwilling to do so, the Court fashioned a remedial plan that relied heavily upon the submissions from the parties and its intervenors and was based upon the record developed in the Commonwealth Court. 181 A.3d 1083 (Pa. 2018).

61 Pa.C.S. § 6132(a)(1)(i)-(ii). Moreover, under 61 Pa.C.S. § 6139(a)(4), the Board has is empowered to create procedures for considering parole applicants that can and must take effect if Appellants prevail on their Constitutional challenge. 61 Pa.C.S. § 6139(a)(4) ("Reasonable rules and regulations shall be adopted by the board for the presentation and hearing of applications for parole."). A remedial plan could also involve allowing the parties to propose rules for approval by the Court that would comply with its constitutional holding.[7]

In sum, the Commonwealth Court should exercise its remedial powers here by striking down § 6137(a) as applied to Appellants due to their categorically-diminished culpability because they did not take a life or intend to take a life; striking down the Parole Board's requirement that applicants for parole reach a minimum, as applied to individuals with that categorically-diminished culpability; and authorizing the Parole Board to utilize the statutory provision that enables individuals who are eligible for parole to have their cases reviewed. The court should also order the parties to confer and submit a joint proposed regulation to cure the

[7] In the alternative, the courts have declared portions of a statute unconstitutional, then invited the legislature to evaluate and pass potential remedial measures. Indeed, in *Chester Downs and Marina LLC v. Pa. Dept. of Revenue*, 174 A.3d 551 (Table) (Pa. 2017), this Court declined to create a new rule after severing the unconstitutional portions of the statute, and instead stayed their decision for 120 days to afford the legislature an opportunity to pass remedial measures. And in *Robinson Township v. Commonwealth*, 147 A.3d 536, 542 (Pa. 2016), this court found Sections 3218.1 of Act 13 violative of the state constitution and stayed its mandate with respect to that section for 180 days in order to give the General Assembly sufficient time to enact remedial legislation.

constitutional defect or, if the parties cannot agree, order the parties to submit separate proposals to the court for consideration, on the basis of which the court can fashion a remedy preserving the lawful aspect of the legislative scheme while curing the constitutional defect.

CONCLUSION

Wherefore, for all the foregoing reasons, Appellants respectfully request that this Court find that the Commonwealth has jurisdiction over their Petition and remand to that court for further proceedings.

Respectfully submitted,

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**Motion for admission pro hac vice forthcoming*

CERTIFICATE OF COMPLIANCE: LENGTH OF BRIEF

I hereby certify that the foregoing Reply Brief for Appellant consists of 9,163 words based on the word count function of the word processing program on which it was prepared, excluding the title page, table of contents, table of citations, and signature blocks, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

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CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Brief for Appellants 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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I hereby certify that on this 22nd day of October, 2021, this Brief for Appellants was served via E-service to the following:

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marie Scott, Normita Jackson, Marsha Scaggs, Reid Evans, Wyatt Evans, Tyreem Rivers, Petitioners	:	
v.	:	No. 397 M.D. 2020
	:	Argued: February 8, 2021
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge (P.)
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION BY
PRESIDENT JUDGE BROBSON **FILED: May 28, 2021**

Before the Court in our original jurisdiction are the preliminary objections of the Pennsylvania Board of Probation and Parole[1] (Board) to a "Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief" (Petition) filed by Marie Scott, Normita Jackson, Marsha Scaggs, Reid Evans, Wyatt Evans, and Tyreem Rivers (collectively, Petitioners). As discussed further herein, Petitioners are all serving mandatory sentences of life imprisonment without parole (LWOP) for felony murder and other crimes they committed as adults, and they seek, *inter alia*, to be considered eligible for parole. For the reasons that follow,

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[1] We note that prior to the filing of this action, the Pennsylvania Board of Probation and Parole was renamed the Pennsylvania Parole Board. *See* Sections 15, 16, and 16.1 of the Act of December 18, 2019, P.L. 776 (effective February 18, 2020); *see also* Sections 6101 and 6111(a) of the Prisons and Parole Code (Parole Code), *as amended*, 61 Pa. C.S. §§ 6101, 6111(a).

we sustain the Board's preliminary objection asserting lack of jurisdiction and dismiss the Petition.

In the Petition, Petitioners aver that they are a group of individuals who were convicted of felony murder, among other crimes. *See* 18 Pa. C.S. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principle [sic] or an accomplice in the perpetration of a felony.").[2] Marie Scott's conviction stemmed from her role as the lookout in a robbery of a gas station during which her co-defendant killed the station attendant. (Petition ¶¶ 2, 23.) Brothers Reid and Wyatt Evans were convicted after they, along with a co-defendant, robbed their victim, who died of a heart attack several hours after the incident. (*Id.* ¶¶ 3-4, 36-37.) Marsha Scaggs was convicted based upon events in which her co-defendant shot and killed a man whom they suspected was a police informant seeking to purchase drugs, after Scaggs refused to do so at her co-defendant's command. (*Id.* ¶¶ 5, 51.) Normita Jackson was convicted following her participation in a robbery in which she invited the victim to her home, where her co-defendant ultimately shot and killed the victim. (*Id.* ¶¶ 6, 66.) Finally, Tyreem Rivers was convicted after he robbed an elderly victim, who died weeks later of pneumonia she contracted in the hospital while being treated for injuries sustained when she fell during the robbery. (*Id.* ¶¶ 7, 78.)

As a result of their convictions, each Petitioner is serving a mandatory LWOP sentence, or, as Petitioners at times put it, "a mandatory death-by-incarceration sentence." (*Id.* ¶ 18.) In support of their characterization of their sentences, Petitioners point to Section 1102(b) of the Crimes Code, 18 Pa. C.S. § 1102(b),

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[2] The Petition indicates that Marie Scott's conviction occurred prior to 1974, when felony murder was classified as first degree murder in Pennsylvania. (Petition at 3 n.1 and 9 n.3.)

which provides that "a person who has been convicted of murder of the second degree . . . shall be sentenced to a term of life imprisonment," and Section 6137(a)(1) of the Parole Code, 61 Pa. C.S. § 6137(a)(1), which provides that "[t]he [B]oard may . . . release on parole any inmate to whom the power to parole is granted to the [B]oard by this chapter, except an inmate condemned to death or serving life imprisonment."[3] (*See* Petition ¶ 18.)

Petitioners' convictions were obtained decades ago, and the time each has served in incarceration ranges from 23 to 47 years. (*Id.* ¶¶ 2-7.) Their sentences notwithstanding, on May 19, 2020, Petitioners each submitted a parole application with the Board seeking parole review. (*Id.* ¶ 19.) The Board denied Petitioners' applications on the basis that Petitioners were serving life sentences and, therefore, were not eligible for parole consideration pursuant to Section 6137(a) of the Parole Code. (*Id.* ¶ 20.) Following the Board's denial of Petitioners' parole applications, Petitioners filed the Petition with this Court on July 8, 2020, raising two claims for relief under Article I, Section 13 of the Pennsylvania Constitution, Pa. Const. art. I, § 13 (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted").

In their first claim, titled "Violation of Right to Be Free from Cruel Punishments Under Article I, [Section] 13," Petitioners assert that LWOP sentences

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[3] Petitioners do not specifically cite Section 6137(a)(1) of the Parole Code in paragraph 18 or any other paragraph of the Petition. Rather, the Petition makes general references to "Section 6137" and "Section 6137(a)" throughout, including a reference to "Section 6137" in paragraph 18. It is clear, however, from Petitioners' brief to this Court that Section 6137(a)(1) is the pertinent provision herein. *See, e.g.*, Petitioners' Brief at 10 (explaining that "61 Pa. C.S. § 6137(a)(1), which prohibits individuals serving life sentences from parole eligibility, . . . is the statutory provision they challenge"). Thus, to the extent that we address Petitioners' arguments at times using general references to Section 6137 or Section 6137(a) as set forth in the Petition or as used by the parties herein, we are mindful that Petitioners specifically take issue with Section 6137(a)(1).

have been recognized as among the most severe forms of punishment; are disproportionate; fail to serve legitimate penological interests when applied to defendants who have lessened culpability because they did not kill or intend to kill as part of their crime of conviction; and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[4] (Petition ¶¶ 135-37.) Claiming that Article I, Section 13 of the Pennsylvania Constitution "provides at least as much protection as the Eighth Amendment," Petitioners further submit that "[their LWOP] sentences for felony murder convictions, where they did not kill or intend to kill as part of their crime of conviction, constitute cruel punishment in violation of Art[icle] I, Section 13." (*Id.* ¶¶ 134, 138.) Additionally, Petitioners assert that the Board violates Article I, Section 13 of the Pennsylvania Constitution by enforcing Section 6137 of the Parole Code, thereby denying them the opportunity to be considered for parole due to their life sentences and "effectuating their death-by-incarceration."[5] (*Id.* ¶¶ 133, 139.)

In their second claim, titled "Violation of Right to Be Free from Cruel Punishments Under Article I, [Section] 13— *Edmunds* Factors," Petitioners again assert that "[their] death-by-incarceration sentences for felony murder convictions, where they did not kill or intend to kill as part of their crime of conviction,

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[4] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[5] At this point, we observe that a significant portion of the 40-page Petition is rooted in the case law pertaining to the sentencing of juveniles, for whom mandatory LWOP sentences have been held unconstitutional because of, *inter alia*, their "lessened culpability." *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). We further note that, following *Miller*, the United States Supreme Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), holding that *Miller* announced a new substantive rule that applies retroactively in state collateral review proceedings. Petitioners, here, were not juveniles at the time they committed their crimes.

constitute cruel punishments in violation of Art[icle] I, [Section] 13." (*Id.* ¶ 143.) While Petitioners base their first claim on the argument that the Pennsylvania Constitution's protections are coextensive with the Eighth Amendment to the United States Constitution, Petitioners base their second claim on the assertion that "Art[icle] I, [Section] 13 provides greater protection than the Eighth Amendment" under the factors set forth in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991),[6] and in light of important policy considerations attendant to "death-by-incarceration sentences in Pennsylvania." (*Id.* ¶¶ 141-42.) As they did in their first claim, Petitioners again assert in their second claim that the Board violates Article I, Section 13 by enforcing Section 6137 of the Parole Code, thereby denying them the opportunity to be considered for parole due to their life sentences and "effectuating their death-by-incarceration." (*Id.* ¶¶ 140, 144.)

In their prayer for relief, Petitioners seek a declaration from this Court that Section 6137 of the Parole Code is "unconstitutional under the Pennsylvania Constitution as applied to individuals serving life sentences for felony murder convictions." (*Id.* ¶ 145.) Petitioners also seek an evidentiary hearing to develop a record with respect to whether application of Section 6137 to those who did not take a life or intend to take a life is unjustified. (*Id.* ¶¶ 147-48.) Petitioners further request that the Court order the Board "to develop plans for review of these cases, including the minimum number of years that must be served prior to consideration for parole, the criteria governing such parole reviews, and the procedural protections that will be in place to ensure a meaningful opportunity for release." (*Id.* ¶ 146.) Finally,

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[6] "Under *Edmunds*, the party arguing in favor of distinct or greater rights under the Pennsylvania Constitution should analyze: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case-law; (3) related case-law from other states; and (4) policy considerations unique to Pennsylvania." *Commonwealth v. Smith*, 836 A.2d 5, 15 n.10 (Pa. 2003) (quoting *Edmunds*, 586 A.2d at 895).

Petitioners request an order directing the Board to review each of Petitioners' cases for consideration of parole. (*Id.* ¶ 149.)

As noted, the Board filed preliminary objections to the Petition, asserting that the Court lacks jurisdiction over the matter and that the Board is an improper party. The Board also demurs on two bases, asserting that Petitioners' challenge is stale and their claims fail on the merits.

In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that we may draw from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). The Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* We may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and we must resolve any doubt in favor of the petitioner. *Id.* "We review preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted." *Armstrong Cnty. Mem'l Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

The Board first argues that this Court lacks jurisdiction over Petitioners' claims pursuant to Section 761(a)(1)(i) of the Judicial Code, 42 Pa. C.S. § 761(a)(1)(i), which provides that this Court does not have jurisdiction over "[a]ctions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the [C]ourt." The Board submits that Petitioners are challenging the legality of their sentences and, thus, Petitioners' claims are cognizable under the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-46. The Board further argues

that, to the extent that Petitioners purport to limit their challenge to Section 6137(a) of the Parole Code and their ineligibility for parole, Section 6137(a) makes clear that eligibility for parole is itself a function or element of a criminal sentence, as it is determined by the court at the time of sentencing. *See* 61 Pa. C.S. § 6137(a)(3) ("The power to parole granted under this section to the [B]oard may not be exercised in the [B]oard's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Board of Pardons in a sentence which has been reduced by commutation.").

The Board further asserts that Section 1102 of the Crimes Code and Section 6137 of the Parole Code are inextricably intertwined, rendering Petitioners' sentences mandatory LWOP sentences. The Board submits that Petitioners' constitutional challenges to their sentences are cognizable under the PCRA and that Petitioners are making an improper attempt at forum shopping given the manner in which our courts have addressed similar challenges in the context of cases involving both juvenile offenders and adult offenders—including the lead petitioner herein. *See Commonwealth v. Scott* (Pa. Super., No. 2246 EDA 2016, filed Dec. 20, 2017) (*Scott I*) (adopting PCRA court's decision rejecting Marie Scott's reliance on United States Supreme Court's decisions in *Miller* and *Montgomery*, regarding mandatory LWOP sentences for juveniles, to satisfy exception to PCRA time-bar, as she was 19 years old at time of murder).

Petitioners counter that the Board mischaracterizes their claim, which they essentially contend is limited to a challenge to Section 6137(a)(1) of the Parole Code and the Board's enforcement of that provision. Petitioners argue that they are not challenging Section 1102(b) of the Crimes Code or their sentences, nor are they seeking release from custody. Rather, they challenge a condition on their sentences

(*i.e.*, lifetime parole preclusion), which is effectuated by Section 6137(a)(1) and the Board's enforcement thereof, and they seek "mere parole eligibility." (Petitioners' Brief at 11.) Petitioners maintain that, viewed in this light, their claims are not cognizable under the PCRA or in a habeas corpus proceeding and, if successful, would have no impact on their underlying "life" sentences. Thus, according to Petitioners, the Petition does not constitute one in the nature of an application for habeas corpus or PCRA relief falling outside of our jurisdiction.

Preliminarily, we observe that it is undisputed that this Court is vested with original jurisdiction over "all civil actions or proceedings . . . [a]gainst the Commonwealth government." 42 Pa. C.S. § 761(a)(1). It is also undisputed that this general rule is subject to certain exceptions, including when the action or proceeding is "in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the [C]ourt." 42 Pa. C.S. § 761(a)(1)(i). The crux of the disagreement between the parties concerning jurisdiction thus centers on whether the Petition falls under the general rule or the exception.

In answering this question, we find instructive our Supreme Court's decision in *Stackhouse v. Commonwealth*, 832 A.2d 1004 (Pa. 2003) (plurality). There, the plaintiff filed a three-count complaint in the Court of Common Pleas of Dauphin County, naming the Pennsylvania State Police (PSP), State Police Commissioner, and Deputy Commissioner as defendants, and demanding a jury trial. *Id.* at 1005-06. In her complaint, the plaintiff maintained that PSP employees improperly delved into her personal affairs during an internal investigation performed in connection with her application for a job promotion. *Id.* at 1006. She further asserted that the Commissioner and Deputy Commissioner failed to ensure that the employees were

properly trained to conduct the investigation and that the Commissioner failed to take corrective action once notified of the issue. *Id.*

In Count I of her complaint, the plaintiff sought relief against PSP, as well as the Commissioner and Deputy Commissioner in their official capacities, in the form of a declaration that her privacy and reputational interests had been harmed during the investigation. *Id.* She also sought an injunction restraining those parties from using the private information obtained for any purpose or from subjecting her to a similar investigation in the future. *Id.* In Counts II and III of the complaint, the plaintiff sought monetary damages and attorneys' fees from the Commissioner for alleged constitutional deprivations undertaken outside the scope of his authority, resulting in emotional distress and injury to the plaintiff's reputation. *Id.*

On appeal, the Supreme Court was tasked with determining whether original jurisdiction over the plaintiff's claims lay in this Court or the court of common pleas. The Supreme Court first observed that this Court generally "has original jurisdiction in cases asserted against 'the Commonwealth government, including any officer thereof, acting in his official capacity.'" *Id.* at 1007 (quoting 42 Pa. C.S. § 761(a)(1)). The Supreme Court continued by explaining that the general rule was subject to particular exceptions, with the exception set forth at Section 761(a)(1)(v) of the Judicial Code being the relevant exception for purposes of that case. *See* 42 Pa. C.S. § 761(a)(1)(v) (providing that this Court lacks jurisdiction over "actions or proceedings in the nature of trespass as to which the Commonwealth government formerly enjoyed sovereign or other immunity and actions or proceedings in the nature of assumpsit relating to such actions or proceedings in the nature of trespass").

The Supreme Court continued by explaining that, in *Balshy v. Rank*, 490 A.2d 415 (Pa. 1985), it "held that all actions against the Commonwealth or its officers acting in their official capacity for money damages based upon tort liability fall outside the scope of the Commonwealth Court's original jurisdiction and are properly commenced in the courts of common pleas." *Stackhouse*, 832 A.2d at 1008. In *Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987), however, the Supreme Court subsequently held "that the original jurisdiction of the common pleas courts over actions against state officials for civil rights violations does not encompass actions seeking equitable or declaratory relief, as such actions are not in the nature of a trespass." *Stackhouse*, 832 A.2d at 1008.

Emphasizing the context of the *Fawber* decision, wherein the plaintiffs "sought a declaration that a particular administrative regulation was unconstitutional, as well as an order precluding its enforcement," the *Stackhouse* Court found the matter before it to be distinguishable:

> Here, [the plaintiff] does not seek to preclude enforcement of an allegedly invalid administrative regulation, or a judicial declaration concerning its validity. Rather, her request for judicial redress stems from a series of events specific to a single departmental inquiry, and is explicitly predicated upon the lack of any regulatory or other legal foundation for such actions. Thus, while couched in constitutional terms, [the plaintiff]'s cause of action as stated in Count I rests upon the same allegations of defamation and invasion of privacy as asserted in Counts II and III. The sum and substance of [the plaintiff's] complaint, then, is that her privacy and reputational interests were invaded when state police officials unlawfully delved into her intimate inter-personal relationships during an internal affairs investigation, and that she is entitled to compensation accordingly. In these circumstances, we do not believe the inclusion of a count for declaratory or injunctive relief premised upon the same events can properly be understood to transform the complaint from one sounding in trespass into the type of matter contemplated by *Fawber*, or by the

Legislature, as belonging within the Commonwealth Court's original jurisdiction.

Id. Significantly, the Supreme Court continued by observing:

> More generally, permitting jurisdictional questions to turn solely upon the styling of claims within a complaint would arguably permit forum shopping through pleading, *cf.* [*Mut.*] *Benefit Ins. Co. v. Haver*, . . . 725 A.2d 734, 745 ([Pa.] 1999) ("[T]o allow the manner in which the complainant frames the request for redress to control in a case . . . would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies."), and indeed, courts in this Commonwealth and elsewhere have traditionally looked to the substance rather than the form of the complaint to determine matters of jurisdiction. *See, e.g.*, *Konhaus v. Lutton*, . . . 344 A.2d 763, 765 ([Pa. Cmwlth.] 1975) (explaining that the substance rather than the form of an action must be examined to determine if, in reality, it is one against an officer of the Commonwealth acting in his official capacity and within the jurisdiction of the Commonwealth Court); *Fennell v. Guffey*, 155 Pa. 38, 40 . . . (1893) (*per curiam*) (holding that the Allegheny county court had subject matter jurisdiction because, while the complaint was "in form assumpsit," it was in substance an action of covenant upon a lease); *Johnston v. Stein*, . . . 562 N.E.2d 1365, 1366 ([Mass. App. Ct.] 1990) (indicating that the question of tribunal jurisdiction is resolved by analyzing the "core" of complaint). Therefore, we hold that, inasmuch as the core of [the plaintiff]'s complaint is an action in trespass, original jurisdiction lies in the court of common pleas notwithstanding the injunctive/declaratory label attached to Count I.

Id. at 1008-09.

With the above pronouncements in mind, we turn to the Petition. As noted, the Petition sets forth two claims for relief. Under the first claim, Petitioners assert that "[LWOP] sentences . . . constitute cruel and unusual punishment in violation of the Eighth Amendment" to the United States Constitution "when applied to defendants who did not kill or intend to kill as part of their crime of conviction and thus have lessened culpability." (Petition ¶ 137.) Petitioners further claim that "[their LWOP] sentences for felony murder convictions, where they did not kill or

intend to kill as part of their crime of conviction, constitute cruel punishment in violation of Art[icle] I, [Section] 13" of the Pennsylvania Constitution, "which provides at least as much protection as the Eighth Amendment" to the United States Constitution. (Petition ¶ 138.) Under their second claim, they likewise assert that their "death-by-incarceration sentences for felony murder convictions, where they did not kill or intend to kill as part of their crime of conviction, constitute cruel punishments in violation of Art[icle] I, [Section] 13." (*Id.* ¶ 143.) These averments squarely challenge the constitutionality of Petitioners' sentences.

We additionally observe that, prior to setting forth their two claims for relief, Petitioners dedicate a significant portion of their Petition to the factual and legal framework supporting those claims, much of which is directed to the imposition of mandatory LWOP sentences generally and their sentences in particular. For example, Petitioners aver that Pennsylvania "is an outlier both within the United States and globally in the imposition of death-by-incarceration sentences," and they claim that the population of "people serving death-by-incarceration sentences in Pennsylvania" is plagued by racial disparities and public health concerns due to aging. (Petition ¶¶ 9, 15-17.) As noted, Petitioners rely upon *Miller*, among other cases, to assert that their "sentences are demonstrably disproportionate and excessive," and even go so far as to call upon this Court to analyze the constitutionality of their sentences. (*See* Petition ¶¶ 96-97 (averring that "in analyzing the constitutionality of [Petitioners'] death-by-incarceration sentences, this Court must" assess various factors)); (*see also id.* ¶ 111 (explaining that "[Petitioners] are prepared to demonstrate at an evidentiary hearing [that their] sentences are unconstitutionally excessive in light of Eighth Amendment jurisprudence," and arguing that *Miller* and other cases "compel a prohibition on

[death-by-incarceration] sentences for felony murder under Pennsylvania's cruel punishments clause").)

Thus, to the extent Petitioners contend that they are not attacking their sentences, their argument is belied by the Petition itself. As such, their challenges are in the nature of claims seeking post-conviction relief. In this respect, Section 9542 of the PCRA, 42 Pa. C.S. § 9542, provides: "This subchapter provides for an action by which . . . persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis."

Nonetheless, in an effort to invoke our original jurisdiction, Petitioners have presented their sentencing claims in the context of a "Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief." In furtherance of this objective, Petitioners have asserted a challenge to the Board's enforcement of Section 6137 of the Parole Code in the context of each of their two claims, in addition to the averments explicitly challenging their sentences. (*See* Petition ¶¶ 133, 139-40, 144.) They have likewise included discrete assertions that the Board's enforcement of Section 6137 constitutes cruel punishment in the averments leading up to those two claims. (*See, e.g.*, *id.* ¶ 95 (asserting that Board's enforcement of Section 6137 "violates the Pennsylvania Constitution's prohibition on cruel punishments").) Additionally, Petitioners have limited their requests for redress on the face of their Petition to declaratory and injunctive relief, (*see id.* ¶¶ 145-49), including "mere parole eligibility." (Petitioners' Brief at 11).

While these circumstances at first blush appear to support Petitioners' claim that original jurisdiction lay with this Court, we agree with the Board that Petitioners have fashioned the Petition in this manner in a thinly veiled attempt to forum shop through pleading, which we will not countenance. *See Stackhouse*, 832 A.2d at 1008. In so doing, we note that this Court has already rejected a challenge remarkably similar to this one on the basis that it constituted a collateral attack on a criminal sentence. In *Hill v. Commonwealth* (Pa. Cmwlth., No. 152 M.D. 2008, filed September 26, 2008),[7] the petitioner Hill filed a complaint in our original jurisdiction, maintaining that he was serving a life sentence for second degree murder. In his complaint, he asserted a challenge to Section 1102 of the Crimes Code and "Section 21 of what is popularly called the 'Parole Act,'"[8] which preceded Section 6137 of the Parole Code and likewise prohibited parole for an inmate serving a life sentence; Hill challenged that those sections violated various provisions of the Pennsylvania Constitution. *Hill*, slip op. at 2-4. Hill requested that the Court grant him declaratory relief and enjoin the Commonwealth from enforcing Section 1102 of the Crimes Code and former Section 21 of the Parole Act. *Id.* at 6. The Commonwealth of Pennsylvania and other named respondents filed preliminary objections, demurring on the basis that the PCRA provided the only means by which Hill could attack his criminal sentence. *Id.* at 4-5.

This Court agreed that Hill was attempting to collaterally attack his sentence and parole eligibility, which fell within the purview of the PCRA. *Id.* at 6. While

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[7] Pursuant to Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a), an unreported panel decision of this Court issued after January 15, 2008, may be cited for its persuasive value, but not as binding precedent.

[8] Act of August 6, 1941, P.L. 861, *as amended*, added by the Act of August 24, 1951, P.L. 1401, *formerly* 61 P.S. § 331.21, repealed by the Act of August 11, 2009, P.L. 147.

Hill alleged that he sought "merely to challenge the constitutionality of Section 1102 of the Crimes Code and [former] Section 21 of the Parole Act" and argued "that the relief he [sought] only stem[med] from this challenge," we held:

> [I]t is clear from examining Section 1102 of the Crimes Code, which provides for a life sentence for second[]degree murder, and Section 21 of the Parole Act, which provides that a convict may not be paroled if he is serving a life sentence, that Hill is attacking his ineligibility for parole, which stems from his sentence of life imprisonment. This is a collateral attack on his sentence and is, therefore, an attack which must be brought under the PCRA and not as a complaint for declaratory judgment and injunctive relief in this Court's original jurisdiction.

Id. at 6-7.

Although decided in the context of a demurrer,[9] the analysis in *Hill* supports our conclusion that this Court lacks original jurisdiction over Petitioners' claims pursuant to Section 761(a)(1)(i) of the Judicial Code. That is, here, while Petitioners purport to limit their challenge only to the constitutionality of Section 6137 of the Parole Code and seek "mere parole eligibility," they are collaterally attacking their sentences. They may not collaterally attack their sentences by using a civil action in this Court seeking declaratory and injunctive relief. *See also Guarrasi v. Scott*, 25 A.3d 394, 402 (Pa. Cmwlth. 2011) (observing that plaintiff "may not use a civil action for declaratory judgment in our original jurisdiction to collaterally attack the legality of his criminal proceedings" and reiterating that "[t]he PCRA is the sole means by which . . . persons serving illegal sentences may obtain collateral relief") (internal quotation marks and citations omitted).

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[9] The *Hill* Court observed that it ordered Hill's complaint to be "treated as a Petition for Review addressed to this Court's original jurisdiction pursuant to 42 [Pa. C.S.] § 761 and Pa[.] R.A.P. 1502." *Hill*, slip op. at 1 n.1. The issue of jurisdiction was not raised or otherwise discussed in the opinion.

Further, even if we were to accept Petitioners' characterization of their claim as one challenging only Section 6137(a)(1) of the Parole Code as divorced from Section 1102(b) of the Crimes Code and their "life" sentences, their success on that claim would not result in the ultimate relief they seek: parole eligibility. This is because, while Section 6137(a)(1) prohibits parole eligibility for inmates "serving life imprisonment," Section 6137(a)(3) of the Parole Code further prohibits parole consideration for inmates who have not served their minimum sentences as set by the sentencing court. *See* 61 Pa. C.S. § 6137(a)(3) ("The power to parole granted under this section to the [B]oard may not be exercised in the [B]oard's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Board of Pardons in a sentence which has been reduced by commutation."). Moreover, this Court has observed that a sentence of life imprisonment imposed under Section 1102(b) of the Crimes Code is a mandatory minimum sentence. *See Castle v. Pa. Bd. of Prob. & Parole*, 554 A.2d 625, 628 (Pa. Cmwlth. 1989) (concluding that Section 1102(b)'s omission of the "words 'not less than' or 'at least' does not render [an inmate's] sentence something other than a mandatory minimum").

Thus, Petitioners' "life" sentences, which they purport not to challenge here, preclude Petitioners' eligibility for parole pursuant to Section 6137(a)(3) of the Parole Code regardless of Section 6137(a)(1)'s applicability. Further, if we were to direct the Board to consider Petitioners' eligibility for parole despite their unchallenged "life" sentences, granting such relief would, in effect, equate to this Court and/or the Board imposing new minimum sentences upon Petitioners. Neither this Court nor the Board, however, can alter Petitioners' criminal sentences; that task

is for the courts of common pleas.[10] These considerations lend additional support to our conclusion that, notwithstanding their styling of the Petition and arguments to the contrary, Petitioners are indeed challenging their sentences and seeking sentencing relief.

The above notwithstanding, the dissent views Petitioners' challenge in accordance with the limited way in which Petitioners seek to portray it (and not as a challenge to Petitioners' sentences), thereby concluding that this Court has jurisdiction over Petitioners' claims. In so doing, the dissent observes that Petitioners' claims cannot be raised in PCRA petitions in light of that statute's timeliness restrictions and the alleged recent factual developments in Petitioners' cases. While we disagree with the dissent's position on the nature of Petitioners' challenge for the reasons stated, we also note the following regarding Petitioners' eligibility for PCRA relief.

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[10] Indeed, in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) (*Batts I*), our Supreme Court first addressed the import of *Miller* in the context of a direct appeal from the imposition of a mandatory LWOP sentence upon a juvenile convicted of first degree murder prior to *Miller's* holding. The Supreme Court held that the remedy for the juvenile and those like him was resentencing where, if the sentencing court found an LWOP sentence to be inappropriate upon evaluation, the juvenile would be "subject to a mandatory maximum sentence of life imprisonment as required by Section 1102(a) [of the Crimes Code], accompanied by a minimum sentence determined by the common pleas court upon resentencing, [thereby] striking the prohibition against paroling an individual sentenced to serve life in prison in Section 6137(a)(1) [of the Parole Code] as applied to th[o]se offenders." *Commonwealth v. Batts*, 163 A.3d 410, 421 (Pa. 2017) (*Batts II*) (quoting *Batts I*, 66 A.3d at 297) (internal quotation marks and citation omitted), *abrogated on other grounds*, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). "Thus, a court may sentence affected defendants to a minimum term-of-years sentence and a maximum sentence of life in prison, exposing these defendants to parole eligibility upon the expiration of their minimum sentences." *Id.* at 451 (relying upon 61 Pa. C.S. § 6137(a)(3)). Petitioners essentially seek that same relief, though they omit a request for "resentencing" and instead ask for "mere parole eligibility" in addition to a declaration that Section 6137 is unconstitutional.

"To be timely, a PCRA petition, including a second or subsequent petition, must be filed within one year of a judgment of sentence becoming final." *Commonwealth v. Spotz*, 171 A.3d 675, 678 (Pa. 2017) (citing 42 Pa. C.S. § 9545(b)(1)). This time bar, which is jurisdictional in nature, can be overcome only if a PCRA petitioner pleads and proves that one of the three statutory timeliness exceptions applies.[11] *Id.* Notably, "[a]lthough [the] legality of [a] sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto." *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999).

One of the PCRA's timeliness exceptions is known as the "newly-discovered facts" exception; it requires that a PCRA petitioner demonstrate that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa. C.S. § 9545(b)(1)(ii). Insofar as Petitioners' claims—which we again view as claims cognizable under the PCRA—are premised upon "new" facts such as the COVID-19 pandemic, their advanced ages, or circumstances demonstrating that Petitioners' continued incarceration no longer serves its penological purpose, those facts would properly be considered in determining whether Petitioners have overcome the PCRA's

[11] Additionally, PCRA petitions invoking one of the exceptions must be filed within a certain amount of time of the relevant event that triggered the filing of the petition. *See Spotz*, 171 A.3d at 679 n.6. Section 9545(b)(2) of the PCRA previously required petitioners to file a petition raising the applicability of one of the timeliness exceptions within 60 days from the date that the claim could have been raised; that provision was amended to extend the 60-day deadline to one year. *See* 42 Pa. C.S § 9545(b)(2). While the amendment became effective on December 24, 2018, it applies only to claims arising on December 24, 2017, or thereafter. *See* Act of October 24, 2018, P.L. 894.

one-year jurisdictional time bar through satisfaction of the timeliness exception set forth in Section 9545(b)(1)(ii).[12]

As a more general matter, we are careful to note that whether a PCRA petitioner is time-barred from bringing a claim that, substantively, is cognizable under the PCRA is immaterial to whether this Court has jurisdiction over that same claim. If it were the case that this Court had jurisdiction over claims that were time-barred under the PCRA, then PCRA petitioners would always bring those claims before this Court, and we would adjudicate them, based on that reasoning. Section 761(a)(1) of the Judicial Code provides, however, that we lack jurisdiction over "actions or proceedings in the nature of applications for . . . post-conviction

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[12] Another PCRA timeliness exception is the so-called "newly-recognized constitutional right" exception; it requires a petitioner to demonstrate that "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa. C.S. § 9545(b)(1)(iii). The Superior Court, however, has repeatedly rejected attempts by PCRA petitioners, who committed crimes as adults that resulted in mandatory LWOP sentences, to avail themselves of that exception through extension of *Miller* and *Montgomery*[*v. Louisiana*]. *See, e.g.*, *Commonwealth v. Lee*, 206 A.3d 1, 11 (Pa. Super.) (*en banc*) (holding that "age is the sole factor in determining whether *Miller* applies to overcome the PCRA time-bar" and "declin[ing] to extend its categorical holding" to PCRA petitioner, who was over 18 at time she committed second degree murder but argued that she could not form requisite intent due to underdeveloped brain), *appeal denied*, 218 A.3d 851 (Pa. 2019); *Commonwealth v. Montgomery*, 181 A.3d 359, 361, 366 (Pa. Super.) (*en banc*) (holding that "the new rule of constitutional law announced in *Miller*, and held retroactive by *Montgomery*, does not apply in this case" because PCRA petitioner was 22 years old at time of offense, and further rejecting petitioner's claim as raised under Equal Protection Clause of Fourteenth Amendment as another "attempt to extend *Miller*'s holding"), *appeal denied*, 190 A.3d 1134 (Pa. 2018); *Commonwealth v. Woods*, 179 A.3d 37, 44 (Pa. Super. 2017) (explaining that "the right recognized by *Miller* and held to be retroactive in *Montgomery* does not provide [the petitioner] a basis for relief from the PCRA time-bar" because he "was over eighteen years old when he committed the murder"); *Commonwealth v. Furgess*, 149 A.3d 90, 94 (Pa. Super. 2016) ("[The p]etitioners who were older than 18 at the time they committed murder are not within the ambit of the *Miller* decision and therefore may not rely on that decision to bring themselves within the time-bar exception in Section 9545(b)(1)(iii)."). As noted by the Board and as discussed above, Marie Scott is among these PCRA petitioners. *See Scott I.*

relief," regardless of whether a court of proper jurisdiction is precluded from exercising it on timeliness grounds. To the extent that the dissent can be read to suggest otherwise, we respectfully disagree.

In sum, although styled as a "Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief" in form, it is apparent that Petitioners are launching a collateral attack on their sentences in substance. As the Petition is "in the nature of an application seeking . . . post conviction relief" and there are no matters pending in our appellate jurisdiction that are ancillary to the Petition, this Court lacks jurisdiction over the Petition pursuant to Section 761(a)(1) of the Judicial Code.[13] Thus, we sustain the Board's preliminary objection raising lack of jurisdiction and dismiss the Petition.[14]

P. KEVIN BROBSON, President Judge

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[13] Insofar as Petitioners are unable to obtain PCRA relief, we note that they are also free to seek relief via other avenues, such as through the state's commutation system or legislative amendment.

[14] Section 5103(a) of the Judicial Code, 42 Pa. C.S. § 5103(a), provides that this Court shall not dismiss an erroneously filed matter for lack of jurisdiction, but shall transfer the case to the proper tribunal. Original jurisdiction over the Petition would lie in the court(s) of common pleas. *See* 42 Pa. C.S. § 9545(a) ("Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas."); Pa. R. Crim. P. 901(B) ("A proceeding for post-conviction collateral relief shall be initiated by filing a petition and 3 copies with the clerk of the court in which the defendant was convicted and sentenced."). Notwithstanding, in view of the true nature of Petitioners' challenge, we further agree with the Board that it is not a proper party to the action. Rather, it is the Commonwealth that participates in post-conviction proceedings. *See* Pa. R. Crim. P. 902(A) ("A petition for post-conviction collateral relief shall bear the caption, number, and court term of the case or cases in which relief is requested . . . ."); Pa. R. Crim. P. 903(A)-(B) (explaining that, upon receipt of PCRA petition, clerk of courts shall "make a docket entry, at the same term and number as the underlying conviction and sentence . . . and . . . place the petition in the criminal case file," then "transmit a copy of the petition to the attorney for the Commonwealth"); Pa. R. Crim. P. 906(A) (providing generally that attorney for Commonwealth may elect to file answer or must do so if ordered by court). As the Board is the only named respondent, dismissal is appropriate.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marie Scott, Normita Jackson, Marsha Scaggs, Reid Evans, Wyatt Evans, Tyreem Rivers, Petitioners	:	
v.	:	No. 397 M.D. 2020
Pennsylvania Board of Probation and Parole, Respondent	:	

ORDER

AND NOW, this 28th day of May, 2021, the preliminary objection raising lack of jurisdiction filed by the Pennsylvania Board of Probation and Parole is hereby SUSTAINED, and the "Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief" is DISMISSED.

P. KEVIN BROBSON, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marie Scott, Normita Jackson, Marsha Scaggs, Reid Evans, Wyatt Evans, Tyreem Rivers, Petitioners	:	
v.	:	No. 397 M.D. 2020
	:	ARGUED: February 8, 2021
Pennsylvania Board of Probation and Parole, Respondent	:	

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge (P)
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

DISSENTING OPINION
BY SENIOR JUDGE LEADBETTER **FILED: May 28, 2021**

Respectfully, I dissent. I do not read the Complaint in this case as an attack on Petitioners' convictions or sentences, but rather as what it purports to be: a facial and as applied Eighth Amendment challenge to the provisions of the Prisons and Parole Code,[1] which require Petitioners' continued incarceration long after it has ceased to serve its original penological purpose and, in light of the COVID-19 pandemic and their advanced ages, puts their lives at risk. These claims plainly cannot be raised in petitions filed pursuant to the Post Conviction Relief Act[2] because such petitions have been time-barred for many years and when they were timely, the pled circumstances which now give rise to potential Eighth Amendment claims did not exist. I cannot express any opinion as to whether Petitioners can prevail on these claims, only that we have jurisdiction to address them and should

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[1] 61 Pa.C.S. §§ 101-6309.

[2] 42 Pa.C.S. §§ 9541-46.

await the development of a factual record and full legal briefing. Accordingly, I would overrule the preliminary objections.

B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita