IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW	:	No. 4 MAP 2021
v.	:	
VERONICA DEGRAFFENREID, THE ACTING SECRETARY OF THE COMMONWEALTH	:	
APPEAL OF: SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE IRWIN AND KELLY WILLIAMS	:	

BRIEF OF APPELLANTS SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE IRWIN AND KELLY WILLIAMS

Direct Appeal from the Order of the Commonwealth Court,
entered January 7, 2021, at No. 578 M.D. 2019

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I. STATEMENT OF JURISDICTION

Jurisdiction over this appeal lies in this Court pursuant to: (i) Pa.R.A.P. 1101(a)(1) because this matter was originally commenced in the Commonwealth Court; (ii) Pa.R.A.P. 341(b)(1) because the Commonwealth Court's Order Announcing the Judgment of the Court was a final order; (iii) 42 Pa.C.S. § 723(a) because this Court has exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court; and (iv) Article V, § 9 of the Pennsylvania Constitution because there shall be a right of appeal in all cases from a court of record to an appellate court.

II. ORDER OR OTHER DETERMINATION IN QUESTION

The text of the Order Announcing the Judgment of the Court in question states:

> AND NOW, this 7th day of January, 2021, the application for summary relief filed by Petitioners, League of Women Voters of Pennsylvania and Lorraine Haw, is GRANTED IN PART and DENIED IN PART as follows:
>
> 1. The Court hereby declares that the proposed amendment to Article I of the Pennsylvania Constitution, as set forth in Joint Resolution No. 2019-1 (Proposed Amendment), violates Article XI, Section 1 of the Pennsylvania Constitution and, therefore, is unconstitutional.
>
> 2. The Court further declares that all votes cast on the Proposed Amendment in the November 2019 general election are invalid.

3. The Secretary of the Commonwealth is ordered not to tabulate or certify any votes cast on the Proposed Amendment in the November 2019 general election.

4. All other requests for declaratory relief are denied as moot

Cmwlth. Ct. ord., 1/7/21 (Appendix A hereto).

III. STATEMENT OF BOTH THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

This appeal involves issues of constitutional interpretation relating to a proposed constitutional amendment, which are pure questions of law and the responsibility of this Court. Accordingly, this Court's standard of review is *de novo* and its scope of review is plenary. *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005); *Pennsylvania Prison Soc'y v. Commonwealth*, 776 A.2d 971, 977 and 977 n. 1 (Pa. 2001).

IV. STATEMENT OF THE QUESTIONS INVOLVED

The questions presented for review are:

A. Whether the Commonwealth Court erred as a matter of law in declaring that the Proposed Amendment to Article I of the Pennsylvania Constitution, as set forth in Joint Resolution No. 2019-1, violated Article XI, Section 1 of the Pennsylvania Constitution, because the Proposed Amendment was contained in only one ballot question?

Decision Below: The Proposed Amendment violated Article XI, § 1 of the Pennsylvania Constitution because the Proposed Amendment was contained in only one ballot question. (Appendix A at ¶ 1)

B. Whether the Proposed Amendment to Article I of the Pennsylvania Constitution, as set forth in Joint Resolution No. 2019-1, violated Article XI, Section 1 of the Pennsylvania Constitution, because the

entire text of the Proposed Amendment did not appear verbatim in the one ballot question?

Decision Below: Given the decision on the first question, this issue was "denied as moot." (Appendix A at ¶ 4)

C. Whether the Proposed Amendment to Article I of the Pennsylvania Constitution, as set forth in Joint Resolution No. 2019-1, failed to fairly, accurately and clearly apprise the electorate of the question to be voted upon?

Decision Below: Given the decision on the first question, this issue was "denied as moot." (Appendix A at ¶ 4)

V. STATEMENT OF THE CASE

A. The Procedural History

On October 10, 2019, Petitioners, League of Women Voters of Pennsylvania and Lorraine Haw, filed an Original Jurisdiction Petition for Review in the Commonwealth Court, naming as Respondent Kathy Boockvar, the Acting Secretary of the Commonwealth, and seeking a declaratory judgment and permanent injunctive relief based on allegations that: (1) the constitutional amendment, known as Joint Resolution 2019-1, proposing a new Article 1, § 9.1, creating a crime victims' bill of rights (the "Proposed Amendment"), violated the separate vote requirement of Pa. Const., Article XI, § 1 (Count I); (2) the text of the Ballot Question prepared by the Secretary, to be posed to the electorate for a vote on the Proposed Amendment, violated Pa. Const., Article XI, § 1 because the Ballot Question did not contain the entire verbatim text of the Proposed Amendment (Count II); and (3) the Ballot Question violated the electorate's right to be fully informed

on the Proposed Amendment because the Ballot Question did not fairly, accurately and clearly apprise the electorate of the question to be voted upon (Count III). (R. 31a-65a). Petitioners also filed an Application for a Preliminary Injunction, seeking to enjoin Respondent from submitting the Ballot Question on the Proposed Amendment to Pennsylvania voters in the November 2019 General Election. By per curiam Order entered October 22, 2019, the Commonwealth Court granted the intervention applications of Respondent Party Intervenors, Shameekah Moore, Martin Vickless, Kristin June Irwin and Kelly Williams (hereinafter "Appellants"), and also of Ronald L. Greenblatt, Esq. (R. 157a-58a.)

At the preliminary injunction hearing held before the Honorable Ellen Ceisler on October 23, 2019 (R. 159a-301a), Petitioners withdrew their request that Respondent be enjoined from submitting the Ballot Question on the Proposed Amendment to the electorate in the November 2019 General Election, and sought as alternate relief that Respondent be enjoined from certifying the votes on the Proposed Amendment pending disposition of the Petition for Review on the merits.

By Memorandum Opinion and Order entered October 30, 2019, the Commonwealth Court, per Judge Ceisler, granted Petitioners' request for preliminary injunctive relief and preliminarily enjoined the Secretary from tabulating and certifying the electorate's vote on the Ballot Question on the Proposed Amendment. (R. 306a-44a.) By *per curiam* Order entered November 4, 2019, at

Nos. 83 MAP 2019 and 84 MAP 2019, the Supreme Court affirmed the October 30, 2019 Order of the Commonwealth Court, stating: "Neither this Order, nor the Order of the Commonwealth Court, deprives any voter of the right to cast a ballot on the proposed 'Victim's Rights' amendment at issue in this litigation at the upcoming November 5, 2019 General Election." (R. 345a-46a.) Chief Justice Saylor filed a Dissenting Statement in which Justices Dougherty and Mundy joined. (R. 347a-49a.)

On November 5, 2019, the electorate cast votes in the General Election on, *inter alia*, the Ballot Question on the Proposed Amendment. In full compliance with the Commonwealth Court's October 30, 2019 Order, as affirmed by the Supreme Court, the Secretary has not tabulated and certified the electorate's November 5, 2019 vote on the Ballot Question on the Proposed Amendment.[1]

The parties subsequently filed in the Commonwealth Court cross applications for summary relief.[2] (R. 408a-26a; R. 427a-42a; R. 443a-60a.) By per curiam Order

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[1] Based on unofficial published reports, in the November 2019 General Election the electorate approved the Proposed Amendment by an overwhelming supermajority. *E.g., https://ballotpedia.org/Pennsylvania Marsy's Law Crime Victims Rights Amendment (2019)* (last visited December 13, 2019) (reporting that the Proposed Amendment garnered 74.01% of votes with 100% of precincts reporting (citing Pennsylvania Department of State 2019 Municipal Election Unofficial Returns at *https://www.electionreturns.pa.gov/)).*

[2] By opposing Petitioners' claims through Appellants' filing of their Answer and New Matter to Petition for Review on November 12, 2019 (R. 350a-64a), and their Application for Summary Relief on December 13, 2019 (R. 443a-60a),

Announcing the Judgment of the Court entered January 7, 2021, the Commonwealth Court granted in part and denied in part Petitioners' application for summary relief and entered the Order from which Appellants now appeal. (*See* Appendix A hereto.) Unreported Memorandum Opinions in Support of Order Announcing the Judgment of the Court were filed by Judge Ceisler, joined in by Judge Wojcik, and by Judge McCullough, and an Unreported Memorandum Opinion in Opposition to Order Announcing the Judgment of the Court was filed by President Judge Leavitt, joined in by Judge Cannon. (*See* Appendix B hereto.)

Appellants filed their Notice of Appeal and Jurisdictional Statement on January 22, 2021. The Secretary has not appealed. Petitioners did not file an answer to Appellants' Jurisdictional Statement.

B. Statement Of The Facts

On June 19, 2019, the Senate passed the Proposed Amendment as House Bill 276, also known as Joint Resolution 2019-1. The Proposed Amendment is set forth as proposed Article I, § 9.1 of the Pennsylvania Constitution and provides for 15 constitutional protections for the rights of victims and others directly impacted by crimes. (*See* the entire text of the Proposed Amendment in Appendix C at 3-5 hereto.)

Appellants thereby raised and preserved the issues presented in this appeal, pursuant to Pa.R.A.P. 302(a).

Pursuant to the requirements of Section 201.1 of the Pennsylvania Election Code (the "Election Code"), 25 P.S. § 2621.1,[3] the Attorney General prepared the requisite Plain English Statement of the contents and purpose, limitations and effects of the Proposed Amendment. (*See* Appendix C at 1-3 hereto.) Pursuant to the requirements of Section 1110(b) of the Election Code, 25 P.S. § 3010(b),[4] the Secretary prepared the Ballot Question for the Proposed Amendment. (*See* Appendix C at 1 hereto.)

Although the Proposed Amendment contained more than 700 words excluding its title, the Ballot Question was limited by statute to not more than 75 words. 25 P.S. § 3010(b). The Secretary's Ballot Question for the Proposed Amendment contained the following 73 words and included 9 of the 15 victims' rights amendments in the Proposed Amendment:

> Shall the Pennsylvania Constitution be amended to grant certain rights to crime victims, including to be treated with fairness, respect and dignity; considering their safety in bail proceedings; timely notice and opportunity to take part in public proceedings; reasonable protection from the accused; right to refuse discovery requests made by the accused; restitution and return of property; proceedings free from delay; and to be informed of these rights, so they can enforce them?

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[3] Act of June 3, 1937, P.L. 1333, No. 320, § 201.1, *added by* the Act of February 19, 1986, P.L. 29, No. 11, § 1.

[4] Act of June 3, 1937, P.L. 1333, art. XI, § 1110, *as amended*.

(*See* Exhibit C at 1 hereto.) The Proposed Amendment, the Attorney General's Plain English Statement and the Ballot Question were properly published and made accessible to the electorate in advance of the November 2019 election, as required by Section 201.1 of the Election Code, 25 P.S. § 2621.1.

VI. SUMMARY OF ARGUMENT

This Court's decision in *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005), governs the application of the separate vote requirement in Article XI, § 1 of the Pennsylvania Constitution to the issues in this case. In *Grimaud*, this Court adopted Justice (now Chief Justice) Saylor's subject matter test for determining whether the separate vote requirement had been violated. Under the subject matter test, if the various amendments are "sufficiently interrelated," a single ballot question and single vote are constitutionally permissible. *Id.* at 841.

In *Grimaud*, this Court also rejected the appellants' argument that multiple ballots and votes were required when a proposed amendment "implicitly" effected other existing constitutional provisions. Instead, this Court held that only those proposed amendments which "facially" and "patently" affected existing constitutional provisions required multiple ballots and votes. *Id.* at 842.

Applying this Court's precedential decision in *Grimaud* to the Proposed Amendment, it is undeniable that all 15 victims' rights therein were "sufficiently interrelated" and, therefore, could be placed in one ballot question and vote.

Moreover, the very "implicit" effects arguments made by Petitioners here were the same as the arguments made by appellants and rejected in *Grimaud*. Because the Proposed Amendment did not alter any of the language in any existing constitutional provisions, it did not facially or patently affect such provisions.

Furthermore, neither Judge Ceisler's nor Judge McCullough's Memorandum Opinions correctly construed or applied this Court's *Grimaud* opinion. In fact, only President Judge Leavitt's Memorandum Opinion understood and properly applied *Grimaud*.

Petitioners' argument that the Proposed Amendment should have been recited verbatim in the Ballot Question runs afoul of this Court's decision in *Stander v. Kelley*, 250 A.2d 474 (Pa. 1969), which rejected the same argument, and the statutory requirement that limits a ballot question to only 75 words. 25 P.S. § 3010(b).

Finally, as the *Stander* test – which was adopted by five of the six Justices in *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016) – makes clear, the only question is whether the Ballot Question here "fairly, accurately and clearly appri[sed] the voter of the question or issue to be voted on." *Stander*, 250 A.2d at 480. Here, the Ballot Question "fairly, accurately and clearly" informed the voters that they were voting to enshrine victims' rights in the Pennsylvania Constitution. Indeed, 9 of the 15 victims' rights in the Proposed Amendment were contained in the Ballot Question.

VII. ARGUMENT

For the reasons set forth below, all of Petitioners' three claims are devoid of merit, the Commonwealth Court's Order should be reversed, the votes on the Proposed Amendment should be tabulated and certified and the Proposed Amendment should be enshrined in the Pennsylvania Constitution.

A. This Court's Precedential Decision In *Grimaud* Governs The Application Of The Separate Vote Requirement In Article XI, Section 1 Of The Pennsylvania Constitution To The Issues In This Case

In *Grimaud*, this Court was called upon to determine whether a constitutional amendment "(1) expanding the capital offenses bail exception to include life imprisonment, and (2) adding preventive detention to the purpose of bail" required two separate ballot questions and two separate votes. 865 A.2d at 841-42. In order to answer this question, this Court expressly "adopted" as its holding then Justice Saylor's concurrence in *Pennsylvania Prison Soc'y v. Commonwealth*, 776 A.2d 971, 984 (Pa. 2001) (plurality), which mandated "a subject-matter focus to determine whether alterations are sufficiently interrelated to justify their presentation to the electorate in a single question." 865 A.2d at 841.

In addition to Justice Saylor's "sufficiently interrelated" standard, this Court also found "persuasive" alternative subject matter tests, such as a "common purpose formulation" and "germane to the accomplishment of a single objective." *Id.* Nevertheless, this Court "adopt[ed] the 'subject matter test' [prescribed by Justice

Saylor] for determining whether a ballot question violates Article XI, § 1": "when two or more amendments shall be submitted they shall be voted upon separately." *Id.*

In *Grimaud*, it was indisputable that the bail amendment effected two significant changes to the prior amendment "by (1) expanding the capital offenses bail exception to include life imprisonment, and (2) adding preventive detention to the purpose of bail." *Id*. Despite this multiplicity, this Court "conclude[d] the proposed changes were related to a single subject, bail," because "[t]he changes were sufficiently interrelated (all concerned disallowance of bail to reinforce public safety) to justify inclusion in a single question." *Id.* For this reason, this Court held that "the Commonwealth Court did not err in concluding the ballot question did not violate the separate vote requirement of Article XI, § 1." *Id.* at 841-842.

In their attempt to invalidate the bail amendment in *Grimaud*:

> Appellants also assert[ed] the single ballot question **implicitly amended**: (1) Article I, § 1's right to defend one's self, by restricting the ability to prepare a defense; (2) Article I, § 9's presumption of innocence, because preventive detention requires a presumption the accused will commit additional crimes if released on bail; (3) Article I, § 13's right to be free from excessive bail, because preventive detention essentially eliminates that right; and (4) Article I, § 25's reservation that Article I rights remain inviolate, because preventive detention punishes without trial and conviction violating Article I, § 9.

Id. at 842 (emphasis added). This Court squarely rejected the appellants' "implicit amendment" argument, holding, as the Commonwealth Court had properly noted, "merely because an amendment 'may possibly impact other provisions' does not mean it violates the separate vote requirement." *Id.*

In rejecting the appellants' "implicit amendment" argument, this Court in *Grimaud* held that "[t]he 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." *Id.* (underlining in original). The word "facially" was underlined obviously to give it emphasis. The reason for this Court's adoption of a bright line test by using and emphasizing the word "facially" is made clear by the very next sentence in the *Grimaud* opinion: "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." *Id.* The *Grimaud* Court understood that opening the door to ballot question challenges because a proposed amendment had some effect on existing constitutional provisions would only insure that no proposed amendment could ever satisfy Article XI, § 1, and thereby improperly nullify the will of the electorate. Thus, this Court held "[t]he question is whether the single ballot question **patently affects** other constitutional provisions, **not whether it implicitly has such an effect**, as appellants suggest." *Id.* (emphasis added).

Since the two bail amendments in the one ballot question did not **on their face** address or modify the existing constitutional provisions protecting the right to defend one's self, the right to be free from excessive bail or the reservation of rights, this Court in *Grimaud* concluded appellants had not satisfied the "facially" and "patently" test. *Id.* Moreover, in order to underscore its bright line test, this Court explained that appellants' "argument concerning the amendment of Article I, § 9's presumption of innocence lacks merit because the 'presumption' language is the same now as it was prior to the amendments." *Id.* Accordingly, since the bail amendments did not modify the presumption of innocence language in Article I, § 9, the amendments did not facially or patently affect Article I, § 9. Nothing could be clearer on this score.[5]

As this Court held in *Grimaud*, "[b]ecause the proposed amendments only patently affected Article I, § 14, regarding when bail is disallowed in criminal cases, and no other part of the Constitution, the Commonwealth Court did not err in concluding the single bail ballot question was properly submitted to the electorate." *Id.*

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[5] This is particularly important here because the sole three-Judge basis for the invalidation of the victims' rights amendments below was the determination that they substantively impacted Article I, § 9, even though there is no mention – not one – of any change in the language of Article I, § 9's rights in the victims' rights amendments. *See* pages 23-24, *infra*.

B. Applying This Court's Precedential Decision In *Grimaud*, the Proposed Amendment Did Not Violate The Separate Vote Requirement In Article XI, Section 1 Of The Pennsylvania Constitution

Applying this Court's *Grimaud* decision to the Proposed Amendment, it is clear that there has been no violation of the separate vote requirement in Article XI, § 1. There are only two questions concerning the separate vote requirement: (1) were the victims' rights amendments "sufficiently interrelated" to justify their presentation to the voters in a single ballot; and (2) did the fact that the victims' rights amendments implicitly touched existing constitutional amendments require multiple ballot questions. The *Grimaud* answers to the first question is yes and the second question is no.

1. The Separate Vote Requirement Was Not Violated Because All Of The Victims' Rights Amendments In The Proposed Amendment Are Sufficiently Interrelated

First, as set forth in the Attorney General's Plain English Statement describing the Proposed Amendment, the following rights were to be established for victims:

- To be treated with fairness and respect for the victim's safety, dignity and privacy
- 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
- To reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct
- To be notified of any pretrial disposition of the case
- 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

- 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
- To reasonable protection from the accused or any person acting on behalf of the accused
- To reasonable notice of any release or escape of the accused
- To refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused
- Full and timely restitution from the person or entity convicted for the unlawful conduct
- Full and timely restitution as determined by the court in a juvenile delinquency proceeding
- To the prompt return of property when no longer needed as evidence
- To proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related post[-]conviction proceedings
- To confer with the attorney for the government
- To be informed of all rights enumerated in this section

Atty. Gen. Plain English Statement (Appendix C at 1-2 hereto).

It is indisputable that all 15 rights are exemplary rights conferred on and accorded to victims relating to or arising out of criminal proceedings. Thus, the only issue is are these 15 rights "sufficiently interrelated" to justify placing them in one ballot question. "Interrelated" means "a mutual or reciprocal relation or parallelism." WEBSTER'S NEW COLLEGIATE DICTIONARY 604 (1977). It is undisputed that each of the 15 rights has a mutual relationship with the other 14 rights. Indeed, this is clearly a case where the whole is, in fact, greater than the sum of its parts – the enshrinement of a panoply of indispensable victims' rights in the

Pennsylvania Constitution. Just as the two proposed bail changes in *Grimaud* were sufficiently interrelated in disallowing bail to enhance public safety, the 15 proposed victims' rights amendments here are sufficiently interrelated in enhancing victims' rights.

Furthermore, applying the formulations found "persuasive" in *Grimaud*, the 15 victims' rights clearly have a "common purpose" and are "germane to the accomplishment of a single objective." 865 A.2d at 841. For, here, it is undeniable that it is the singular purpose of the Proposed Amendment to enshrine a panoply of related victims' rights in the Pennsylvania Constitution.

In sum, the 15 victims' rights amendments were constitutionally placed in the one Ballot Question.

2. The Proposed Amendment Does Not Facially Or Patently Affect Existing Constitutional Provisions Because It Does Not Alter Their Language

Second, just as in *Grimaud*, Petitioners here contend that permitting the Proposed Amendment will affect and change existing constitutional provisions, and, therefore, absent ballot questions addressing such changes, the single ballot question for the Proposed Amendment violates the separate vote requirement in Article XI, § 1. According to Petitioners, the Proposed Amendment alters the Judiciary's exclusive prerogative to control criminal court proceedings set forth in Article V, § 10, the accused's right to use compulsory process set forth in Article I, § 9, the

pardon procedure set forth in Article IV, § 9, and the availability of bail set forth in Article I, § 14.

However, this same argument was made by the appellants in *Grimaud* and rejected there by this Court. The appellants there claimed that the bail amendments would alter constitutional rights to defend one's self, to the presumption of innocence and to be free from excessive bail. Although the *Grimaud* Court acknowledged that it was necessary to examine "the content, purpose and effect" of the bail amendments, 865 A.2d at 842, the Court then adopted a bright line measure for doing so:

> 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 . . . The question is whether the single ballot question **patently affects** other constitutional provisions, **not whether it implicitly has such an effect**, as appellants suggest.

Id. (underlining in original; emphasis added). Thus, the *Grimaud* Court foreclosed any consideration of the "implicit" effects of a proposed amendment.

Moreover, the *Grimaud* Court provided a defining illustrative example of how to apply its bright line holding:

> The [appellants'] argument concerning the amendment of Article I, § 9's presumption of innocence lacks merit because the 'presumption' language is the same now as it was prior to the amendments.

Id. Likewise, here, the Proposed Amendment has not altered any of the language in any other constitutional provisions. The language in Article V, § 10, Article I, § 9, Article IV, § 9, and Article I, § 14, remains the same now as it was prior hereto.

As the *Grimaud* Court aptly recognized, any other approach would make it "hard to imagine" how any proposed amendment could pass constitutional muster in accordance with Article XI, § 1. *Id*. Simply stated, the one Ballot Question containing the victims' rights amendments did not violate the separate vote requirement in Article XI, § 1.

C. Neither Judge Ceisler's Nor Judge McCullough's Memorandum Opinions Correctly Construed Or Applied This Court's *Grimaud* Holdings – Only President Judge Leavitt's Memorandum Opinion Did So

1. Judge Ceisler's Opinion

In her opinion, Judge Ceisler acknowledged that this Court in *Grimaud* expressly adopted Justice Saylor's "subject-matter test" and that the "petitioners in *Grimaud* advanced similar arguments to those made here." Judge Ceisler Slip Op. at 14. However, Judge Ceisler then disregarded these undeniable facts and incorrectly held *Grimaud* was "not directly applicable" here because *Grimaud* "involved amendments to *existing* constitutional provisions, not adoption of an entirely new section that may conflict with other provisions of the Constitution," citing and quoting to Justice Todd's opinion in *Sprague v. Cortes*, 145 A.3d 1136, 1145 (Pa. 2016) ("There is a categorical difference between the act of creating

something entirely new and altering something which already exists."). Judge Ceisler Slip Op. at 15 (italics and boldface from Judge Ceisler's quote omitted).[6]

In rejecting *Grimaud*, Judge Ceisler plainly misapprehended Justice Todd's opinion in *Sprague*. For, the issue in *Sprague* had nothing to do with the *Grimaud* Court's adoption of the "subject matter test" and its application to a single ballot question. On the contrary, the **sole issue** in *Sprague* was whether the ballot question amending the Pennsylvania Constitution to extend the judicial retirement age to 75 had fairly, accurately and clearly apprised the voters of the question on which they were required to vote. Justice Todd concluded that, because the ballot question failed to inform the voters that the pre-amendment judicial retirement age was 70 and the pending amendment was extending the retirement age by five years, the amendment was misleading and, therefore, did not fairly, accurately and clearly apprise the voters of the question on which they were voting. 145 A.3d at 1145-1150. Thus, Judge Ceisler's importation of Judge Todd's opinion in *Sprague* to justify disregard of *Grimaud's* adoption of the "subject matter test" was clearly erroneous.

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[6] As discussed, *infra*, at page 22, Judge McCullough expressly rejected Judge Ceisler's novel approach, stating "I disagree, however, with significant portions of Judge Ceisler's analysis of the applicable constitutional standard." Judge McCullough Slip Op. at 2.

Based upon her determination that "the Proposed Amendment would implement sweeping and complex changes to the Constitution" (Judge Ceisler Slip Op. at 16), Judge Ceisler then spends six pages describing the "effects" of the Proposed Amendment **without** a scintilla of any reference to the *Grimaud* "subject matter test." *See* Judge Ceisler Slip Op. at 17-22. In addition to finding that the Proposed Amendment would adversely affect the ability of an accused to obtain discovery of exculpatory evidence pursuant to Article I, § 9, Judge Ceisler also determined that the courts' dockets would be clogged by an "increase in pretrial discovery motions" and the "uncertainty of determining who is impacted by a crime and how to notify each such person," all in Judge Ceisler's conclusion "impeding the right to a speedy trial." *Id.* at 19. Judge Ceisler also found that the Proposed Amendment would affect the negotiation of plea agreements, the trial process itself and proceedings within the Department of Corrections and local county jails. *Id.* at 19-20.

By relying on these multiple "implicit" effects, Judge McCullough determined that Judge Ceisler had departed from *Grimaud*, which expressly held that "implicit" – as contrasted to "facial" and "patent" – effects were not sufficient to justify invalidating a single ballot question and vote for a proposed constitutional amendment. Judge McCullough Slip Op. at 7. On this point, Judge McCullough

was clearly correct and she and President Judge Leavitt, joined in by Judge Cannon, constituted the majority of the Commonwealth Court.[7]

It is not until page 22 of her opinion that Judge Ceisler discusses the *Grimaud* "subject matter test." In determining that the enhancements of victims' rights in the Proposed Amendment were not sufficiently interrelated, Judge Ceisler declared:

> The Proposed Amendment (1) contains multiple changes to the Constitution because it provides a whole series of new, separate, and independent rights to victims of crimes, and (2) would facially and substantially affect multiple existing constitutional articles and sections across multiple subject matters. 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 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.

Judge Ceisler Slip Op. at 23; *see also id.* at 24-26. But, again, by relying on such "implicit" effects, Judge Ceisler has elided the holding in *Grimaud* that "[t]he 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." 865 A.2d at 842 (underlining in original).

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[7] We discuss Judge McCullough's and President Judge Leavitt's opinions at pages 22-26, *infra*.

In sum, Judge Ceisler's opinion cannot be squared with this Court's opinion in *Grimaud*.

2. Judge McCullough's Opinion

As discussed, *supra*, Judge Ceisler did not even attempt to follow this Court's opinion in *Grimaud* because she concluded that *Grimaud* did not apply where a proposed constitutional amendment involved the "adoption of an entirely new section [of constitutional rights] that may conflict with other provisions of the Constitution." Judge Ceisler Slip Op. at 15. Judge McCullough, who sought to apply *Grimaud* throughout her opinion, disagreed with Judge Ceisler's unprecedented approach, stating she "disagree[d] . . . with significant portions of Judge Ceisler's analysis of the applicable constitutional standard." Judge McCullough Slip Op. at 2.

However, Judge McCullough's opinion conflates two distinct concepts articulated in *Grimaud*. First, in determining that the bail subject matters were sufficiently interrelated, the *Grimaud* Court held that they were because "all concerned disallowance of bail to reinforce public safety." 865 A.2d at 841. The same can clearly be said of the victims' rights amendments in the Proposed Amendment: they all concern the enhancements of victims' rights relating to or arising out of criminal proceedings.

The *Grimaud* language focused on by Judge McCullough – examining the "content, purpose and effect" of the Proposed Amendment – is entirely separate from the "sufficiently interrelated" test. The "content, purpose, and effect" test **only** relates to the question of whether a proposed amendment should be subject to more than one ballot question and one vote because it touches on other constitutional provisions. And in this context, the *Grimaud* Court held that "[t]he 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." *Id.* at 842 (underlining in original).

Significantly, in *Grimaud*, the appellants made the same argument there that Petitioners make here. Thus, in *Grimaud*, the appellants contended that the single ballot bail question would affect the constitutional rights to defend one's self, to the presumption of innocence and to be free from excessive bail. *Id.* Here, Petitioners contend that the single ballot victims' rights question would affect the constitutional rights to be confronted with witnesses, to compulsory process for obtaining witnesses and exculpatory evidence, to bail, to commutation and pardons, to a speedy trial and to open courts. Judge Ceisler Slip Op. at 17-18, 21-25.

In seeking to apply *Grimaud*, Judge McCullough found **only** that the Proposed Amendment "impose[d] a clear limitation upon a criminal defendant's right [under Article I, § 9] to obtain potentially favorable witnesses, testimony and materials, and,

thus, would serve as a direct barrier to the accused's ability to gather exculpatory evidence." Judge McCullough Slip Op. at 6. Accordingly, Judge McCullough concluded "[b]ecause there is manifest tension between this portion of the Proposed Amendment and the longstanding protections of Article I, Section 9, I believe this is precisely the sort of 'patent' effect upon another constitutional provision that *Grimaud* envisioned." *Id.*

However, the *Grimaud* Court expressly rejected the very analysis adopted by Judge McCullough involving the same kind of argument involving Article I, § 9. For, in *Grimaud*, the appellants contended that the bail amendments affected Article I, § 9's presumption of innocence and thus should have required two votes. The *Grimaud* Court held that the appellants' contention "lack[ed] merit because the 'presumption' language is the same now as it was prior to the [bail] amendments." 865 A.2d at 842. The same is ineluctably true here. The Proposed Amendment has not facially or patently affected Article I, § 9 because its language "is the same now as it was prior to the [victims' rights] amendments." *Id.*

Accordingly, albeit for different reasons, Judge McCullough's opinion – like Judge Ceisler's – cannot be squared with *Grimaud*.

3. President Judge Leavitt's Opinion

In her opinion, joined in by Judge Cannon, President Judge Leavitt religiously hewed to this Court's opinion in *Grimaud*. Initially, she accurately stated that:

> This amendment, known as "Marsy's Law," creates a right in crime victims and does not patently delete or revise existing provisions in the Pennsylvania Constitution. The League of Women Voters has not demonstrated otherwise. Instead, it has offered only hypotheticals on the various ways this newly declared right might impact the rights of a criminal defendant in some case, in some time and in some place.

Judge Leavitt Slip Op. at 3. For this reason, President Judge Leavitt determined that Petitioners had failed to "present an actual controversy" for proper application under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541. *Id.* at 3. In her view, Petitioners were impermissibly seeking an "advisory opinion" on "supposed events [that] may, or may not, take place." *Id.* at 3-4.

President Judge Leavitt then correctly found that Petitioners' argument that the Proposed Amendment "implicitly" amended existing constitutional provisions ran afoul of the *Grimaud* holding that "merely because an amendment may possibly impact other provisions does not mean it violates the separate vote requirement." 865 A.2d at 842; Judge Leavitt Slip Op. at 5. As President Judge Leavitt pointed out echoing *Grimaud*, "[e]very amendment must have some impact on other provisions of the Constitution, or it would be surplusage." Judge Leavitt Slip Op. at 5.

Furthermore, she observed that neither Judge Ceisler's nor Judge McCullough's opinions undertook the necessary *Grimaud* analysis to determine whether the victims' rights amendments were "sufficiently interrelated" to be

presented "to the electorate in a single question." 865 A.2d at 841; Judge Leavitt Slip Op. at 6. Without such an undertaking, neither Judge Ceisler nor Judge McCullough could "conclude[ ] that the ballot question required more than a single vote." Judge Leavitt Slip Op. at 6.

In sum, President Judge Leavitt concluded that "[b]ecause a declaratory judgment should never issue in anticipation of events that may never occur, [she] would deny summary relief to the League of Women Voters." *Id.* at 7. For her, "[t]he centerpiece of our Declaration of Rights is that '[a]ll power is inherent in the people . . .' PA CONST. art. I, § 2. The judgment the Court enters today deprives the people of this power on the strength of no more than speculation." *Id.*

D. There Is No Requirement That The Proposed Amendment Be Recited Verbatim In The Ballot Question

This Court has never required that a proposed constitutional amendment be placed on the ballot for the voters in *haec verba*. In fact, in *Stander v. Kelley*, 250 A.2d 474 (Pa. 1969), this Court reached the opposite conclusion. *Stander* involved a ballot question which was "but a tiny and minuscular statement of the very lengthy provisions of the [constitutional amendment to] Judiciary Article V." *Id.* at 480. Despite the "tiny and minuscular" ballot question, this Court held that the **only** valid question was whether "the ballot fairly, accurately and clearly apprize the voter of the question or issue to be voted on." *Id.*

Moreover, as recognized by Justice Baer in *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016), the "Constitution does not speak to the wording of ballot questions but merely provides the General Assembly with the power to decide the manner and time in which to present proposed constitutional amendments to voters." *Id.* at 1141. In accordance with its authority, the General Assembly prescribed that "[e]ach question to be voted on shall appear on the ballot labels, in brief form, of not more than **seventy-five words**, to be determined by the Secretary of the Commonwealth in the case of constitutional amendments." 25 P.S. § 3010(b) (emphasis added); 145 A.3d at 1141. Thus, the statute mandates that the ballot question, as phrased by the Secretary, cannot exceed 75 words.

Pursuant to the 75 word statutory limitation, the Secretary carefully crafted a 73 word Ballot Question containing 9 of the 15 victims' rights in the Proposed Amendment. This is all that was required. Simply stated, a verbatim recitation of the Proposed Amendment in the Ballot Question was not only not required pursuant to *Stander* but it was legislatively cabined by the 75 word requirement.

E. The Ballot Question Fairly, Accurately And Clearly Apprised The Voters Of The Question To Be Voted On

In *Sprague*, five of the six Justices determined that the *Stander* test was the governing test: whether "the question as stated on the ballot fairly, accurately and clearly apprize the voter of the question or issue to be voted on." 250 A.2d at 480.

Thus, based on *Stander*, in *Sprague* Justice Baer, joined by Justices Donahue and Mundy, declared:

> Thus, the question before us is not whether we believe one version of the ballot question is superior to another, nor is it relevant how we would phrase the ballot question if left to our own devices. Instead, our role in the constitutional amendment process is limited to a review of whether the ballot question fairly, accurately and clearly apprises the voter of the question on which the electorate must vote.

145 A.3d at 1142. Justice Todd, joined by Justice Dougherty, agreed with Justice Baer:

> As acknowledged in Justice Baer's Opinion at page 9, *Stander* is the governing test to assess whether the content and meaning of the wording of a ballot question is adequate to enable the voter to understand the true nature of the changes to the Constitution which a proposed amendment will effectuate.

Id. at 1149 n. 8.[8]

Here, the Ballot Question fairly, accurately and clearly informed the voters of 9 of the 15 constitutional rights to be accorded to crime victims. The voters clearly knew that the Proposed Amendment was intended to enshrine numerous rights for crime victims in the Pennsylvania Constitution. The mere fact that some of the victims rights protections were omitted from the Ballot Question because of the 75

[8] In fact, Justice Wecht penned his dissent because, contrary to the other five Justices, he wrote "separately to express [his] skepticism that the test this Court applied in *Stander* . . . controls here." *Id.* at 1153.

word statutory limit did not mislead the voters. They knew precisely what they were voting on – enhanced rights for the victims of crime! Since the Ballot Question here exceeded the "tiny and minuscular" disclosure contained in the *Stander* ballot question, 250 A.2d at 480, it is more than sufficient.

Moreover, the Attorney General's Plain English Statement set forth **all** 15 of the victims' rights contained in the Proposed Amendment.[9] Given that at least three copies of the Plain English Statement were published in or about each polling place and one copy was published in every publication of the Proposed Amendment, the voters had ample opportunity to read the entire Proposed Amendment if they so desired. As Judge Ceisler recognized in her Opinion, "[t]he parties agree that the Proposed Amendment, the Plain English Statement, and the Ballot Question were all properly published and accessible to the electorate in advance of the November 2019 election, as required by Section 201.1 of the Election Code." Judge Ceisler Slip Op. at 3.

In sum, the voters were fairly, accurately and clearly informed as to what was before them and they overwhelmingly voted in favor of the Proposed Amendment.[10]

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[9] As required, the Plain English Statement also disclosed the "purpose, limitations and effects of the ballot question." 25 P.S. § 2621.1.

[10] *See* n.1, *supra*.

VIII. CONCLUSION

For the foregoing reasons, Petitioners' three claims are devoid of merit, the Commonwealth Court's Order should be reversed, the votes on the Proposed Amendment should be tabulated and certified and the Proposed Amendment should be enshrined in the Pennsylvania Constitution.

Respectfully submitted,

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