

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 578 M.D. 2019

**LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA
and LORRAINE HAW,
Petitioners**

v.

**KATHY BOOCKVAR, THE ACTING SECRETARY
OF THE COMMONWEALTH,
Respondent**

**BRIEF FOR AMICUS CURIAE, THE
PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION,
IN SUPPORT OF THE APPLICATION FOR SUMMARY RELIEF FILED BY KATHY
BOOCKVAR, SECRETARY OF THE COMMONWEALTH.**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of constitutional questions in criminal matters is of special interest to district attorneys throughout Pennsylvania. Moreover, as the chief law enforcement officers for their respective counties, each district attorney is responsible for both prosecution of all crimes arising therein, as well as the care of all victims of those criminal offences.

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

SUMMARY OF THE ARGUMENT

When reviewing a challenge to a constitutional amendment on the ground that it violates Article XI, Section I, of the Pennsylvania Constitution's "single-subject" requirement, this Court must apply the "subject matter test", specifically, (1) whether the subject matter is sufficiently interrelated so as to justify inclusion in a single question, and (2) whether the proposed amendment does not facially affect other parts of the Constitution.

Without question, the proposed Amendment, which affords rights to victims of crimes, satisfies the first prong. As for the second prong, the Supreme Court in *Grimaud, infra*, has held that simply because an amendment may possibly impact other provisions of the Constitution does not mean it violates the separate vote requirement, but rather, whether the amendments facially affect other parts of the Constitution. Contrary to petitioners' assertions, the proposed Amendment will not substantially affect any right currently held by the criminally accused, and therefore, the proposed Amendment does not violate the single-subject requirement, of Article XI, Section I.

ARGUMENT

- I. THE PROPOSED AMENDMENT IS CONCERNED WITH PROVIDING RIGHTS TO THE VICTIMS OF CRIMES IN PENNSYLVANIA, IS SUFFICIENTLY INTERRELATED AND DOES NOT FACIALLY AFFECT OTHER CONSTITUTIONAL RIGHTS, AND THEREFORE, DOES SATISFY THE SINGLE-SUBJECT REQUIREMENT, OF ARTICLE XI, SECTION I.

In support of the Court's ruling that the proposed Constitutional Amendment impacts the single-subject requirement of Article XI, Section I, of the Pennsylvania Constitution, the Court relied extensively upon the testimony of Ronald L. Greenblatt, Esq., regarding the effect the proposed amendment would have on the constitutional rights of individuals accused of committing crimes. Specifically, the Court found that the proposed Amendment appeared "to contain multiple changes to the Constitution because it provides a whole series of new and mutually independent rights to victims of crimes" and "may amend multiple existing constitutional articles and sections across multiple subject matters"; specifically, "it proposes changes to multiple enumerated constitutional rights of the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to a speedy trial, the right to confront witnesses, the right to pretrial release, the right to post-conviction relief, and

the right to appeal--as well as changes to the public's right of access to court proceedings." Slip Op at p. 29. Your *Amicus*, the Pennsylvania District Attorneys Association, respectfully submits that the testimony, and conclusions based thereon, are without support in fact or law, and that the petitioners cannot sustain their burden that the proposed amendment facially affects other parts of the Constitution, and therefore, violates Article XI, Section I's single-subject requirement.¹

In *Grimaud v. Commonwealth of Pennsylvania*, 581 Pa. 398, 865 A.2d 835, 841 (2005), our Supreme Court reviewed a challenge to a constitutional amendment where the challengers alleged that the amendment violated Article XI, Section I, of the Pennsylvania Constitution, on the ground that it violated the "single-subject" requirement. In upholding the Amendment, the Court adopted the "subject matter test", specifically, (1) whether the subject matter is sufficiently interrelated so as to justify inclusion in a single question, and (2) whether the proposed amendment does not

¹ Your *Amicus*, the Pennsylvania District Attorneys Association, adopts and supports in full the arguments set forth by Respondent in its brief, as well as those set forth by Interveners Shameekan Moore, Martin Vickless, Kristin June Irwin and Kelly Williams, and therefore, will limit the focus of this brief to this limited issue, mindful of the obligations of an *amicus curiae* to assist the Court in resolving disputes of significant importance, as stated in the Note to Pa.R.A.P. 531.

facially affect other parts of the Constitution. In analyzing the latter prong of this analysis, the Court cited to this Honorable Court's opinion in the case approvingly,

“because an amendment “may possibly impact other provisions” does not mean it violates the separate vote requirement. *Grimaud*, [806 A.2d 923] at 930. The test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments facially affect other parts of the Constitution. Indeed, it is hard to imagine an amendment that would not have some arguable effect on another provision; clearly the framers knew amendments would occur and provided a means for that to happen. The question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect.

Grimaud, supra, at 409, 865 A.2d at 842. While it is certainly true that the proposed Amendment does touch on certain other constitutional rights afforded to the criminally accused under the Pennsylvania Constitution, it does not change or injure them in any way as alleged by Mr. Greenblatt in his testimony and accepted by the Court.

The proposed language for an amendment to the Constitution is as follows:

§ 9. 1 . Rights of victims of crime.

(a) To secure for victims justice and due process

throughout the criminal and juvenile justice systems, *a victim shall have the following rights*, as defined by the General Assembly, *which shall be protected in a manner no less vigorous than the rights afforded to the accused*: [1] to be treated with fairness and respect for the victim's safety, dignity and privacy; to reasonable and timely notice of and to be present at all proceedings involving the criminal or delinquent conduct; [2] to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused; [3] to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct; [4] to be notified of any pretrial disposition of the case; [5] with the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon; [6] to be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender; [7] to reasonable protection from the accused or any person acting on behalf of the accused; [8] to reasonable notice of any release or escape of the accused; [9] to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused; [10] full and timely restitution from the person or entity convicted for the unlawful conduct; [11] full and timely restitution as determined by the court in a juvenile delinquency proceeding; [12] to the prompt return of property when no longer needed as evidence; [13] to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings; [14] to confer with the attorney for the government; [15] and to be informed of all rights enumerated in this section.

(b) The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. This section does not grant the victim party status or create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court.

(c) As used in this section and as further defined by the General Assembly, the term "victim" includes any person against whom the criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

Pa. S.B. No. 1011 of 2018 (bracketed numbers supplied for ease of analysis) (emphasis supplied). Of significant importance is the highlighted text, that the rights to be afforded victims will be “protected in a manner no less vigorous than the rights afforded to the accused”, not more than. It must be recognized that when in conflict, all constitutional rights may at some point have to yield to some other right or policy, and courts have articulated rules and standards by which rights are respected or be found subordinate to

some other right or public need.² None are absolute; rather, the Constitution demands that before the right be infringed or curtailed, there must be due process of law. While the Pennsylvania Constitution does not use the phrase due process, the courts of this Commonwealth have long recognized that the meaning behind the phrase is present by the Constitution's use of the phrase "law of the land". See *Commonwealth v. Chilcote*, 396 Pa. Super. 106, 117, 578 A.2d 429, 434 (1990) citing *Commonwealth v. Heck*, 341 Pa. Super. 183, 491 A.2d 212 (1985), affirmed 517 Pa. 192, 535 A.2d 575 (1987) (citation omitted). (These provisions guarantee that a person is not to be deprived of life, liberty, or property without due process of law (14th Amendment) or unless by the law of the land (art. I, § 9). The terms "law of the land" and

² For example, the First Amendment's prohibition on establishing a state religion does not prohibit tax exempt status for church property, *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), does not force localities to open their town board meetings with non-sectarian prayer, *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014), and does not prevent government tuition aid from potentially being used in private religious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The First Amendment's free exercise clause does not extend to religious objections to a particular war. *Gillette v. U.S.*, 401 U.S. 437 (1971). The First Amendment's protection of free speech does not extend to speech urging the overthrow of the government by unlawful means. *Gitlow v. People of State of New York*, 268 U.S. 652 (1925). The Freedom of the Press does not extend to libel or intentional defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Second Amendment does not confer an unlimited right to bear arms. *D.C. v. Heller*, 554 U.S. 570 (2008).

“due process of law” are legal equivalents). Accordingly, and contrary to the testimony of Mr. Greenblatt, no right afforded to victims will automatically supersede those rights held by the criminal accused.

First, Mr. Greenblatt’s testimony and conclusion that the proposed Amendment would violate an accused right to confrontation and compulsory process under Article 1, Section 9, is blatantly wrong. As Mr. Greenblatt admitted, no criminal defendant can currently compel a victim or witness to give the defense an interview or submit to a deposition. (HT of 10/23/19 at pp. 25, 73). Moreover, the Rules of Criminal Procedure provide a mechanism for the accused to compel the production of evidence. Pa.R.Crim.P. 573(A). provides, in relevant part:

(A) Informal. Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion to the court. Such motion shall be made within 14 days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.

Pa.R.Crim.P. 573(A). Clearly, an accused has available to him the ability to seek the assistance of the court to obtain any records or physical evidence that he may want. See *Commonwealth v. Mejia-Arias*, 734 A.2d 870 (Pa.Super. 1999) (Defendant's rights of confrontation and compulsory process attached pre-trial and, therefore, he was entitled to subpoena personnel files of arresting officers in effort to prepare his defense).

His further suggestion that the victim could refuse to cooperate despite a court's order to disclose borders on the absurd. (See HT at 67). No party may refuse to honor a court order. Everyone understands that they have a right of privacy in their homes and offices, yet everyone also knows that they must surrender their privacy when a warrant or a subpoena is executed. A subpoenaed witness who refuses to testify when ordered to do so may be dealt with either by criminal contempt, civil contempt or both. *In re Martorano*, 464 Pa. 66, 76–77, 346 A.2d 22, 27–28 (1975); and see also *Commonwealth v. Hawkins*, 322 Pa.Super. 199, 469 A.2d 252 (1983) (A witness who refuses to comply with a subpoena *duces tecum* may be dealt with by criminal contempt, civil contempt or both.) Simply because a victim has the right to refuse to cooperate with a criminal defendant or his counsel informally does not mean that she could refuse to obey a court order any

more than a criminal defendant could. See *Commonwealth v. Palchanes*, ___ A.3d. ___, 2019 PA Super 351 (Nov. 27, 2019) (Defendant could be charged and convicted for obstructing administration of law or other governmental function where he was being investigated for driving under the influence of alcohol and refused to comply with officer's valid search warrant to obtain blood draw and would not allow blood draw to take place). Of course, before a criminal defendant could compel a victim to produce evidence, he would be required to demonstrate its relevance. See *Commonwealth v. Stantz*, 353 Pa. Super. 95, 101, 509 A.2d 351, 354 (1986) (“Appellant's argument that the inability to interview Tammy before trial restricted cross-examination to the subjects set forth in her statement is specious: cross-examination of an adverse witness is limited to matters brought out on direct examination.” citing *Commonwealth v. Lore*, 338 Pa.Super. 42, 57, 487 A.2d 841, 849 (1984); and *Commonwealth v. Rhem*, 283 Pa.Super. 565, 575, 424 A.2d 1345, 1350 (1980) (“An abuse of discretion will not be found if the defendant's right to full and effective cross-examination is not abridged, even if the defense is not permitted to cross-examine in the manner it desires.”). Accordingly, the proposed Amendment would not substantively change existing practice.

Similarly without support was Mr. Greenblatt's claim that prosecutors could object to a defense attorney's vigorous cross-examination of a victim because it fails to show respect for the victim's safety, dignity and respect. (HT at 37-38). When witnesses take the stand they are required to answer all proper questions as ruled by the court. A criminal defendant may have a Fifth Amendment and an Article I, Section 8, right not to testify, but once he takes the stand he waives the right to complain that he should be subjected to cross-examination. See *In re M.W.*, 972 A.2d 1213, 1216 (Pa.Super. 2009)("although a defendant in a criminal proceeding may refuse to take the witness stand based upon the constitutional privilege against self-incrimination, a criminal defendant who takes the witness stand waives this privilege for purposes of cross-examination." citing *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).). Again, the proposed Amendment states that a victim's rights should be protected no less vigorously than those of the accused, not more.

As for the claim that the criminal justice system would be turned on its head due to the notice requirement to victims, it should be noted that the Crime Victims Act. 18 P.S. § 11.101, *et seq*, currently requires notice to victims of crimes at all stages of proceedings just as the proposed Amendment does, and places an obligation on the victim to provide a valid

address and telephone number to all law enforcement agencies responsible for notification to the victim, and be responsible for updating that information upon change of status. 18 P.S. § 11.211. It strains credulity to suggest that every guilty plea, every post-conviction hearing, every parole hearing will be frustrated and lacking finality because it could never be known that notice was properly provided to all interested victims. On the contrary, from the time the case originates, law enforcement is in constant contact with the victims and their families and it is reasonable to conclude that victims and law enforcement officials will comply with their statutorily-imposed obligations. Notably, Mr. Greenblatt acknowledged on cross-examination that this procedure is currently in place. (See HT at pp 55-56).

Accordingly, contrary to petitioners' assertions, the proposed Amendment will not substantially affect any right currently held by the criminally accused, and therefore, the proposed Amendment does not violate the single-subject requirement, of Article XI, Section I.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, *amicus curiae*, respectfully requests that the grant Respondent Secretary Boockvar's Application for Summary Relief, and rule that the Amendment is constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Pa.R.A.P. 531(b) that this amicus brief does not exceed the 7,000 word count.

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