

**IN THE SUPREME COURT OF PENNSYLVANIA**

DANIEL HARMON,	:	
	:	
Appellant,	:	
	:	
v.	:	No. 37 EAP 2017
	:	
UNEMPLOYMENT	:	
COMPENSATION	:	
BOARD OF REVIEW,	:	
	:	
Appellee.	:	

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***BRIEF OF AMICI CURIAE, COMMUNITY LEGAL SERVICES, INC., THE NATIONAL EMPLOYMENT LAW PROJECT, THE PUBLIC INTEREST LAW CENTER, & THE HOMELESS ADVOCACY PROJECT***

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On Allowance of Appeal from the decision of the Commonwealth Court, entered on June 7, 2017, at No. 787 C.D. 2015, affirming the decision of the Unemployment Compensation Board of Review, 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 2017, 937 of 1,251, or 75%, of CLS’s new employment intakes involved criminal records, by far the most common reason people came to CLS for employment-related help. CLS previously has appeared before this Court and Commonwealth Courts 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 restrictions 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 case, NELP has deep expertise in the areas of unemployment insurance and maximizing

employment opportunities for people across the country with arrest and conviction records. In these areas, NELP has catalyzed new research, issued major reports, litigated, and participated as amicus in numerous cases.

**The Public Interest Law Center** (“the Law Center”) is a nonprofit law firm with a mission of using 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 reduce barriers to fundamental resources and services, including education, health care, housing, a safe and health neighborhood, the right to vote and, important here, employment. The Law Center addresses the pervasive discrimination against people with criminal records through lawsuits against employers who refuse to hire based solely on criminal histories in violation of Pennsylvania and federal law.

**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; eligibility for Veterans benefits, health care and discharge characterization upgrades; enforcing custody and other family law rights; accessing shelter, 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.

In accordance with Pa.R.A.P. 531(b)(2), this is to certify that no person or entity, other than the amicus curiae, its members, or counsel, (i) paid in whole or in part for the preparation of the amicus curiae brief, or (ii) authored in whole or part the amici curiae brief.



## SUMMARY OF THE ARGUMENT

The Commonwealth Court’s erroneous 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 Compensation Board of Review*, 163 A.3d 1057, 1066 (Pa. Commw. Ct. 2017). *Amici curiae* write to emphasize the reentry consequences that would flow from such a punitive reading of this remedial law and ask this Court to reverse the ruling below.

If the Commonwealth Court’s construction of Section 402.6 takes root, it would undermine criminal court sentences of partial confinement, which serve the reentry purpose of keeping people involved in the criminal justice system connected to the workforce. Moreover, it would effectively turn Section 402.6 into a “collateral consequence,” disqualifying otherwise eligible persons for UC benefits merely because of incarceration following from a conviction. This construction is at odds with the Legislature’s customary practice of connecting collateral consequences with the *offense*, rather than the *sentence* of incarceration. Finally, it would put Pennsylvania conspicuously out of step with other states across the country that are working to mitigate, rather than multiply, the collateral consequences that stem from a conviction, as well as Pennsylvania policymaking efforts in that direction. For these reasons, the lower court’s interpretation of Section 402.6 cannot stand.

## ARGUMENT

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

The decision by the Court of Common Pleas to impose a sentence of 60 days confinement over the course of 30 consecutive weekends rather than 60 consecutive days helped to ensure that Mr. Harmon, despite his conviction, could “keep his job.” *See* Administrative Record, Item No. 5, “Summary Appeal Docket”; *Harmon*, 163 A.3d at 1068 (dissenting opinion). A sentence of partial confinement—which the Commonwealth Court later concluded was disqualifying for UC benefits—meant that Mr. Harmon could remain an active participant in the labor market. *Id*; *see Chamberlain v. Unemployment Comp. Bd. of Review*, 114 A.3d 385, 397 (2015) (discussing the purposes of partial confinement, which include allowing individuals to work or seek employment).<sup>1</sup>

The importance of keeping people who are involved in the criminal justice system connected to the workforce cannot be overstated. In the United States, more

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<sup>1</sup> *See also Com. v. DiMauro*, 642 A.2d 507, 508 (1994) (“...we find the legislature intended one sentenced to partial confinement to be confined in a penal institution with permission to leave the facility to go to work, school or other proper activity.”); *Com. v. Walton*, 433 A.2d 517, 520 (1981) (“Partial confinement is ‘the Sentencing Code’s term for work release.’”).

than 70 million people—nearly 1 in 3 adults—have arrest or conviction records, and 700,000 people re-enter their communities after a term of incarceration every year.<sup>2</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 now conduct background checks on some or all job candidates.<sup>3</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>4</sup> As a result, according to one estimate, nearly 60 percent of previously incarcerated individuals remain unemployed one year after release.<sup>5</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

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2 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>).

3 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>.

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

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

per year and earn 40 percent less annually, for an overall loss of \$179,000 even before the age of 50.<sup>6</sup> In the year after an incarcerated father is released, family income drops 15 percent, relative to pre-incarceration levels.<sup>7</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 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>8</sup>

Beyond the economic consequences, the barriers to employment facing people with records have significant public safety implications. In fact, a 2011 study concluded that employment was the single most important factor in reducing recidivism.<sup>9</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 divorced from this Court's analysis of Section 402.6 or the consequences that would flow from a broad and overly punitive reading of the law. Barriers to employment and recidivism can

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<sup>6</sup> Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 11-12 (2010), <http://bit.ly/1YjcAau>.

<sup>7</sup> *Id.* at 21.

<sup>8</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>9</sup> Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 *Just. Q.* 382, 382-410 (2011).

be mitigated by partial confinement sentences that permit persons under supervision to maintain employment, rather than having to find new jobs after release from short periods of incarceration, with the drag of a conviction record.

Here, the Court of Common Pleas crafted a sentence that offered a modicum of economic stability for Mr. Harmon via continued employment. *Harmon*, 163 A.3d at 1068-69 (dissenting opinion). To then render Mr. Harmon, and people in similar situations, ineligible for UC benefits solely because of partial confinement is not only counterproductive, but also “punitive and not consistent with the remedial purpose of the Law.” *Id.* at 1068.

Indeed, the Commonwealth Court’s construction of Section 402.6 could leave individuals serving sentences of partial confinement worse off, relative to total confinement. For example, although partial confinement may allow people with convictions to continue working, if they become unemployed (even if through no fault of their own), they are ineligible to receive unemployment compensation for a longer period. *See id.* at 1064 (Mr. Harmon was effectively disqualified from UC compensation for more than half a year, even though the term of his sentence was only 60 days). This reading of the law 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>10</sup>

## **II. READING SECTION 402.6 AS A COLLATERAL CONSEQUENCE IS INCONSISTENT WITH OTHER PENNSYLVANIA STATUTES AND CONTRARY TO THE EFFORTS TO PROMOTE SUCCESSFUL REENTRY**

The Commonwealth Court’s reading of Section 402.6 makes the statute “a collateral civil consequence to incarceration.” *Harmon*, 163 A.3d at 1066. In other words, a claimant faces automatic disqualification from UC benefits solely because of his or her sentence of incarceration, in any form. However, that interpretation is 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 or drug felonies), usually in a way meant to draw a clear connection between the offense and

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<sup>10</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”).

the subsequent consequence. These contexts include employment restrictions,<sup>11</sup> driving privileges,<sup>12</sup> firearm ownership,<sup>13</sup> and public office eligibility.<sup>14</sup>

The opinion below strayed 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 Commonwealth Court’s construction of the legislative intent untenable.<sup>15</sup>

Moreover, this unduly punitive interpretation of Section 402.6—one that expands collateral consequences for people with criminal records—is out of step

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11 *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>.

12 *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).

13 18 Pa.C.S.A. § 6105 (outlining a series of offenses—including murder and kidnapping—that prohibit a person from possessing a firearm).

14 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).

15 The Commonwealth Court’s holding 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. 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).

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>16</sup> These reforms covered the waterfront, offering remedies to expunge criminal records, allowing for offense downgrades, and preserving access to housing, public benefits, and employment.<sup>17</sup> Thus, in a conscious effort to better reintegrate people with criminal records, collateral consequences have become increasingly disfavored and discarded in every corner of the country.

Pennsylvania, too, has generally moved in the direction of reducing collateral consequences. Notably, the General Assembly recently passed Act 5 of 2016, which, for the first time in Pennsylvania, permits people to petition to seal records containing misdemeanor convictions. Pennsylvania's courts have also invalidated overbroad statutory employment disqualifications based on an understanding that such barriers can make economic security and rehabilitation even more elusive.<sup>18</sup> In

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16 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>.

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

18 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



the executive branch, Governor Wolf recently issued a statewide human resources policy, which included a ban-the-box provision.<sup>19</sup>

In sum, the Commonwealth Court's construction of Section 402.6 in a manner that effectively imposes a new 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 Commonwealth to mitigate such collateral consequences. These inconsistencies warrant a reversal of the ruling below.

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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); *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358, 362 (1973) ("To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.").

<sup>19</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 foregoing reasons, *Amici Curiae* respectfully submit that this Court reverse the Commonwealth Court's decision and deem Mr. Harmon eligible under Section 402.6 of the Unemployment Compensation Law.

Dated: February 15, 2018

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing brief complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 3425 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

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