IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 578 MD 2019

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA
and LORRAINE HAW,

Petitioners,

(RONALD L. GREENBLATT, Intervenor-Petitioner)

v.

KATHY BOOCKVAR, Acting Secretary of the Commonwealth,

Respondent.

(SHAMEEKA MOORE, *et al*.,
Intervenors-Respondents)

BRIEF FOR PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

On Application for Final Relief

Peter Kratsa
PRESIDENT, PACDL
MacElree Harvey, Ltd.
17 West Miner St.
West Chester, PA 19382
(610) 840-0209

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorney for Amicus PACDL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF INTEREST OF THE AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 1

II. ARGUMENT FOR AMICUS CURIAE

A. Introduction 2

B. The Proposed Amendments alter and effectively repeal the presumption of innocence that is part of "the law of the land" 4

C. The Proposed Amendments alter the provisions of the Pennsylvania Constitution and implementing statutory protections which attempt to guard against wrongful convictions 9

D. Without notice to the voters, the single ballot question seeks impermissibly to amend several provisions of the Declaration of Rights at once 16

III. CONCLUSION 23

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY... 24

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT 24

TABLE OF AUTHORITIES

Cases

Bergdoll v. Kane, 557 Pa. 72, 731 A.2d 1261 (1999) 18

Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394 (1895) 6

Commonwealth v. A.D.B., 752 A.2d 438 (Commw. Ct. 2000) 5

Commonwealth v. Allshouse, 614 Pa. 229, 36 A.3d 163 (2012) 4

Commonwealth v. Bonomo, 396 Pa. 222, 151 A.2d 441 (1959) 6

Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d 638 (1998) 10

Commonwealth v. Raffensberger, 435 A.2d 864 (Pa. Super. 1981) 5

Commonwealth v. Williams, 215 A.3d 1019 (Pa.Super. 2019) 15

Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976) 5

Gondelman v. Commonwealth, 520 Pa. 451, 554 A.2d 896 (1989) 17

League of Women Voters v. Boockvar, — Pa. —, — A.3d —, 2019 WL 5692191 (per curiam) 3

Lee v. Glunt, 667 F.3d 397 (3d Cir. 2012) 12

Lee v. Sup't, Houtzdale SCI, 798 F.3d 159 (3d Cir. 2015) 13

Pennsylvania Prison Society v. Commonwealth, 565 Pa. 526, 776 A.2d 971 (2001) 18

Sprague v. *Cortes*, 636 Pa. 542, 145 A.3d 1136 (2016) 18

Stander v. *Kelley*, 433 Pa. 406, 250 A.2d 474 (1969) 18

Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930 (1978) 5

Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922 (1898) 4

Constitutions, Statutes and Rules

U.S. Const. amend. XIV, § 1 8

Pa. Const. Art. I, § 1 ..... 5, 8
Pa. Const. Art. I, § 9 ..... 4, 21

Pa. Const. Art. I, § 10 ..... 8, 22
Pa. Const. Art. I, § 14..... 10, 15, 20
Pa. Const. Art. I, § 25..... 16, 17, 23
Pa. Const., Art. V, § 9 11
Pa. Const., Art. XI, § 1 18

18 Pa.C.S. § 2702(a)(6) 15

25 Pa.Stat. § 2621.1 ..... 18, 19

42 Pa.C.S. § 5919 21
42 Pa.C.S. §§ 6501–6505 10
42 Pa.C.S. § 9541 10
42 Pa.C.S. § 9542 11
42 Pa.C.S. § 9545(b) 12

Pa.R.App.P. 127 24
Pa.R.App.P. 531(b) 2, 24

Pa.R.Crim.P. 500–501 21

Other Authorities

John Adams, *Defense Opening Statement at Boston Massacre Trial* (1770) ... 5

William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND, bk. IV (1753) 5

Samuel R. Gross, "The staggering number of wrongful convictions in America," *The Washington Post* (7/24/15), available at https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/ 260fc3a2-1aae-11e5-93b7-5eddc056ad8a_ story.html 9

National Registry of Exonerations, Univ. of Michigan, "Other Arson Cases: Han Tak Lee" (added 12/28/15), https://www.law.umich.edu/ special/ exoneration/Pages/casedetail.aspx?caseid=4820 14

National Registry of Exonerations, Univ. of Michigan, "Other Pennsylvania Cases: Nicholas Yarris" (7/8/19 update), https://www.law.umich.edu/special/ exoneration/Pages/casedetail.aspx?caseid=3771 14

National Registry of Exonerations, Univ. of Michigan, "Recent Exonerations," https://www.law.umich.edu/special/exoneration/Pages/recentcases.aspx 14

Pennsylvania Innocence Project, "About: Our Impact," available at https://www.innocenceprojectpa.org/about 9

Beth Schwartzapfel, "The Billionaire's Crusade," The Marshall Project (posted 5/22/18), available at https://www.themarshallproject.org/2018/05/22/nicholas-law 20

Thomas Raeburn White, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA (1907) 6

I. STATEMENT OF INTEREST OF THE *AMICUS CURIAE* PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys – including private practitioners, public defenders, and academics – who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants. PACDL membership currently includes more than 900 private criminal defense practitioners and public defenders throughout the Commonwealth. PACDL regularly files *amicus curiae* briefs in the Supreme Court of Pennsylvania (including in this matter on appeal from the grant of preliminary relief), and occasionally in the Superior Court, in this Court, or at the Supreme Court of the United States.

PACDL and its members have a direct interest in the outcome of this case, as part of PACDL's mission is to ensure the fairness and workings of the criminal justice system in Pennsylvania; ensure the fair administration of justice; and to advocate for the rights of persons charged with, and those

convicted of and imprisoned for, crimes. The proposed constitutional amendments, however, infringe upon and substantially dilute a bedrock principle of the criminal justice system, to wit: the presumption of innocence, and directly conflict with and amend several provisions of the Constitution that seek to protect the rights of individuals accused of wrongdoing. These protections have been enshrined in the Declaration of Rights of the Constitution of this Commonwealth for more than two centuries.

Pursuant to Pa.R.App.P. 531(b)(2), PACDL states that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

II. ARGUMENT FOR AMICUS CURIAE

The Pennsylvania Association of Criminal Defense Lawyers supports the petitioners in their request for permanent equitable relief against the formal tallying or certification of the November 5, 2019, popular vote on the "Victims' Rights" or "Marsy's Law" amendments to the Constitution of the Commonwealth of Pennsylvania. The reasons for this position are as follows.

A. Introduction

On October 30, 2019, following a hearing, this Court (Ceisler, J.), sitting in its original jurisdiction, filed a memorandum and order (not reported) granting preliminary relief (hereinafter, "PI Mem. Op.") to the League of Women Voters of Pennsylvania and Lorraine Haw, and to their intervenor Ronald L. Greenblatt, Esq. (collectively, the petitioners). By *per curiam* Order

filed November 4, 2019, the Supreme Court affirmed this Court's preliminary injunction. *League of Women Voters v. Boockvar*, — A.3d —, 2019 WL 5692191. The injunction bars the respondent Secretary of State, pending this Court's final decision, from formally tallying and finally certifying the vote on a patently invalid ballot question to extensively amend the 1776 Declaration of Rights that is at the heart of our Commonwealth's Constitution.

As persuasively demonstrated in Judge Ceisler's memorandum, the single ballot question for the "Crime Victim Rights Amendment" (hereinafter, the "Proposed Amendments") would not merely touch upon, but would actually alter and amend multiple sections of the Pennsylvania Constitution. As ably explained in the memorandum opinion, the resulting harms include inevitable undermining of the rights that PACDL exists to protect for the accused, and immediate interference with the effective performance of the defense function that PACDL likewise exists to support and facilitate for its members. These harms will be compounded by uncertainty, confusion and needlessly increased costs to all actors and institutions that make up the criminal justice system, including prosecutors, police, correctional officials, and the courts themselves.

In addition to those sections of the Pennsylvania Constitution that the petitioners and this Court's prior opinion identify as being amended by the challenged ballot measure, the Proposed Amendments also infringe upon and undermine additional inviolate rights held by all citizens of (and other persons within) this Commonwealth, without informing the electorate of these conse-

quences. The voters were thus presented with a ballot question which briefly summarized select portions of the Proposed Amendments and failed to identify all provisions of the Pennsylvania Constitution that would be amended if the Proposed Amendments were certified as having been approved. The Proposed Amendments effectively strip any person within this Commonwealth who is accused of a crime of the presumption of innocence, and amend – without notice to the voters – provisions of the Pennsylvania Constitution which act as a shield against wrongful convictions. Accordingly, this Court should now enter final relief invalidating this pernicious and ill-advised measure.

B. The Proposed Amendments alter and effectively repeal the presumption of innocence that is part of "the law of the land."

This Court's preliminary opinion mentions but does not elaborate the impact of the Proposed Amendments on the presumption of innocence. PI Mem. Op. at 14. This aspect deserves fuller attention. The presumption of innocence is a fundamental right – recognized since long before the Founding and thus a critical component of "the law of the land," Pa. Const., Art. I, § 9 – that cloaks every person charged with a criminal offense. See *Commonwealth v. Allshouse*, 614 Pa. 229, 268, 36 A.3d 163, 186 (2012) (referencing "the fundamental rule that the state, as a condition of its authority to take the life [or liberty] of an accused, must overcome the presumption of his innocence"), quoting *Thompson v. Missouri*, 171 U.S. 380, 387, 18 S.Ct. 922, 925 (1898);

accord *Commonwealth v. A.D.B.*, 752 A.2d 438, 443 (Commw. Ct. 2000); *Commonwealth v. Raffensberger*, 435 A.2d 864, 865 (Pa. Super. 1981).

The right to enjoy a presumption of innocence in any criminal case has been recognized as an essential and "basic component of a fair trial under our system of criminal justice." *Taylor v. Kentucky*, 436 U.S. 478, 479, 98 S. Ct. 1930, 1931 (1978) (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692 (1976)). Its history as a foundation of due process and the "law of the land" predates the Revolution and the Constitution itself. *See* William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND, bk. IV ("Of Public Wrongs"), ch. 27, *358 (1753) ("the law holds that it is better that ten guilty persons escape than that one innocent suffer"); John Adams, *Defense Opening Statement at the Boston Massacre Trial* (1770) (explaining why public safety demands that "[i]t is more important that innocence be protected than it is that guilt be punished").

The citizens of this Commonwealth, since 1776, have recognized as "inherent rights of mankind" "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty …." Pa. Const., Art. I, § 1. The presumption of innocence is an essential aspect of the American legal system, firmly established in our jurisprudence as part of "the law of the land," which underpins all of the more specific constitutional rights. Thus, this bedrock right is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor*, 436 U.S. at 483

(quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403 (1895)). More than sixty years ago, our Supreme Court, in *Commonwealth v. Bonomo*, opined:

> The presumption of innocence grew up as a policy of law and is not based upon probabilities at all. It represents the law's humane approach to the solution of a dispute which may result in the loss of life or liberty. Because of this concern the law has ordained that any government which seeks to take from any person his life or liberty has the burden of proving justification for doing so. It is the continuing presumption of innocence which is the basis for the requirement that the state has a never-shifting burden to prove guilt beyond a reasonable doubt. Since this presumption is with the defendant not only at the beginning of the trial but throughout all its stages, and even while the jury is considering its verdict, it is obvious that no contrary presumption can be indulged.

396 Pa. 222, 229, 151 A.2d 441, 445 (1959) (footnote and internal citation omitted). As the first great treatise on the Pennsylvania Constitution declared, discussing "the law of the land": "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Thomas Raeburn White, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 115 (1907) (quoting Daniel Webster).

The presumption of innocence applies equally to the pre-trial process as it does at trial. The Proposed Amendments, however, define "victim" to include "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." But no

judge, consistent with the presumption of innocence, could find that a crime has in fact been "committed," much less that the accused is the person who committed it, at the pre-verdict stages of the case where these Proposed Amendments are to be enforced. In requiring that judges act as if guilt were presumed, the Proposed Amendments strip an accused of this most fundamental of rights. Instead, the Proposed Amendments would create an irrefutable presumption that every complainant (among others deemed in some undefined way to be "directly harmed") in every criminal case is, in fact, a "victim," that is, a person against whom "the crime" was in fact committed. This result cannot stand – at least not without being approved by a fully-informed citizenry.

This same, heretofore unconstitutional inference is even more clearly drawn from some of the particular provisions of the Proposed Amendments, including those which would purport to guarantee a right "to reasonable protection from the accused." By accepting the premise that every complainant is actually a "victim," along with a broad additional class of previously undefined persons deemed to be "directly harmed," the Proposed Amendments would turn the accused's right to the presumption of innocence on its head, if not eradicate the right entirely.

Yet the ballot question, as presented to the voters, ignores the irreconcilable conflict that the Proposed Amendments would create between the constitutional rights of an accused and the "rights" of a person who has not been – and consistent with due process for the accused cannot be – established

factually from the moment of arrest or before as a true victim. Moreover, the stated ballot question wholly disregards the untenable situation which lower courts will face when, for example, hearing a motion for bail by an arrested individual against whom the evidence may be slight, while being required at the same time to consider the claims of the accuser or his or her family that bail must be set high because of their "fear." The proposed Amendments state that these conflicting rights are to be given equal weight. Which right will prevail, and by what criteria?

Critically, the Proposed Amendments give no real weight to the historic understanding that when criminal charges are filed, the accused is confronted with a potential deprivation of inherent rights that the Constitution of the Commonwealth of Pennsylvania protects, to wit: life, liberty and property. Pa. Const., Art. I, § 1. Protection of these rights is so fundamental to the definition of a free society that of the fifty or so distinct rights of persons mentioned in the Declaration of Rights, more than twenty are rights specific to those accused or suspected of criminal conduct. Although an actual victim in a criminal case also suffers a deprivation, that harm is categorically different; it is not *the State* that has deprived the crime victim of life, liberty or property. Constitutional rights are enumerated because they represent what it means to be free in one's relation to State power, not what it means to enjoy safety and dignity in our interactions with fellow citizens, which is the proper subject of civil law and of legislation.

Nothing in either the ballot question or the "Plain English Statement" accompanying the ballot question begins to explain these consequences to voters. A right that is bestowed on all citizens and serves as part of the essential foundation upon which our liberty (and our criminal justice system) is built, such as the presumption of innocence, should not be constitutionally undermined or abrogated without informing voters of this impact in the plainest language and allowing them to exercise an informed vote on that issue. The ballot question fails to achieve that goal.

C. The Proposed Amendments alter the provisions of the Pennsylvania Constitution and implementing statutory protections which attempt to guard against wrongful convictions.

Regrettably, wrongful convictions occur in the United States, and innocent individuals have been incarcerated, sometimes for decades, for crimes that they did not commit. *See* Samuel R. Gross, "The staggering number of wrongful convictions in America," *The Washington Post* (7/24/15) (information from National Registry of Exonerations), available at https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/ 260fc3a2-1aae-11e5-93b7-5eddc056ad8a_ story.html (last accessed 10/31/19). Pennsylvania is not immune from this travesty. *See* Pennsylvania Innocence Project, "About: Our Impact" (16 exonerations in Project's first ten years), available at https://www.innocenceprojectpa.org/about (last accessed 10/31/19). The Proposed Amendments' creation of a new constitu-

tional right to a "a prompt and final conclusion of the case and any related post[-]conviction proceedings" places in jeopardy the existing constitutional rights which attempt to provide some protection against such miscarriages of justice.

Criminal defendants enjoy a protected right under Article I, Section 14 of the Pennsylvania Constitution to pursue *habeas corpus* relief, even after their convictions have otherwise "become final." Chapter 65 of the Judicial Code, 42 Pa.C.S. §§ 6501–6505, addresses the process for obtaining habeas corpus relief. Section 6503 provides:

> **(a) General rule.--**Except as provided in subsection (b), an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.
>
> **(b) Exception.--**Where a person is restrained by virtue of sentence *after* conviction for a criminal offense, the writ of habeas corpus shall not be available *if a remedy may be had by post-conviction hearing proceedings authorized by law*.

42 Pa.C.S. § 6503 (emphasis added).

Through the Post Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq.* (the "PCRA"), the legislature has provided a process and remedy for an individual to secure relief after a conviction for a criminal offense, as assured by the Constitution's habeas corpus clause, as referenced in § 6503. *Commonwealth v. Peterkin*, 554 Pa. 547, 553, 722 A.2d 638, 641 (1998). One of the PCRA's central missions is to act as a failsafe against wrongful convictions. The Act

states, in part, that "[t]his subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief …." 42 Pa.C.S. § 9542. The Proposed Amendments inherently amend, and thus threaten, this fundamental constitutional right and protection by creating a new and conflicting right of victims to a "prompt and final" conclusion to criminal cases, including appeals and PCRA proceedings.[1]

The PCRA sets forth certain time parameters pursuant to which a petition seeking PCRA relief must be filed:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) 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; or
>
> (iii) 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

[1] Access to a meaningful appeal is also constitutionally protected in Pennsylvania. Pa. Const., Art. V, § 9. Much of what is discussed in this part of this amicus brief is also applicable to the Proposed Amendments' unacknowledged impact on the fair administration of criminal appeals.

> in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within one year of the date the claim could have been presented.

42 Pa.C.S. § 9545(b)(1), (2).

As the foregoing reflects, an individual who is convicted of a crime and who remains in custody has at least one year from the date that the conviction "becomes final" – which itself may be many years after the crime was committed – to exercise the constitutional right of access to habeas corpus by initiating an application for relief under the PCRA. Indeed, that one-year period can be extended significantly if one or more of the provisions of subsection (b)(1) are triggered.

The Proposed Amendments, however, provide "victims" with the right to be heard in any proceeding where a right of the victim is implicated, including a new and unexplained "right" to "proceedings free from unreasonable delay and *a prompt and final conclusion of the case and any related postconviction proceedings*" (emphasis added). Victims will undoubtedly urge a broad interpretation of the Proposed Amendments, and judges will be obligated to consider denying access to PCRA relief for this reason alone, as a "victim" contends that exploration of new and troubling questions about guilt violates the right to a prompt and final conclusion of the case.

Experience teaches that exonerations can often take a decade of digging and litigation. For example, in *Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), Lee

was convicted of first degree murder and arson in Monroe County in 1990 and his direct appeal rights (and then PCRA) were subsequently exhausted without success. Over twenty years later, in 2012, the U.S. Court of Appeals held that Lee was entitled under a writ of habeas corpus to discovery to pursue his claim that the "admission of the Commonwealth's fire expert testimony undermined the fundamental fairness of Lee's entire trial because critical testimony was premised on since-debunked "junk science" forensic evidence and was therefore itself unreliable. *Id.* 407. The Third Circuit observed that "[t]hese factual allegations are not contradicted by the existing record, not least because the Commonwealth has not offered any evidence supporting the validity of the old methodology and does not challenge the accuracy of the Lentini [expert] affidavit, which describes the developments in fire science since Lee's trial and explains that many of the scientific theories relied upon by the Commonwealth's experts have been refuted." *Id.*

It took another three years of litigation before the Third Circuit, in *Lee v. Sup't, Houtzdale SCI*, 798 F.3d 159 (3d Cir. 2015), was able to affirm the federal district court's grant of habeas corpus relief to Lee. The appellate court concluded that Lee "was convicted of murdering his daughter based primarily on scientific evidence that, as the Commonwealth now concedes, is discredited by subsequent scientific developments" and that "the Commonwealth has not pointed to 'ample evidence' sufficient to prove guilt beyond reasonable doubt." *Id*. 161, 169. After 24 years of wrongful imprisonment, Lee was released, and

the Commonwealth determined that Lee would not be re-prosecuted. *See* National Registry of Exonerations, Univ. of Michigan, "Other Arson Cases: Han Tak Lee" (added 12/28/15), available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4820 (last accessed 10/31/19).

Lee sat in prison for decades for a crime that he did not commit and as a result of a conviction that was premised on faulty science.[2] Indeed, as it turned out, there was never any crime at all, and therefore no "victim" of any "offense"; the fire was actually an accident. Yet under the Proposed Amendments, a court would have been obligated to presume otherwise. Regrettably, many other cases like Lee's exist. *See e.g.*, National Registry of Exonerations, "Recent Exonerations," https://www.law.umich.edu/special/exoneration/Pages/recentcases.aspx (last accessed, 10/31/19). A defined "victim" (such as Lee's ex-wife, mother of the deceased), asserting a "right" to "prompt" and "final resolution" of the case, might prevent such belated exercises of justice from being obtained under our PCRA. The Proposed Amendments thus appear to directly amend the anti-suspension clause of Article I, section 14, which protects the right to habeas corpus.

[2] One of several exonerations of death-sentenced prisoners in Pennsylvania resulted from a *third round* of DNA testing, which occurred during a *second* habeas corpus proceeding and after *two* prior unsuccessful PCRA filings. The truth was not uncovered until more than twenty years after the brutal rape-murder for which Nicholas Yarris had been convicted in Delaware County. See https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3771 Again, in the Yarris case, enforcement of a victim family's "constitutional right" to a "prompt and final" resolution of the case could have resulted in a horrific travesty and miscarriage of justice.

The problem of belated exoneration is not limited to murder cases. In *Commonwealth v. Williams*, 215 A.3d 1019 (Pa.Super. 2019), for example, a denial of PCRA relief was recently reversed.[3] Nearly all the testimony in a ten-year old drug case was entirely discredited by newly-discovered evidence, while the defendant (the famed rapper who performs as "Meek Mill") was in custody for an alleged probation violation. One of the false charges in that case was a count of "aggravated assault" alleging under 18 Pa.C.S. § 2702(a)(6) that the defendant pointed a firearm at the arresting officer. That corrupt policeman – the very person later shown to have presented false testimony – would be classed as a "victim" under the Proposed Amendments and granted rights (equal in weight to the defendant's) to "a prompt and final resolution" of the case. Again, in the far-from-unique circumstances of that case, enforcement of the Proposed Amendments could have prevented exoneration of an innocent person under the guise of protecting the "rights" of a false accuser.

Promptness and finality are important interests in our system of justice, but to elevate them to the level of a constitutional right enjoyed by an open-ended class of "victims" threatens the innocent with a permanently locked prison cell. Nothing in the official summary or ballot statement even alludes to this impact of passing the Proposed Amendments.

[3] *See also* No. 31 EM 2018 (4/24/18) (order of Supreme Court directing grant of bail pending appeal in same case).

D. Without notice to the voters, the single ballot question seeks impermissibly to amend several provisions of the Declaration of Rights at once.

Expressing a fundamental political and philosophical premise of a free Commonwealth, our Constitution since at least 1790 has provided that:

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const., Art. I, § 25 ("Reservation of Powers in People"). In this provision, the expression "this article" refers to Article I of the Constitution of Pennsylvania, better known as the Declaration of Rights, largely drafted in 1776 for the newly independent former colony and in force in its present form, with few changes, since 1790 for the Commonwealth, as a State within the United States of America. PACDL would respectfully remind this Court that it is no coincidence that nearly half of the many rights that the Framers saw fit to include in the Declaration were rights for those accused of crimes. The Founding Generation was well aware that all governments, both tyrannical and democratic, must be restrained from abusing the awesome power of the criminal process to oppress the poor, the unpopular, the disadvantaged, the dissident, and the troublesome, and that the only way to protect against such abuses is to protect both the presumption of innocence and the many procedural rights of *every* accused person at every stage of every case.

With respect to Section 25, our Supreme Court has observed, "We agree with the general proposition that those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government." *Gondelman v. Commonwealth*, 520 Pa. 451, 467, 554 A.2d 896, 904 (1989). The "people," of course, have the right to amend their Constitution, including its Declaration of Rights. *Id*. ("It is absurd to suggest that the rights enumerated in Article I were intended to restrain the power of the people themselves."). But PACDL urges that special care and restraint should be exercised whenever a proposed amendment – much less a package of multiple amendments – appears to trench on one or more of these most fundamental of rights.

Of course, for the "people" of Pennsylvania to take the extraordinary step of amending their Declaration of Rights, they must understand what actually is being amended. Any argument to the contrary is an affront to the foundational philosophy embedded in Article I, §25 and results in a *de facto* – and necessarily impermissible – arrogation of this important right by the government itself.

In the case of "Marsy's Law," as this Court recognized in its preliminary injunction opinion, the "people" were asked whether to substantially amend several provisions of the Declaration of Rights in a single ballot question drafted by the Secretary of the Commonwealth:

> 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?

(emphasis added). The Proposed Amendments "facially" amend multiple provisions of the Declaration of Rights, which for good reason is forbidden by the Constitution itself. *See* PI Mem. Op. at 22–29, discussing *Grimaud v. Commonwealth*, 581 Pa. 398, 407–09, 865 A.2d 835, 841–42 (2005), *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999), and *Pennsylvania Prison Society v. Commonwealth*, 565 Pa. 526, 776 A.2d 971 (2001) (all explaining "single subject" requirements of Pa. Const., Article XI, § 1).

Both the official ballot question and the Plain English Statement drafted by the Attorney General, while longer, were necessarily incomplete, given the forbidden complexity of the Proposed Amendments, providing a separate but related basis to invalidate the measure under 25 Pa. Stat. § 2621.1. *See* PI Mem. Op. at 34; *Grimaud*, 581 Pa. at 409–12, 865 A.2d at 842–44; *Sprague* v. *Cortes,* 636 Pa. 542, 145 A.3d 1136, 1141 (2016) (equally divided Court; opinion of Baer, J., for 3 Justices); *Stander* v. *Kelley,* 433 Pa. 406, 250 A.2d 474, 480 (1969). The italicized "including" makes explicit that the official question is incomplete and therefore inaccurate and unacceptable. Precisely because the Proposed Amendments directly affect so many different provisions of the

Constitution, it would be virtually impossible to summarize it accurately and completely in a ballot statement.[4]

The Commonwealth's failure to provide to "the people" a full and accurate summary of the Proposed Amendments is significant. By way of example only, the Proposed Amendments include in subsection (c) only a partial definition of the term "victim." The definition is incomplete by its terms: it states what the term "victim" "*includes*" but not what it "means." No reference is made to that fact in the ballot question; and nothing in the ballot question reflects that: (i) for a person to be a "victim" within the meaning of the Proposed Amendments, he or she only needs to *accuse* somebody of a crime and that no determination has to be made (so far as it appears) by any judicial officer that the person has actually been victimized by the accused (or at all)[5] before the full panoply of rights set forth in the Proposed Amendments is

[4] While the "Plain English Statement of the Office of Attorney General" provides a fuller recitation of the provisions of the Proposed Amendments, even that document is incomplete. Under the Election Code, the Attorney General is to "prepare a statement in plain English which indicates the purpose, *limitations and effects* of the ballot question on the people of the Commonwealth…" 25 Pa.Stat. § 2621.1 (emphasis added). The "Plain English Statement" in this case certainly does not address the limitations and effects of the ballot question, even assuming that voters were aware of the existence of the Plain English Statement, and could manage to seek it out wherever it may have been posted in their polling place prior to entering the voting booth.

[5] Although not all the clauses of the Proposed Amendments make explicit reference to any offense committed "by the accused," they do refer to a person victimized by "*the* offense," not "*an* offense" (and certainly not "an alleged offense") and thus necessarily refer to "the offense specified in the complaint or information," and thus, "the offense allegedly committed by the accused."

triggered; and (ii) the Proposed Amendment expressly excludes from the definition of a "victim" the accused (among others). Hence, a woman who has been the subject of prior domestic violence and finally defends herself against the perpetrator but is charged with a crime as a result of her actions (a not-uncommon occurrence) cannot be considered a "victim" under the Proposed Amendments. The same dilemma exists in any disputed case of self-defense.

By way of further example of its deficiencies, the ballot question:

- While referencing the rights of crime victims to have their safety considered in bail proceedings, failed to alert the electorate that the Proposed Amendments actually seek to provide: "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" (emphasis added), thus actually extending this rights beyond "victims," while not even defining the scope of "family" included in this right,[6] and quite plainly suggesting that bail may be set in an amount designed to ensure pretrial detention in cases not otherwise allowed under Article I, section 14, thus wholly ignoring the presumption of innocence while amending the right to reasonable bail heretofore guaranteed in nearly all cases;

[6] In fact, the original supposed outrage against which the so-called "Marsy's Law" was directed by the California billionaire who is its sole financial sponsor was the release on bail of an ex-boyfriend accused of killing the sponsor's sister (in 1983). The asserted "harm" to the victim's "family" was their surprise and unhappiness at seeing the accused carrying out normal daily activities in his neighborhood, such as shopping, while free on pretrial bail. *See* Beth Schwartzapfel, "The Billionaire's Crusade," The Marshall Project (posted 5/22/18), available at https://www.themarshallproject.org/2018/05/22/nicholas-law (last accessed 10/31/19).

- While referencing the right of crime victims to have "reasonable protection from the accused," the electorate was not advised that the Proposed Amendments actually provide a "right … to reasonable protection from the accused *or any person acting on behalf of the accused*" (emphasis added), again expanding, without explanation or guidance, the scope of individuals who fall within that latter clause, including the distinct suggestion that criminal defense lawyers are a threat to crime victims, from whom the latter are said to need legal "protection";
- While referencing the right of crime victims to "refuse discovery requests made by the accused," the electorate was not advised that the Proposed Amendments actually provide the victim with the right "to refuse an interview, deposition[7] or other discovery request made by the accused *or any person acting on behalf of the accused*" (emphasis added), thus directly interfering with and impeding the duty of defense counsel, heretofore guaranteed by Article I, section 9, to investigate the case and prepare for hearings or trial;
- Nothing in the ballot question reflected that the Proposed Amendments require that the new rights to be conferred must "be protected in a manner no less vigorous than the rights afforded to the accused," thus inevitably leading to judicial "balancing" of these supposedly co-equal rights that will necessarily lead to

[7] "Depositions" are allowable under Pennsylvania criminal procedure only in extraordinary circumstances when necessary to protect the compulsory process rights (Art. I, § 9) of the accused. *See* 42 Pa.C.S. § 5919; Pa.R.Crim.P. 500–501.

instances in which the heretofore guaranteed rights of the accused will not be enforced at all.

The above examples are merely illustrative of the failure of the ballot question, on its face, to fully advise "the people" of the substance of the Proposed Amendments.[8] Critically, the ballot question did not even attempt to advise "the people" that the Proposed Amendments also facially amend a multitude of other rights set forth in the Declaration of Rights, and that, most fundamentally, the Proposed Amendments directly threaten, by facially disregarding, the presumption of innocence. *See* Argument B, *ante*.

PACDL suggests that the ballot question, crafted by officers of the State, is couched in politically expedient terms to seek an *uninformed* vote by the people based on emotion and prejudice. After all, who would vote against a question which seeks to grant to "crime victims" the right "to be treated with fairness, respect and dignity"? The ballot question included amendments to multiple provisions of the venerable and ostensibly "inviolate" Declaration of Rights, without fully advising voters of its multifarious and profound impacts, and without giving the voters their right to approve or disapprove some, all or none of the Proposed Amendments. Given the failure of the ballot to question to fully inform "the people" of the full scope of rights which the Proposed

[8] Additional questions abound. If a victim's right to "reasonable and timely notice" under the Proposed Amendments was violated, and a trial ended with acquittal, might the amendment not potentially be deemed to outweigh the defendant's protection against retrial under the Double Jeopardy Clause of Article I, § 10?

Amendments seek to provide, it is the government, and not the people, that would be amending the constitution. That result impugns Article I, §25 of the Constitution and must fail.

CONCLUSION

For the foregoing reasons, *amicus curiae* PACDL respectfully requests that this Honorable Court granting permanent injunctive relief against certification of the results of the November 5, 2019, vote on the Proposed Amendments.

Respectfully submitted,

Dated: December 13, 2019

PETER GOLDBERGER
Pa. Atty. ID # 22364
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

PETER KRATSA
President, PACDL
Pa. Atty. ID # 71009
MacElree Harvey, Ltd.
17 West Miner St.
West Chester, PA 19382
(610) 840-0209

Counsel for Amicus Curiae, PACDL

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify pursuant to Pa. R. App. P. 127 that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* (eff. 1/5/2018) that require filing of confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

I certify pursuant to Pa.R.App.P. 531(b)(3), that this Brief (including the Statement of Interest) contains no more than 5706 words, including footnotes, which is less than the allowable 7000 words.