

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

DANIEL HARMON,	:	
	:	
Petitioner,	:	
	:	No. _____
v.	:	
	:	Allocator Docket 2017
UNEMPLOYMENT	:	
COMPENSATION	:	
BOARD OF REVIEW,	:	
	:	
Respondent.	:	

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***AMICI CURIAE* BRIEF IN SUPPORT OF  
PETITION FOR ALLOWANCE OF APPEAL**

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Petition for Allowance of Appeal from the Order of June 7, 2017 of  
the Commonwealth Court at No. 787 C.D. 2015, affirming the decision of  
the Unemployment Compensation Board of Review, B- B-577458 on April  
15, 2015, denying unemployment compensation benefits

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## STATEMENTS OF INTEREST

**Community Legal Services, Inc.** (“CLS”) is a legal aid program serving low-income clients living in the City of Philadelphia. However, CLS attempts to perform its work in a manner that benefits low-income people throughout the State of Pennsylvania and beyond. It established one of the first legal aid reentry practices in the country in the 1990s. In 2016, 882 of its 1,413 new employment intakes involved criminal records, by far the most common reason people came to CLS for employment-related help. CLS has appeared before this Court and Commonwealth Court on issues concerning collateral consequences of criminal records. In 2003, CLS was co-counsel in *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003), in which this Court held that the criminal records provisions of the Older Adults Protective Services Act (“OAPSA”) violated the Pennsylvania Constitution. Most recently, CLS was co-counsel in *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Commw. 2015)(*en banc*)(permanently enjoining criminal records provisions of OAPSA).

**The National Employment Law Project** (“NELP”) is a non-profit legal research and advocacy organization with more than 45 years of experience promoting policies that create good jobs, expand access to work, and strengthen support for low-wage workers and the unemployed. Relevant to this petition, NELP has deep expertise in the areas of unemployment insurance and maximizing

employment opportunities for all Americans with arrest and conviction records. In these areas, NELP has issued major reports, litigated, and participated as amicus in numerous cases.

**The Public Interest Law Center** (“the Law Center”) is a nonprofit organization whose mission is to use high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. The Law Center uses litigation, community education, advocacy, and organizing to secure their access to fundamental resources and services. There is an extremely high unemployment rate among African Americans, particularly African-American men in the region, that is caused, in large part, by the disproportionately high rate at which African-American men are arrested and/or incarcerated, coupled with the increasing reluctance of employers to hire people with criminal records. As part of its mission, the Law Center seeks to eliminate these barriers faced by people reentering society after incarceration. The Law Center regularly represents individuals and classes of individuals in filing legal challenges against employers who refuse to hire based on unrelated criminal convictions under Pennsylvania and federal law. The Law Center employs litigation as one part of a multi-pronged strategy that also includes listening to employers about the concerns that lead them to avoid people with criminal histories and

educating both employers and employees about the laws concerning the use of criminal records.

**The Homeless Advocacy Project** (“HAP”) is a nonprofit organization that provides free civil legal services to individuals and families experiencing homelessness, or at risk of becoming homeless, in Philadelphia. HAP provides comprehensive legal assistance in a broad range of areas including: establishing eligibility for benefits programs such as Supplemental Security Income, Temporary Assistance for Needy Families, medical assistance and food stamps (SNAP); establishing eligibility for Veterans Compensation and Pension benefits, VA health care and discharge characterization upgrades; enforcing custody and other family law rights; accessing shelter, behavioral health services and other supportive services; replacing lost or stolen identity documents; preserving private and subsidized housing eligibility; and protecting consumer rights. HAP seeks to reduce or eliminate homelessness and to increase access to stable housing by representing clients to overcome barriers such as inadequate income and poor credit histories. HAP has represented and continues to represent many individuals who have become homeless due to loss of employment income needed to sustain their housing. The risk of homelessness is magnified when these individuals – most living paycheck to paycheck – are denied access to unemployment compensation benefits while



searching for work. With shelters filled to capacity, the risk of ending up street homeless is great.

## **REPORT OF OPINION BELOW**

An opinion was rendered in Commonwealth Court by Judge Brobson for the majority of the *en banc* court, which decided the case by a 4-3 margin. President Judge Leavitt and Judge Cosgrove issued dissenting opinions. *Harmon v. Unemployment Compensation Board of Review*, No. 787 C.D. 2015 (Pa. Commw. June 7, 2017)(*en banc*). Currently, only a Westlaw citation is available: 2017 WL 2457402.

## **QUESTIONS PRESENTED**

1. Will the majority opinion of Commonwealth Court, which denies unemployment benefits to workers terminated through no fault of their own simply because they serve partial confinement sentences on weekends when they are not working, thwart reentry efforts by criminal court judges to keep people who have been convicted connected with the workforce?
2. Did the General Assembly intend to create a “collateral consequence” by denying unemployment benefits to workers serving weekend confinement, despite a general trend towards reducing collateral consequences?

## **REASONS FOR ALLOWANCE OF APPEAL**

The *en banc* Commonwealth Court’s interpretation of Section 402.6 of the Unemployment Compensation Law, 43 P.S. § 802.6 (“Section 402.6”), bars claimants from obtaining unemployment compensation (“UC”) following *any* period of incarceration, no matter how brief. *Harmon v. Unemployment Comp. Bd. of Review*, 787 C.D. 2017, at 7, 17 (hereafter “Op.”). *Amici curiae* write to emphasize the reentry consequences of Commonwealth Court’s 4-3 decision.

If Commonwealth Court’s reading of Section 402.6 is allowed to take root, it would undermine criminal court sentences of partial confinement, which serve the crucial reentry purpose of keeping criminal justice involved people connected to the workforce. Moreover, the majority’s interpretation would turn Section 402.6 into a “collateral consequence,” disqualifying otherwise eligible persons for UC benefits merely because of a conviction. Such a construction is inconsistent with virtually all collateral consequences in Pennsylvania, which are based on offense rather than sentence. Also, it would put Pennsylvania conspicuously out of step with other states across the United States that are currently working to mitigate, rather than multiply, the collateral consequences that flow from a conviction, as well as Pennsylvania policymaking decisions in that direction. For these reasons, the proper interpretation of Section 402.6 merits review by this Court.

**I. THE RULING BELOW HINDERS JUDICIAL EFFORTS TO KEEP PEOPLE WITH CRIMINAL RECORDS CONNECTED TO THE WORKFORCE BY ISSUING SENTENCES THAT MINIMIZE INCARCERATION AND MAXIMIZE EMPLOYMENT**

In the proceedings below, one primary goal shaped the criminal court judge’s decision to impose a sentence of 60 days confinement over the course of 30 consecutive weekends rather than 60 consecutive days: ensuring that Mr. Harmon—despite his conviction—could “keep his job.” *See* Dissenting Op. at MHL-3. A sentence of partial confinement, which the Commonwealth Court later held was disqualifying for unemployment compensation benefits, was intended to make this goal possible. *Id.* at 6.

The importance of keeping people who are involved in the criminal justice system connected to the workforce cannot be overstated. Across the country, more than 70 million people—or nearly 1 in 3 adults—have arrest or conviction records, and 700,000 people re-enter their communities following a term of incarceration every year.<sup>1</sup>

Following release, the stigma associated with a criminal record—even for minor offenses—is difficult to wash, particularly in the employment context. For example, studies show that nearly nine in ten employers conduct background checks

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<sup>1</sup> Anastasia Christman & Michelle Natividad Rodriguez, Nat’l Emp’t Law Project, *Research Supports Fair Chance Policies* 1 & n.1 (Aug. 1, 2016), <http://bit.ly/1sk48Nn> (citing U.S. Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2012 2 (Jan. 2014), <http://bit.ly/2m1uC4U>).

on some or all job candidates.<sup>2</sup> When these background checks turn up a record, the applicant's job prospects plummet: the callback rate for white applicants craters from 34% to 17%, and from 14% to 5% for African American candidates.<sup>3</sup> As a result, upwards of 60 percent of people who have been incarcerated are unemployed one year after release.<sup>4</sup>

Even for individuals who are able to find work following release, there is a steep price to be paid, as a history of incarceration operates as a lifelong drag on economic security. Formerly incarcerated men can expect to work nine fewer weeks per year and earn 40 percent less annually, for an overall loss of \$179,000 even before the age of 50.<sup>5</sup> In the year after an incarcerated father is released, family income drops 15 percent, relative to pre-incarceration levels.<sup>6</sup> And given the staggering number of people with records in the United States, this dilution of economic power impacts us all. This stigmatization of people involved in the

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<sup>2</sup> Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (Jul. 19, 2012), <http://bit.ly/2mhlrzh>.

<sup>3</sup> Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. of Sociology* 937, 955-58 (2003), <http://bit.ly/1vNQBJk>.

<sup>4</sup> Joan Petersilia, Nat'l Inst. of Justice, *When Prisoners Return to the Community: Political, Economic, and Social Consequences* 3 (2000), <http://bit.ly/2sr7gao>.

<sup>5</sup> Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11-12 (2010), <http://bit.ly/1YjcAau>.

<sup>6</sup> *Id.* at 21.

criminal justice system slams the brakes on our economy, and reduced the nation's gross domestic product by as much as \$87 billion in 2014 alone.<sup>7</sup>

At the same time, beyond the purely economic consequences, the barriers to employment facing people with records have significant public safety implications. A 2011 study concluded that employment was the single most important factor in reducing recidivism.<sup>8</sup> Simply put, keeping people in jobs keeps them out of jail.

This broader context—namely, the social forces that keep employment out of reach for too many Americans with records—should not be wholly divorced from the analysis of Section 402.6 or the practical effects of the Commonwealth Court's holding, if allowed to stand. Barriers to employment and recidivism can be reduced by partial confinement sentences that permit persons under supervision to retain employment, rather than having to find new jobs after release from short periods of incarceration. In the present case, the judge fashioned a sentence that was designed to offer a modicum of stability for Mr. Harmon via continued employment. *See Op.* at 2; *Dissenting Op.* at JMC 1-3.

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<sup>7</sup> Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 1 (2016), <http://bit.ly/2atNJBu>.

<sup>8</sup> Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 *Just. Q.* 382, 382-410 (2011).

Under the majority’s opinion below, partial confinement may allow people with convictions to keep working, but it may leave them worse off if they lose their job—even if through no fault of their own—and are ineligible to receive unemployment compensation for a longer period of time, relative to total confinement. *See Op.* at 12. Such a ruling would undermine the labor market connectivity goal that partial confinement is meant to foster, given that UC benefits provide a safety net that helps unemployed workers stay strongly connected to the job market and access jobs with higher wages.<sup>9</sup>

**II. INTERPRETING SECTION 402.6 AS A COLLATERAL CONSEQUENCE IS INCONSISTENT WITH OTHER PENNSYLVANIA STATUTES AND CONTRARY TO REENTRY EFFORTS TO AMELIORATE COLLATERAL CONSEQUENCES**

As Judge Brobson, writing for the majority, noted, the majority’s interpretation of Section 402.6 makes the statute “a collateral civil consequence to incarceration.” *Op.* at 16. In other words, an incarcerated claimant would be disqualified from UC benefits solely because of being convicted and sentenced to incarceration in any form. However, the Commonwealth Court’s interpretation is

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<sup>9</sup> *See generally* Andrew Stettner & Maurice Emsellem, Nat’l Emp’t Law Project, *Unemployment Insurance Is Vital to Workers, Employers and the Struggling Economy* (Dec. 2002), <http://bit.ly/2tgWJCe>; Joshua Smith, Valerie Wilson, & John Bivens, Econ. Policy Inst., *State Cuts to Jobless Benefits Did Not Help Workers or Taxpayers* 1 (July 2014), <http://bit.ly/1rXTic9> (discussing how unemployment benefits keep workers engaged in the labor force and increase “workers’ job-search intensity”).



inconsistent the General Assembly's actions in other settings, in which collateral consequences are tied to certain *offenses* and *grades*, rather than *sentences*.

In virtually every context, the General Assembly has tied collateral consequences to certain disqualifying offenses (such as aggravated assault, drug felonies), usually in a way meant to draw a connection between the offense and the subsequent consequence. These contexts include employment restrictions,<sup>10</sup> driving privileges,<sup>11</sup> firearm ownership,<sup>12</sup> and public office eligibility.<sup>13</sup>

The opinion below strays far from these examples. One searches in vain for examples where the General Assembly has created collateral consequences based on sentences. By hitching a collateral consequence to the *penalty* of incarceration rather than the type of *offense*, the lower court's holding is both untailed and inconsistent with the General Assembly's actions in other areas. This inconsistency makes the majority's construction of the legislative intent untenable.<sup>14</sup>

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<sup>10</sup> See generally, Community Legal Services, Inc., *Legal Remedies and Limitations on the Employment of People with Criminal Records in Pennsylvania* (May 2016), <http://bit.ly/2tS2bxa>.

<sup>11</sup> *Com. v. Duffey*, 639 A.2d 1174 (1994) (suspending, pursuant to 18 Pa.C.S.A. § 6308, driving privileges for 90 days following a conviction for underage drinking).

<sup>12</sup> 18 Pa.C.S.A. § 6105 (outlining a series of offenses—including murder and kidnapping—that prohibit a person from possessing a firearm).

<sup>13</sup> Pa. Const. art. II, § 7 (precluding a person convicted of embezzlement of public moneys, along with other offenses, from holding any office in the Commonwealth).

<sup>14</sup> Commonwealth Court's interpretation that the General Assembly intended to enact a collateral consequence in Section 402.6 is also inconsistent with this Court's ruling on the purpose of the statute in *Chamberlain v. Unemployment Compensation Board of Review*, 114 A.3d 385 (Pa.

Moreover, this unduly punitive interpretation of Section 402.6—one that expands collateral consequences for people with criminal records—is out of step with efforts nationwide to mitigate collateral consequences. Between 2009 and 2014 alone, 41 states and the District of Columbia enacted more than 150 pieces of legislation to chip away at the multitude of collateral consequences confronting people with records.<sup>15</sup> These reforms cover the waterfront, offering remedies to expunge criminal records, allow for offense downgrades, and preserve access to housing, public benefits, and employment.<sup>16</sup> Thus, in a conscious effort to better reintegrate people with criminal records, collateral consequences have become increasingly disfavored in every corner of the country.

In fact, Pennsylvania too generally has moved in the direction of reducing collateral consequences. Notably, the General Assembly recently passed Act 5 of 2016, bringing sealing to misdemeanor convictions in Pennsylvania for the first time. Pennsylvania’s courts have invalidated overbroad statutory employment

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2015). Based on legislative history, *Chamberlain* determined that the General Assembly enacted Section 402.6 to reverse *Greer v. Unemployment Compensation Board of Review*, 392 A.2d 918 (Pa. Commw. 1978), “by precluding unemployment compensation benefits to those claimants who were incarcerated in prison and *eligible for work release*.” *Id.* at 396 (emphasis added).

<sup>15</sup> Ram Subramanian, Rebecka Moreno, & Sophia Gebreselassie, Vera Inst. of Justice, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014* 11 (2014), <http://bit.ly/2eYcOpq>.

<sup>16</sup> *Id.*; see also Michelle Natividad Rodriguez & Beth Avery, Nat’l Emp’t Law Project, *Unlicensed & Untapped* (Apr. 2016), <http://bit.ly/1rwd2ry>.

disqualifications.<sup>17</sup> In the executive branch, Governor Wolf recently issued a statewide ban-the-box provision.<sup>18</sup>

In sum, the Commonwealth Court majority's construction of Section 402.6 as a collateral consequence based on the sentence of incarceration is inconsistent with the General Assembly's customary framing of collateral consequences based on offenses. It is also in contrast to efforts around the country and the state to mitigate such collateral consequences. These inconsistencies warrant this Court's review of the underlying decision.

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<sup>17</sup> E.g., *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Commw. 2015)(*en banc*)(permanently enjoining criminal record provisions of Older Adults Protective Services Act ("OASPA")); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. 2012)(finding lifetime ban of manslaughter in Public School Code to be unconstitutional); *Warren County Human Services v. State Civil Service Commission*, 844 A.2d 70 (Pa. Commw. 2004)(concluding lifetime ban of aggravated assault in Child Protective Services Law to be unconstitutional); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003)(also finding OAPSA's lifetime criminal record prohibitions to be unconstitutional).

<sup>18</sup> Pennsylvania Office of Administration, Human Resource Policy, *Fair Chance Hiring* (HRP No. HR-TM001)(May 15, 2017), <http://bit.ly/2tRQcQ0>.

## **CONCLUSION**

For the forgoing reasons, *Amici Curiae* respectfully requests that this Court grant the Petition for Allowance of Appeal in this case.

Respectfully submitted,

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## **CERTIFICATION OF COMPLIANCE**

I hereby certify that the foregoing *Amici Curiae* Brief in Support of Petition for Allowance of Appeal contains less than the limit of 4,500 words. Pa.R.A.P 531(b)(3). According to the word processing system used to create this Brief, the word count is 3520.

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Dated: July \_\_, 2017

**APPENDIX A**

**COMMONWEALTH COURT PANEL OPINION  
FROM WHICH APPEAL IS SOUGHT**

## **PROOF OF SERVICE**

I hereby certify that I have caused to be served a true and correct copy of the foregoing *Amici Curiae* Brief in Support of Petition for Allowance of Appeal on the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P 121(d) and Pa.R.A.P 122:

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