IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 EM 2018 & 103 EM 2018

JERMONT COX and KEVIN MARINELLI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF FOR *AMICUS CURIAE* OF SENATOR SCOTT MARTIN, SENATOR GENE YAW, SENATOR SCOTT HUTCHINSON, SENATOR MIKE FOLMER, SENATOR LISA BAKER, SENATOR WAYNE LANGERHOLC, SENATOR CAMERA BARTOLOTTA, SENATOR MICHELE BROOKS, SENATOR JOSEPH SCARNATI, SENATOR JOHN GORDNER, SENATOR RYAN AUMENT, SENATOR MARIO SCAVELLO, SENATOR KIM WARD

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I. INTRODUCTION

This matter asks the Court to rely on an untested report prepared for *the General Assembly's* consideration and treat it as if it is a finished product, fully ready for *judicial* reliance and decision-making. The Court should decline Petitioners' request to proceed in reliance on "facts" that have not been fully vetted to the degree necessary to support judicial review. Still, if the Court elects to proceed, the Court should leave room for further legislative action by treating the present challenge as the as-applied challenge Petitioners state it is, and not as the *facial* challenge it silently attempts to lodge.

II. STATEMENT OF INTEREST

Senator Scott Martin is the duly elected Pennsylvania Senator representing Senate District 13, which covers Lancaster County. Senator Gene Yaw is the duly elected Pennsylvania Senator representing Senate District 23, which covers Bradford, Lycoming, Sullivan, Susquehanna and Union Counties. Senator Scott E. Hutchinson is the duly elected Pennsylvania Senator representing Senate District 21, which covers Butler, Clarion, Forest, Venango and Warren Counties. Senator Mike Folmer is the duly elected

Pennsylvania Senator representing Senate District 48, which covers Lebanon, Dauphin and York Counties. Senator Lisa Baker is the duly elected Pennsylvania Senator representing Senate District 20, which covers Luzerne, Pike, Susquehanna, Wayne and Wyoming Counties. Senator Wayne Langerholc Jr. is the duly elected Pennsylvania Senator representing Senate District 35, which covers Bedford, Cambria & Clearfield Counties. Senator Camera Bartolotta is the duly elected Pennsylvania Senator representing Senate District 46, which covers Beaver, Washington and Greene Counties. Senator Michele Brooks is the duly elected Pennsylvania Senator representing Senate District 50, which covers Crawford, Erie, Mercer and Warren Counties. Senator Joseph B. Scarnati III is the duly elected Pennsylvania Senator representing Senate District 25, which covers Cameron, Clearfield, Clinton, Elk, Jefferson, Mckean, Potter and Tioga Counties. Senator John R. Gordner is the duly elected Pennsylvania Senator representing Senate District 27, which covers Columbia, Luzerne, Montour, Northumberland and Snyder Counties. Senator Ryan P. Aument is the duly elected Pennsylvania Senator representing Senate District 36, which covers Lancaster County. Senator Mario M. Scavello is the duly

elected Pennsylvania Senator representing Senate District 40, which covers Monroe and Northampton Counties. Senator Kim L. Ward is the duly elected Pennsylvania Senator representing Senate District 39, which covers Westmoreland County. Senators Martin, Yaw, Hutchinson, Folmer, Baker, Langerholc, Bartolotta, Brooks, Scarnati, Gordner, Aument, Scavello, Ward are collectively referred to as the Senators.

As members of the legislative branch of Commonwealth government, the Senators have an inherent interest in ensuring that the legislative function conferred on the General Assembly by Article II of the Pennsylvania Constitution is protected. The present matter, if accepted by the Court, stands to directly impede the Senators' ability to perform their legislative function in matters involving the death penalty in Pennsylvania, which is a matter of significant public policy concern for the General Assembly.

This *amicus curiae* brief is submitted to protect the foregoing interests. No person or entity other than the Senators or their counsel paid in whole or in part for this brief, nor authored it in whole or in part. *See* Pa.R.A.P. 531(b)(2).

III. ARGUMENT

The Court should not rely on the Joint State Government Commission's 2018 report on the death penalty to decide this matter. That report is not a suitable for the foundation of judicial decision-making, and was never intended as such. Further, the matter before the Court purports to be an as-applied challenge; the Court should treat it as such, and not as the facial challenge it actually lodges. This is necessary so as to preserve the General Assembly's ability to fix the laws, if any, that need repaired to comport with the Pennsylvania Constitution.

A. The purpose of the JSGC Report was to give guidance to the General Assembly on potential legislative changes; it was not intended to stand in for judicial fact-finding or to eliminate important policy debates.

The chief predicate support for Petitioners' challenge to the death penalty is the June 2018 Report of the Joint State Government Commission (JSGC), entitled "Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee." (hereafter, the JSGC Report or the Report). *See, e.g.*, Pet. Br. at 1 (opening sentence of brief, citing JSGC Report). Petitioners treat the JSGC Report and the "facts" that it purports to contain as gospel truths that need no further

judicial review or testing, and that require only application as a matter of law by this Court. *See* Pet. Br. at 4 (describing "evidence from" JSGC Report). But even if the Court is inclined to exercise its jurisdiction and entertain the present matter, the Court should not do so in *sole* reliance on the conclusions in the JSGC Report, for at least three reasons.

First, this JSGC Report, like most JSGC reports, is intended to inform and advise *the General Assembly* about potential statutory reforms, and it does not contain findings of fact suitable for judicial decision-making. To illuminate, in general, the JSGC is tasked with gathering information that may be "useful to [the] *General Assembly*," and, thus, from time-to-time, the JSGC makes reports "to the *General Assembly*" of findings and recommendations that the *General Assembly* may then consider in setting policy and making laws. *See* 46 P.S. § 66(a) & (c) (emphasis added); *see also* 46 P.S. § 67 (authorizing studies and investigations that the General Assembly, by resolution, directs). Under the Statutory Construction Act, such reports may be relied on by courts for the limited purpose of assisting in interpreting *statutes* that follow from JSGC reports. 1 Pa.C.S. § 1939; *see also In re Jackson*, 174 A.3d 14, 28 n.11 (Pa. Super. 2017) ("The Statutory Construction Act

authorizes us to consult Joint State Government Commission reports in construing statutes, and, if necessary to resolve a lack of explicitness, to consider a statute's history and relevant former law.").[1]

But what neither caselaw nor statute permits is the use of the content of JSGC reports—standing alone—as final and definitive facts, suitable for judicial review. This is so for a simple reason: the reports are for the *General Assembly's* use in making policy, and as a springboard for further factual inquiries and testing in making such policy. *See* Senate Resolution No. 6 (P.N. 1833), Session of 2011 (directing JSGC to report "to the Senate"). Thus the "facts" in them do not need to be of full evidentiary value. Indeed, the "facts" in these reports—and specifically, the present JSGC Report—are not subject to full cross-examination or other meaningful weight or credibility testing, as is required to net evidence of admissible value in a court of law. *Cf. C.S. v. Com. Dep't of Human Services, Bureau of Hearings and Appeals*, 184 A.3d 600, 604 (Pa. Cmwlth. 2018) ("[C]ross-examination is 'the greatest legal engine ever invented for the discovery of the truth,' …

[1] As a notable parenthetical, in response to some of the concerns expressed by the JSGC, the General Assembly set aside an additional $500,000 specifically to fund "indigent criminal defense in capital cases" for Fiscal Year 2019-2020. *See* Act of June 28, 2019, P.L. ____, No. 20 (amending 72 P.S. § 1712-J).

and is 'a vital feature of the law.'" (internal citation omitted)). And critically, the "facts" in the JSGC Report are very much subject to weight and credibility testing, as the response to the Report by the Pennsylvania District Attorneys Association readily reveals.[2] *See* Commonwealth Answer to Petition for Review, 103 EM 2018, Exhibit A (Pennsylvania District Attorneys Association response to JSGC Report).

Second, if the Court were to rely solely on the JSGC Report in granting the relief requested by Petitioners, the Court's action will have a chilling effect on future legislative studies, to the detriment of good governance. To explain, as noted above, JSGC reports are intended to guide the General Assembly in making informed decisions on legislation. *See* 46 P.S. § 66. But if such reports are to be used by the judiciary as a proxy for judicial fact-finding, and more importantly, as a means to bypass the General Assembly's ability to (i) propose, (ii) deliberate upon, and (iii) pass vital legislation, the General Assembly will be incented not to have such reports created in the future. This is not an incentive the Court should want to create. The

[2] There are, of course, many other potential weight and credibility challenges to the "facts" in the JSGC Report beyond those raised by the Pennsylvania District Attorneys Association. By way of just one example, the first "fact" in the Report, which is cited at footnote 4, is based on an *op-ed* advocating against the death penalty. *See* JSGC Report at 1, n.4.

General Assembly needs to have the ability to create studies of important public policy issues, but it will simply have no reason to do so if those studies will permit the law-making function of the General Assembly to be bypassed. This will, no doubt, yield less effective policy-making.

Third, and finally, even if the Court is going to accept the Report, standing alone, as the basis for further decision-making, the Court should at least critically examine whether the "facts" in it are supported by the record they are purportedly based upon. By way of analogy, even in a standard PCRA appeal, this Court does not blindly accept the facts developed below as unreviewable truths; instead, the Court requires that the facts be "supported by the record." *See Com. v. Hanible*, 30 A.3d 426, 438 (Pa. 2011); *see also Com. v. Iannaccio*, 480 A.2d 966, 971 (Pa. 1984) (non-PCRA matter, opinion of Zappala, J.) ("It is axiomatic that in reviewing findings of fact, an appellate court must give great deference to the fact finder whose province it is to pass upon the credibility of witnesses, whom he has seen and heard, and determine the weight if any to be given their testimony. This deference does not, however, extend so far as to allow a lower court to base its decision on speculation

derived from the testimony which it finds credible. The court's determination must be based on facts in the record."). Likewise, here, the Court should not accept the findings of "fact" in the JSGC Report without examining whether the underlying support for those findings actually justifies them, *cf. supra* footnote 1, which is perhaps a task best-suited for a special master. *See Com. v. Brown*, 196 A.3d 130, 200 (Pa. 2018) (Saylor, C.J., dissenting) (describing use of special master in extraordinary jurisdiction matter involving counsel for indigent capital defendants).

For the foregoing reasons, the Senators request that the Court exercise caution before any reliance is placed on the JSGC Report in disposing of the present matter, and further requests that the Court decline to exercise its jurisdiction.

B. To preserve the General Assembly's ability to fix any statutes that need remedied, the Court should treat this matter as an as-applied challenge, and not as the facial challenge it attempts to lodge *sub silentio*.

Despite repeatedly stating in their Brief that they are presenting an "as applied" (or "as administered") challenge to the death penalty in Pennsylvania, *see* Pet. Br. at 7, 15, 17, 18, 19, 39, 90, 95, Petitioners have not actually presented a case for an as-applied petition. Indeed,

what Petitioners actually appear to present, albeit *sub silentio*, is a facial challenge to the death penalty in Pennsylvania, but without the required analysis to prevail on such an argument. Regardless, so as to preserve for the Senators the opportunity to correct any "as applied" problems with Pennsylvania's laws on the death penalty, the Senators request that the Court take Petitioners at their stated word and treat this as an as-applied challenge, leaving open the possibility for legislative reforms that such a challenge permits.

To illustrate the foregoing, a brief summary of the difference between facial and as-applied challenges is necessary. To begin, enacted legislation of course enjoys a "presumption of constitutionality." *See Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019). Thus, a statute will not be declared unconstitutional unless it "clearly, palpably violates the Constitution." *Id.* (quotations removed). These standards consequently mean a challenger to the constitutionality of a law faces a "high burden." *Id.* This burden is made that much higher in a facial challenge, where to show a statute is unconstitutional, the party must demonstrate "there are no circumstances under which the statute would be valid." *Id.* In contrast,

in an as-applied challenge, the party does not need to show that the law as written is unconstitutional, but rather need show that "its application to a *particular* person under *particular* circumstances deprived that person of a constitutional right." *See Nigro v. City of Philadelphia*, 174 A.3d 693, 699-700 (Pa. Cmwlth. 2017) (quotations removed; emphasis added).

In this matter, despite repeatedly saying they are advancing an as-applied challenge, neither of the Petitioners (nor any of the hundreds of other persons they purport to advocate for, *see* Pet. Br. at 95 (asking that "all" death sentences in the Commonwealth be vacated)) has identified any *particular* law that was applied to them and then explained how that *particular* law was applied in an unconstitutional manner.[3] Instead, they have argued that *some* laws in Pennsylvania may individually or collectively violate constitutional rights in certain circumstances. Stated otherwise, what they have put before the Court is not actually the substance of an as-applied challenge where one law or

[3] Of note, Petitioners, as they readily acknowledge, have each *twice* been before this Court prior to the present petition. *See* Pet. Br. at 8 (citing *Com. v. Cox*, 728 A.2d 923 (Pa. 1999); *Com. v. Marinelli*, 690 A.2d 203 (Pa. 1997); *Com. v. Cox*, 983 A.2d 666 (Pa. 2009); *Com. v. Marinelli*, 810 A.2d 1257 (Pa. 2002)). In these prior four trips to this Court Petitioners could have lodged challenges to whatever laws they believe have been applied unconstitutionally as to them in particular.

another is identified and how it has impacted the particular petitioner is explained based on his circumstances or facts, *see Nigro*, 174 A.3d at 699-700; instead, what has been put before the Court is *sub silentio* advocacy for a facial challenge to the death penalty. Yet, Petitioners have omitted a critical part of such advocacy: they have not explained how the death penalty can never be validly applied in any circumstance. *See Germantown Cab Co.*, 206 A.3d at 1041.

In consequence, the Court should treat the Petitioners' advocacy as what it directly states it is: an as-applied challenge. *See* Pet. Br. at 7, 15, 17, 18, 19, 39, 90, 95. The Senators are acutely concerned with the manner of constitutional challenge since a facial challenge, if successful, would eliminate the death penalty for all time as a matter of constitutional law; whereas, an as-applied challenge, if successful, would save room for the General Assembly to remedy the identified constitutional defects in the existing laws as they are applied to the Petitioners.

Therefore, the Senators request that the Court decline to exercise its jurisdiction in this matter, but if the Court is inclined to proceed, then the Senators request that the Court treat the constitutional

challenge as the as-applied challenge that it repeatedly states it is, and not as the facial challenge it is seemingly lodging in fact.

IV. CONCLUSION

The matter before the Court is attempting to take an important public policy issue—the death penalty—from the General Assembly's consideration and place it before the Court based entirely on a report prepared *for the General Assembly*. That report, however, bears none of the hallmarks of judicial fact-finding, and is, instead, the *initial* step in further debate and further fact-finding by the General Assembly. The Court should reject the invitation to make major policy decisions based on disputed and debatable "facts." Nevertheless, if the Court is inclined to take this matter, it should review it as what Petitioners state it is—an as-applied challenge—and not as what they actually ask this Court to do: apply a facial remedy by striking down the death penalty as a matter of constitutional law.

Respectfully submitted,

Dated: July 12, 2019

s/ Joshua J. Voss

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WORD COUNT CERTIFICATION

I hereby certify that the above principal brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 2682 words, exclusive of the cover page, tables, and the signature block.

Dated: July 12, 2019

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