

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 4 MAP 2021

**LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA AND
LORRAINE HAW**

v.

**VERONICA DEGRAFFENREID AS ACTING SECRETARY OF
THE COMMONWEALTH**

**APPEAL OF: SHAMEEKAH MOORE, MARTIN VICKLESS,
KRISTIN JUNE IRWIN AND KELLY WILLIAMS**

**BRIEF FOR *AMICUS CURIAE*
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF PENNSYLVANIA**

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON JANUARY 7, 2021 AT NO. 578 MD 2019

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STATEMENT OF THE QUESTION INVOLVED

Whether the Proposed Constitutional Amendment (Marsy's Law) providing protections for crime victims violates the single subject requirement under Article XI, Section 1 of the Pennsylvania Constitution?

Answer of the Commonwealth Court: Yes.

Suggested Answer: No.

INTEREST OF THE AMICUS

The Crime Victims’ Rights Amendment, commonly known as “Marsy’s Law,” would secure permanent procedural protections for the victims of crime as part of Pennsylvania’s Constitution. It was placed on the ballot for the November 5, 2019 General Election pursuant to the procedures set forth in Article XI, Section 1 of the Pennsylvania Constitution. Although Marsy’s Law was unofficially approved by 73 percent of the voters, the Commonwealth Court initially enjoined the Secretary of the Commonwealth from certifying the vote and subsequently declared that the proposed Amendment was unconstitutional because it violated the single subject requirement under Article XI, Section 1 of the Pennsylvania Constitution.

The Attorney General, as the chief Law Enforcement Officer for Pennsylvania, brings a unique perspective to the protection of victims’ rights, since the Attorney General has a “duty both to respect the rights of the defendant and to enforce the interests of the public.” *Commonwealth v. Clancy*, 192 A.3d 44, 52 (Pa. 2018). This Amendment strikes that balance and enshrines it in the Constitution.

The Attorney General also has a specific role to play in the process of amending the Pennsylvania Constitution. The Attorney General must prepare a plain English statement indicating “the purpose, limitations and effects of the ballot question” and approve of the ballot labels on which the proposed

constitutional amendment is printed. 25 P.S. §§ 2621.1, 2755. The Attorney General has an even broader interest in such amendments being properly presented to the electorate and being made a part of the Constitution where they are approved by the voters and conform to the requirements of this Court.

Here, the Commonwealth Court repudiated the single subject standard established by this Court and instead adopted a test this Court has specifically rejected. The Commonwealth Court's decision threatens the constitutional amendment process. The Office of Attorney General, therefore, has a substantial interest in the outcome of this action.

SUMMARY OF ARGUMENT

In *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005), this Court established the framework for analyzing whether a proposed constitutional amendment satisfies the single subject requirement of Article XI, Section 1 of the Pennsylvania Constitution—the subject matter test. That test has two sub-parts: first, the proposed changes must be sufficiently interrelated to justify inclusion in a single question; and second, it must not substantively affect other constitutional provisions, meaning it does not “facially” or “patently” affect other provisions. In other words, the amendment must not rewrite the language of another constitutional provision.

The Crime Victims’ Right Amendment satisfies both parts of the subject matter test. The General Assembly accurately identified the narrowly-tailored single subject in the text of the amendment as follows: “to secure for victims justice and due process throughout the criminal and juvenile justice systems.” And, the Amendment does not alter the language of any other constitutional provision; rather the Amendment is entirely new.

The Commonwealth Court, rather than applying this clear, bright-line rule, not only adopted its own test – the “implicit effects” test – but did so in the face of this Court’s rejection of it in *Grimaud*. As this Court recognized in *Grimaud*, the framers did not make it impossible to amend the Constitution. They “knew

amendments would occur and provided a means for that to happen.” *Id.* at 842. Therefore, because every amendment has some arguable effect on another constitutional provision, this Court rejected the implicit effects test.

Having cast *Grimaud* aside, the Commonwealth Court relied on bad law – its decision in *Pennsylvania Prison Society v. Commonwealth*, 727 A.2d 632 (Pa. Cmwlth. 1999), *rev’d* 776 A.2d 971 (Pa. 2001) – for the proposition that amendments proposed by the legislature and approved by the electorate are reserved for simple, straightforward changes to the Constitution. This finds no support in the text of the Constitution, this Court’s caselaw, or reality. More complex changes, such as Article V, Section 18, establishing the Court of Judicial Discipline, have been made to the Constitution through the legislatively initiated amendment process.

The lead opinion’s application of the discredited implicit effects test was itself erroneous. The lead opinion’s suggestion that the accused’s right to confrontation and to compulsory process would be infringed was seriously overwrought. As the League of Women Voters recognized, the accused cannot compel a victim or witness to give the defense an interview or submit to a deposition. Rather, it is through pretrial disclosure of evidence held by the prosecution, typically overseen by the court, that the accused’s rights are protected. As for the right of confrontation, once subpoenaed to testify, a victim must be

subject to cross examination or face being found in contempt of court. The lack of implicit effects aside, no constitutional right is unlimited, but must be balanced against other, sometimes competing, constitutional rights. In fact, the criminal justice system is already balancing the same interests set forth in the proposed amendment as they are already largely contained in the Crime Victims Act.

More fundamentally and more importantly, the Crime Victims' Right Amendment satisfies the single subject requirement of Article XI, Section 1 of the Pennsylvania Constitution, the Commonwealth Court's contrary conclusion is clear error and must be reversed.

ARGUMENT

I. This Court Established in *Grimaud* that the Governing Standard for Article XI, Section 1’s Single Subject Requirement is the Subject Matter Test.

Article XI, Section 1 of the Pennsylvania Constitution “establishes the procedure for the General Assembly’s proposal of amendments and the electorate’s adoption,” stating, in pertinent part that, “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” *Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005). The standard governing this constitutional requirement of a “single subject” or “separate vote” was established by this Court’s decision in *Grimaud*.

There, this Court adopted then Justice Saylor’s concurrence in *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001), which set forth a clear, bright-line test. A proposed constitutional amendment runs afoul of the single subject requirement when it violates “the subject matter test.” *Grimaud*, 865 A.2d at 841-42. This test has two sub-parts.

First, the changes must be “sufficiently interrelated . . . to justify inclusion in a single question.” *Id.* at 841. So, for example, in *Grimaud*, the General Assembly proposed two changes to section 14 of Article I by expanding the capital offenses bail exception to include offenses for which the sentence is life imprisonment and by adding preventative detention to the purpose of bail. *Id.* These two changes

were presented to the electorate in a single question. *Id.* This Court held that this single question did not violate the subject matter test because “the proposed changes were related to a single subject,” that is, “all concerned disallowance of bail to reinforce public safety.” *Id.*¹

Second, a proposed amendment violates the single subject requirement when, considering its “content, purpose, and effect,” it “substantive[ly] affects” other constitutional provisions. *Id.* at 842. But the fact the proposed amendment “implicitly amends,” “may possibly impact other provisions,” or “might touch other parts of the Constitution *when applied*,” is not enough. *Id.* (emphasis added). Rather, the test is “whether the amendments *facially* affect other parts of the Constitution.” *Id.* Stated otherwise, “[t]he question is whether the single ballot question patently affects other constitutional provisions.” *Id.* This Court meant for the phrases “facially” and “patently” to have their ordinary meanings. The

¹ In adopting this first part of the subject matter test, this Court found authority from other jurisdictions persuasive. Those jurisdictions formulated the test in different ways, but the thrust of the test is the same. *See Korte v. Bayless*, 16 P.3d. 200, 203-05 (Ariz. 2001) (explaining a “common-purpose formulation” to inquire into whether the proposed amendments are sufficiently related to “constitute a consistent and workable whole on the general topic embraced”); *Clark v. State Canvassing Bd.*, 888 P.2d 458, 462 (N.M. 1995) (applying a “rational linchpin” of interdependence test); *Sears v. State*, 208 S.E.2d 93, 100 (Ga. 1974) (inquiring into whether all of the proposed changes “are germane to the accomplishment of a single objective”); *Fugina v. Donovan*, 104 N.W.2d 911, 914 (Minn. 1960) (upholding separate propositions that, although they could have been submitted separately, were rationally related to a single purpose, plan, or subject).

proposed amendment must change the language of another amendment. This Court underscored this very point by italicizing “facially.” *Id.* The reason for this rule was obvious, for every amendment has “some arguable effect on another provision.” *Id.* But “clearly the framers knew amendments would occur and provided a means for that to happen.” *Id.* They did not desire for it to be impossible to amend the Constitution.

Therefore, applying this test in *Grimaud*, the bail amendments “only patently affected Article I, § 14, regarding when bail is disallowed in criminal cases.” *Id.* The presumption of innocence “language” contained in Article I, Section 9 was “the same now as it was prior to the [bail] amendments,” and so the bail amendments did not violate this second part of the subject matter test.

The subject matter test enunciated in *Grimaud* is a clear, bright-line rule, and one that is easily applied, both by the General Assembly when it proposes constitutional amendments, and the courts when they review those amendments. That test applies here.

II. The Crime Victims’ Rights Amendment Satisfies the Subject Matter Test.

The Crime Victims’ Rights Amendment satisfies both parts of the subject matter test. In fact, each procedural step in Article XI, Section 1 was followed “with precision.” *League of Women Voters of Pa. v. Boockvar*, 2021 WL 62268, *21 (Leavitt, P.J., dissenting).

First, the proposed changes are sufficiently related to justify inclusion in a single ballot question. Those changes are “related to a single subject,” one the General Assembly explicitly and accurately set forth in the text of the Amendment: “to secure for victims justice and due process throughout the criminal and juvenile justice systems.” Joint Resolution No. 2019-1, H.B. 276, 203d Gen. Assemb., Reg. Sess. (Pa. 2019-2020) (Joint Resolution No. 2019-1). For example, the right to have the victim’s safety considered in setting bail, to reasonable and timely notice of public criminal proceedings, to notification of any pretrial disposition (except grand jury proceedings), to be heard in any proceeding where a victim’s right is implicated, such as plea and sentencing, to refuse an interview by the accused or his representative, to be notified of any parole proceedings, to full and timely restitution, and to the return of property when no longer needed as evidence, are all interrelated to that single subject. This single subject is, in fact, highly specific, and not swept up so broadly “into a common focus” such as “the criminal law.” *Cf. League of Women Voters*, 2021 WL 62268, *19 (McCullough, J., concurring).

Second, the proposed changes do not substantively affect other constitutional provisions because they change “no other part of the Constitution.” *Grimaud*, 865 A.2d at 842. These proposed changes would add an amendment to the Constitution. They do not change the language of any other constitutional

provision. Just as in *Grimaud*, we know this because the “language is the same now as it was prior to” these proposed changes. *Id.*

Accordingly, applying the *Grimaud* test, the Crime Victims’ Right Amendment satisfies Article XI, Section 1’s single subject requirement.

III. The Commonwealth Court Cast Aside Controlling Precedent, Adopted its Own Test that This Court Rejected in *Grimaud*, and Relied on Bad Law in Striking Down the Crime Victims’ Rights Amendment as Unconstitutional.

Instead of applying the clear, bright-line test established in *Grimaud*, the lead opinion cast it aside. Even worse, the Commonwealth Court chose to resurrect the “implicit effects” test, a test that this Court specifically rejected in *Grimaud*. Further compounding this error, the lead opinion applied bad case law from the Commonwealth Court that this Court had reversed.

The lead opinion cast aside *Grimaud*, seeing it as only guidance, when it is binding precedent. *League of Women Voters*, 2021 WL 62268, *7. And, in doing so, the lead opinion made a distinction that has no basis in the Constitution: that *Grimaud* does not govern because it involved an amendment to an existing constitutional provision, not the adoption of a new amendment. *Id.* at *8. Article XI, Section 1 makes no such distinction. The lead opinion found nothing controlling from this Court to support such a distinction. Accordingly, the lead opinion sought support elsewhere in Justice Todd’s dissent in *Sprague v. Cortes*, 145 A.3d 1136, 1145 (Pa. 2016) (Todd, J., dissenting). But in addition to being a

dissent, that opinion dealt not with the single subject requirement but with the clarity of a ballot question (is the question fair, accurate, and clear). *Id.* at 1136-37. Having found no support from this Court, the lead opinion incorrectly relied on bad case law from the Commonwealth Court.

In *Pennsylvania Prison Society v. Commonwealth*, 727 A.2d 632 (Pa. Cmwlth. 1999), the General Assembly proposed changes to the power to pardon. The Commonwealth Court struck them down, stating, “[t]he process described in Article XI, section 1 is reserved for simple, straightforward changes to the Constitution, easily described in a ballot question and easily understood by the voters. This process should not be used to circumvent a constitutional convention, the process for making complex changes to the Constitution.” *Id.* at 634.

This Court, however, reversed on appeal. *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971, 973 (Pa. 2001). The distinction the Commonwealth Court sought to make between simple and complex changes to the Constitution was not part of this Court’s holding. Yet, the lead opinion relied on it, even considering it “[o]f critical importance” to its resolution. *League of Women Voters*, 2021 WL 62268, *9. This was fundamental error. *See In re Burke*, 741 A.2d 756, 757 (Pa. Super. 1999) (Supreme Court’s order of reversal in another case “render[ed] the entire opinion of the Superior Court reversed and of no precedential value”); *see also Department of Transp. v. Marpoe*, 630 A.2d 561,

562 n.4 (Pa. Cmwlth. 1993) (noting that an overruled decision is “of no precedential value”). This distinction, lacking any textual support in the Constitution or this Court’s case law, also has no basis in reality. Certainly, more complex constitutional amendments have been enacted using Article XI, Section 1, such as Article V, Section 18, establishing the Court of Judicial Discipline.

That Amendment, adopted in 1993, abolished the Judicial Inquiry and Review Board and created the Judicial Conduct Board, which investigates and prosecutes charges of judicial misconduct, and the Court of Judicial Discipline, which adjudicates those charges. *See In re Bruno*, 101 A.3d 635, 680 (Pa. 2014); *In re Interbranch Comm’n on Juvenile Justice*, 988 A.2d 1269, 1272 n.4 (Pa. 2010). In addition, that Amendment sets forth, *inter alia*, the composition of both the Board and the Court; the length of an appointee’s term; that the Board and the Court shall prescribe rules for the conduct of its members, appoint staff, and prepare and administer their own budgets; rights of the accused to confidentiality, due process, discovery, subpoena witnesses and compel production of evidence, and the presumption of innocence; the disciplinary action the Court may impose, including the removal, suspension, or retirement of a mentally or physically disabled judge; absolute immunity for the Board, the Court, and their staff; and a right of appeal to the Pennsylvania Supreme Court both for a judge and the Board. Pa. Const., Art. V, § 18. Though far more complex than the Crime Victims’ Right

Amendment, the Court of Judicial Discipline Amendment was enshrined in the Constitution using the legislatively initiated process.

The lead opinion erred once again when it applied the second part of the subject matter test. Rather than asking whether the proposed changes facially or patently affect other constitutional provisions, by changing the language of those provisions, the lead opinion looked to its “implicit effects,” that is, how the proposed changes “might touch other parts of the Constitution when applied.” *Grimaud*, 865 A.2d at 842. And the lead opinion found a host of implicit effects, going so far as to speculate about clogged court dockets stemming from motions and appeals filed by defense attorneys seeking discovery. *League of Women Voters*, 2021 WL 62268, *10.

Both the concurrence and the dissent rightly identified this fatal flaw in the lead opinion’s analysis. *League of Women Voters*, 2021 WL 62268, *20 (McCullough, J., concurring) (the lead “opinion’s reliance upon ‘implicit’ effects is clear in [certain] portions of its analysis”); *id.* at 22-23 (Leavitt, P.J., dissenting) (rejecting the League’s argument – which the lead opinion followed – because it relied upon implicit effects), both citing *Grimaud*, 865 A.2d at 842. Again, this Court rejected the implicit effects test in *Grimaud* because it contravenes the framers’ intent that amendment of the Constitution should not be impossible.

Beyond the fundamental analytical error concerning the single subject requirement, the lead opinion's suggestion of implicit effects was seriously overwrought. As the President Judge put it, such arguments "do not withstand close scrutiny." *League of Women Voters*, 2021 WL 62268, 23 (Leavitt, P.J., dissenting).

The Crime Victims' Rights Amendment enshrines the following rights in the Constitution:

- To be treated with fairness and respect for the victims' safety, dignity and privacy
- To have the safety of the victim and the victims' 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

As even the lead opinion recognized, many of the proposed changes to the Constitution are already codified in 18 P.S. § 11.201; *League of Women Voters*, 2021 WL 62268, *14. As such, for more than two decades, the courts have been balancing the rights of victims with those of criminal defendants. *See e.g. Commonwealth v. King*, 182 A.3d 449, 454-459 (Pa. Super. 2018). Constitutional adjudication of competing rights proceeds the same way because no constitutional right is unlimited. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited”). The Amendment enshrines this very principle, since the rights of victims are “to be protected in a manner no less vigorous than the rights afforded to the accused.” Joint Resolution No. 2019-1.

The Commonwealth Court was most troubled by its belief that the accused’s constitutional rights to confront the witnesses against him and to compulsory process for obtaining witnesses would be infringed. Pa. Const., Art. I, § 9. Those rights aren’t even implicated, let alone infringed.

The Crime Victims' Right Amendment concerns, *inter alia*, pretrial rights. It affords a victim of a crime the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused." Joint Resolution No. 2019-1. The League's expert witness, a criminal defense attorney, acknowledged that no criminal defendant can compel a victim or witness to give the defense an interview or submit to a deposition. Rather, it is through pretrial disclosure of evidence held by the prosecution that the accused's rights are protected. The courts typically oversee this procedure, and victims cannot overrule the courts. *See League of Women Voters*, 2021 WL 62268, *22 (Leavitt, P.J., dissenting) (League's argument "assumes that the defendant will not be able to obtain assistance of the court to compel discovery needed for a fair criminal trial").

Rule 573(A) of the Pennsylvania Rules of Criminal Procedure provides a procedural mechanism for pretrial disclosure. Under that rule, the parties are encouraged to resolve discovery disputes. Failing that, the demanding party can file a motion. Pa.R.Crim.P. 573(A). Substantively, for example, the prosecution must disclose exculpatory material to the defense. *Brady v. Maryland*, 313 U.S. 83 (1963); Pa.R.Crim.P. 573(B)(1)(a). Similarly, "where the Commonwealth has in its possession pretrial statements of its witnesses which have been reduced to writing and relate to the witness' testimony at trial, it must, if requested, furnish copies of

these statements to the defense.” *Commonwealth v. Brinkley*, 480 A.2d 980, 984 (Pa. 1984); *see Commonwealth v. Lloyd*, 567 A.2d 1357, 1359 (Pa. 1989) (trial court should have granted defendant’s subpoena of victim’s psychiatric records under state constitution guaranteeing right of confrontation and to compulsory process).

As for trial rights, nothing in the Crime Victims’ Rights Amendment permits a victim, if subpoenaed, to refuse to testify. Thus, as guaranteed by the state constitutional right of confrontation, a victim must be subject to cross examination or face being found in contempt of court. *See In re Martorano*, 346 A.2d 22, 27-28 (Pa. 1975). So, just as this Court has been doing since its inception with other competing constitutional amendments, it will properly balance the rights of the accused and the victim. *See e.g. Moore v. Jamieson*, 306 A.2d 283, 288 (Pa. 1973); *see also Department of Transp. v. Taylor*, 841 A.2d 108, 116 (Pa. 2004).

In addition to the “implicit effects” test not being the governing standard, the lead opinion applied it erroneously, finding impacts on other constitutional provisions that do not exist.

More fundamentally and more importantly, the Crime Victims’ Right Amendment satisfies the single subject requirement of Article XI, Section 1 of the Pennsylvania Constitution, the Commonwealth Court’s contrary conclusion is clear error and must be reversed.

CONCLUSION

The Court should reverse the judgment of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,781 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Howard G. Hopkirk

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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief for Amicus Curiae Attorney General for the Commonwealth of Pennsylvania via PACFile on all registered PACFile users.

/s/ Howard G. Hopkirk_____

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Date: March 2, 2021