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Ending Life-Without-Parole for Felony-Murder, Amending the Parole Code, and *Sutley*

Subject: Ending life-without-parole for second-degree murder via amending the parole code
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This brief memo addresses the legal viability of ending life-without-parole (LWOP) sentences for those convicted of second-degree murder in Pennsylvania through amendment of the parole code. Such an amendment is legally permissible, capable of retroactive application to convictions that are final, ensures equity and judicial economy, and is free of the uncertainty and financial and emotional burdens – which will be immense – that will accompany more than 1,000 PCRA proceedings in this context. Specifically, this memo addresses how *Sutley* is viewed by a majority of today's Pennsylvania Supreme Court, which reinforces what is already apparent from a reading of *Sutley*: the legislature may amend the parole code without traducing upon judicial authority. *See Com. v. Sutley*, 474 Pa. 256 (1977) ("those portions of the statute which did not alter the judicial decision as to the length of time of state control over the offender did not impinge upon the traditional judicial sentencing power and thus did not alter or modify the judicial sentence which had become final.").

The *Sutley* decision was discussed briefly by the PA Supreme Court in a recent case that Amistad Law Project and Abolitionist Law Center litigated – *Scott v. PA Board of Parole,* which was decided in October of 2022. The only issue in that appeal was whether our clients could challenge the constitutionality of their LWOP sentences for second degree murder in a civil lawsuit, or if they had to challenge them through the PCRA. A majority of the court ruled that they did not have jurisdiction to consider the merits of our challenge in a civil lawsuit. Justice Wecht dissented and would have ruled that the Court had jurisdiction. Wecht wrote a dissenting opinion where he raised the question of future legislative efforts to reform LWOP sentencing. The majority opinion responded to Wecht in footnote 15, writing:

> Nothing we say today addresses the General Assembly's "ability to expand parole eligibility to lifers with a simple change to the Parole Code." *Id* . at 206. We acknowledge that in *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977), this Court addressed a statute permitting offenders who were convicted under a harsher statute the right to be resentenced under a more lenient amended statute. The *Sutley* Court held that the statute was unconstitutional by violating the separation of powers. Again, these issues go far beyond the limited issue presented here and we thus briefly note only that the *Sutley* decision has been criticized for its focus on the judiciary's authority. *See Villani v. Seibert*, 639 Pa. 58, 159 A.3d 478, 487 n.6 (2017) ("We note that several Justices, as well as other judges and commentators, have expressed substantial discomfort with decisions, such as *Sutley*, which have evaluated legislative social policy judgements having broadscale, substantive impacts mainly in terms of a concern for

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> judicial power."). Moreover, the *Sutley* decision was largely concerned with the fact the judge had previously exercised judicial discretion. 378 A.2d at 786 ("The judicial discretion is the determination of the period of control over the person of the offender in view of the nature of the crime, the background of the defendant and the other pertinent considerations for such a decision."). Those concerns have no applicability where the General Assembly had completely removed that discretion in the first place by enacting a statutory scheme resulting in a mandatory minimum of life imprisonment without parole. In sum, whatever the merits of these points and distinctions, this case does not involve legislative reforms to LWOP sentences.

This analysis shows that the majority in *Scott* recognize that *Sutley* does *not* prevent the legislature from amending the parole code and providing parole eligibility to people sentenced for second degree murder. Furthermore, the majority suggests that in the event a party would attempt to challenge legislative reform to the parole code pursuant to *Sutley*, they are prepared to consider that *Sutley* itself was wrongly decided.

The majority opinion in *Scott* was authored by Justice Donohue and joined in full by Justices Todd and Dougherty. Justice Mundy wrote a concurring opinion in which she disagreed with some parts of the majority's reasoning, but did not mention its discussion of legislative reform, implying that she found no fault with footnote 15. Justice Wecht would have ruled in our favor from the outset and is extremely likely to agree that *Sutley* does not prevent legislative amendment of the parole code. Justice Brobson did not participate in the decision at all because he was one of the judges in the Commonwealth Court for our case. In sum, at least five of the six current justices are very likely to find that *Sutley* does not pose a barrier to the legislature providing parole eligibility for lifers. As the majority opinion in *Scott* noted, the *Sutley* court was concerned with the legislature effectively overturning decisions made by judges in sentencing decisions. There is no concern that that will happen here – the legislature mandated that people convicted of second degree murder be sentenced to life imprisonment and that the parole board cannot consider anyone serving a life sentence for parole. The legislature would only be changing its own previous mandates, not those decided by a judge, which is fully within its power to do.

All advocates working on this issue in Pennsylvania agree that the best outcome is ending LWOP for people convicted of second degree murder, and doing so in a way that will withstand any potential legal challenge. The best vehicle to do that is amending the parole code to allow the parole board to consider and release on parole people serving life sentences for second-degree murder convictions. It will provide uniform and universal eligibility for release and enable more people to be released sooner and more efficiently.

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Providing the possibility of discretionary resentencing through the PCRA will be burdensome, slow-moving, and lead to disparate results as more than 1,000 cases progress across 68 counties. With such a large number of cases spread across so many jurisdictions, it is inevitable that some judges will deny re-sentencing, leaving LWOP in place, or impose a minimum in excess of 25 years. These outcomes will ensure protracted litigation, but it will be litigation on remarkably unfavorable terrain where the sentence will be assessed under an abuse of discretion standard that is highly deferential to judicial determinations.[1]

PCRA proceedings as contemplated in the proposed draft legislation will obligate defense counsel to engage in the resource-intensive mitigation investigations that were involved in resentencing proceedings pursuant to *Miller v. Alabama.* District Attorney Offices will likewise have to expend considerable resources and many will assess each case through the lens of political risk and liability that attends homicide cases. The impact on victims' family and loved ones has the potential to be extraordinarily re-traumatizing in such extensive proceedings that may proceed like full-blown sentencing trials akin to those seen in the capital punishment context.

The best case scenario in the event the proposed draft legislation passes is that some people will be made eligible for parole through a discretionary judicial resentencing while courts of common pleas, district attorney offices, and defense lawyers in 68 counties, along with higher appellate courts, will be mired in resource-intensive and highly uncertain litigation of an indefinite nature, especially in light of the fact that every year more and more people will become eligible for applying for re-sentencing due to having reached their 25-year point of incarceration, which is a statutory prerequisite to filing the type of PCRA contemplated in the draft legislation.

None of this necessary, as the objective of ensuring parole eligibility *for everyone* convicted of second-degree murder can be achieved by simply amending that parole code. While it is possible that such a reform could be challenged in court, that is the case with any legislation that may pass in this context. We should seek to pass legislation that will provide the optimal chances for providing parole eligibility for everybody convicted of this offense and defeating any possible challenges. Given the dramatic shift in the political terrain on this issue and the Pennsylvania Supreme Court's explicit recognition that *Sutley* does not impede the legislature's ability to pursue reform through the parole code on this issue, the moment is ripe for amending the parole code in order to end LWOP for felony-murder.

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[1] While state constitutional challenges under the cruel punishments clause or equal protection mandate will allow arguments that anything in excess of the 25-year-minimum that applies prospectively in the proposed legislation is unconstitutional, there is no precedent for applying those constitutional protections in a comparable criminal sentencing context.

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