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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 14 MAP 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

DANIEL GEORGE TALLEY,

Appellant.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, IN SUPPORT OF APPELLANT

Appeal from the Order of the Superior Court at No. 2627 EDA 2018 dated July 17, 2020, reconsideration denied September 23, 2020, Affirming the Judgment of Sentence of the Montgomery County Court of Common Pleas, Criminal Division, dated August 24, 2018 at No. CP-46-CR-0005241-2017.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union of Pennsylvania is a non-profit, nonpartisan organization dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In particular, the ACLU of Pennsylvania has a strong interest in protecting the right to pretrial liberty enshrined in the Pennsylvania Constitution.

INTRODUCTION

Amici submit this brief to assist the Court in addressing the first of the two questions on which this Court granted review:

> Is the Commonwealth required under Art. I, [S]ection 14 of the Pennsylvania Constitution to produce clear and convincing evidence at a bail revocation hearing in order to meet its burden of proof that there is "no condition or combination of conditions other than imprisonment that will reasonably assure the safety of any person and the community when the proof is evident or presumption great"?

Petitioners urge this Court to find that the substantial proof required under the Constitution, proof that is "evident or the presumption great," equates to a clear and

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

convincing standard of proof. In addition to being in line with the majority of jurisdictions who have interpreted similar constitutional provisions, such a ruling is compelled by Pennsylvania's constitutional history, the importance of pretrial liberty, and concepts of due process. Amici believe that this Court's analysis must be grounded in the history and purpose of Article I, Section 14.

The Pennsylvania Constitution confers a broad right to pretrial release for most people accused of crimes, conditioned only upon the provision of sufficient sureties: "[T]he Constitution of the Commonwealth mandates all persons have a right to be released on bail prior to trial in all cases except those" persons who are not "bailable." *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). In order to comport with the fundamental interest in pretrial liberty set forth in Art. I, Section 14, the exceptions set forth in that provision should be construed narrowly and applied with the greatest of care.

This Court's analysis, Amici believe, must start with the bedrock constitutional principle of pretrial freedom, which protects the presumption of innocence and reflects our founders' abhorrence of punishment before trial, and dates to the founding of our Commonwealth. Under the Pennsylvania Constitution, pretrial detention is the carefully limited exception. Although the categories of defendants considered "bailable" have changed, the right of release afforded to all defendants determined bailable has remained inviolate for over two hundred years

and through multiple iterations of the Pennsylvania Constitution. To deny an accused person their pretrial freedom on a burden of proof less than clear and convincing evidence would undermine the fundamental protections enshrined within the Pennsylvania Constitution.

ARGUMENT

I. THE HISTORY OF THE PENNSYLVANIA CONSTITUTION'S BAIL PROVISIONS DEMONSTRATES THAT THEY CONFER A RIGHT TO RELEASE FOR ALL BAILABLE DEFENDANTS AND PROHIBIT UNWARRANTED PRETRIAL DETENTION.

When William Penn, Pennsylvania's founder, drafted the language "all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great" for the Commonwealth's first governing document,[2] he intended to prevent the abuses of pretrial detention that he had endured in England, and to create in this new land, a "whole society in which freedom should be mandatory."[3] That intent endures throughout Pennsylvania's history.

[2] Pa. Frame of Government of 1682, Laws Agreed Upon in England, art. XI (1682).
[3] PAUL A. WALLACE, PENNSYLVANIA: SEED OF A NATION 38 (1962).

The Pennsylvania Constitution creates a broad right to pretrial liberty, which the state may not restrict except in exceedingly rare and limited circumstances. Article I, Section 14 of the Pennsylvania Constitution mandates that:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great. . . .

PA. CONST. art. I, § 14. Article I, Section 13 of the Pennsylvania Constitution further provides, in relevant part, that "[e]xcessive bail shall not be required." PA. CONST. art. I, § 13.

Article I, Section 14 means precisely what it says: "the Constitution of the Commonwealth mandates all persons have a right to be released on bail prior to trial in all cases except those" few who are not bailable under the constitution. *Truesdale*, 296 A.2d at 831. These bedrock constitutional provisions reflect "(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense." *Id.* at 834-35.

a. Brief History of the Origins of Article I, Section 14 of the Pennsylvania Constitution.

William Penn originally drafted the language "all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the

presumption great," for the 1682 Frame of Government of Pennsylvania.[4] The 1682 Frame gave this bail provision teeth, affording defendants who should have been bailable but were instead detained the extraordinary power to sue for "double damages against the informer, or prosecutor."[5] With this 1682 Frame, Penn created the most liberal pretrial release law in the colonies.[6]

The context in which William Penn drafted the 1682 Frame is necessary to understand Pennsylvania's broad constitutional bail provision. In seventeenth century England, the king could order people detained for long periods without a trial. Many incarcerated people bought their way out of oppressive and dangerous jails by paying bribes and fines.[7] Penn himself was incarcerated three times in England and once in Ireland for writing, speaking, and acting as a Quaker.[8] While imprisoned in the Tower of London, Penn was likely denied bail.[9] On another occasion, a judge incarcerated Penn while his father lay dying, and Penn's father

[4] Pa. Frame of Government, *supra* note 2.
[5] *Id.* at art. XII.
[6] TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 28 (2014).
[7] Neil Howard Cogan, *The Pennsylvania Bail Provisions: The Legality of Preventative Detention*, 44 TEMP. L.Q. 51, 52 (1971).
[8] Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 TEMP. L.Q. 475, 477 (1977); THE PAPERS OF WILLIAM PENN, VOLUME ONE 1644-1679 171-75 (Mary Maples Dunn & Richard S. Dunn eds., Univ. of Penn. Press 1982)**Error! Bookmark not defined.** (discussing the arrest and trial of William Penn and his fellow Quaker William Mead in August 1670).
[9] Lermack, *supra* note 8, at 477.

paid for his son's release so that they could be together before the elder Penn's death.[10]

In addition to his personal experience, Penn witnessed his Quaker brethren similarly persecuted and imprisoned. In 1682, the same year Penn drafted the Frame of Government, he wrote a letter to England's Parliament describing the Quaker experience of incarceration:

> [B]y the constant and violent execution of [these laws] numbers of us have been torne from our families Kindred and Callings and cast into nastty darke & Strait Dungions, wher many have been stencht & poyson'd to death, whilest multitudes of others have been and daily are prosecuted and distraind upon by the law. . . . [11]

These ordeals profoundly influenced Penn and, in response, he sought to create in this new land, a "whole society in which freedom should be mandatory."[12] In a letter describing his aim, Penn wrote:

> we lay a foundation for after ages to understand their liberty as men. . . . No man [is] to be arrested, condemned, imprisoned or molested in his estate or liberty but by twelve men of the neighborhood.[13]

With the bail provisions in the 1682 Frame of Government, Penn took an extraordinary step to prevent unnecessary pretrial incarceration.

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[10] THE PAPERS OF WILLIAM PENN, VOLUME ONE, *supra* note 8, at 171-72.
[11] THE PAPERS OF WILLIAM PENN, VOLUME TWO 1680-1684 51 (Mary Maples Dunn & Richard S. Dunn eds., Univ. of Penn. Press 1982) (Letter from William Penn to English Parliament, Nov. 1680).
[12] WALLACE, *supra* note 3, at 38.
[13] WILLIAM WISTAR COMFORT, WILLIAM PENN AND OUR LIBERTIES 65-66 (1947).

In 1776, the drafters of Pennsylvania's first constitution incorporated Penn's requirement that "all prisoners be bailable," along with a prohibition on excessive bail.[14] Pennsylvania's bail provision became the model for almost every state constitution adopted after 1776.[15]

These constitutional bail provisions remained substantively unchanged for over two hundred years and throughout successive constitutional iterations. In 1998, Article I, Section 14 was amended to allow for the denial of bail to defendants facing life imprisonment and to those defendants who present such a danger that no combination of conditions can assure an individual's or a community's safety. Despite expanding the exceptions to the rule that all prisoners shall be bailable, the 1998 amendment maintained the same exacting standard of proof that must be met before a bail authority may deny bail.[16]

The meaning of Penn's words "[a]ll prisoners shall be bailable," cannot be doubted: throughout history, bail meant release.[17] A 1783 English treatise defined bail as a "means of giving liberty to a prisoner and at the same time securing" a defendant's appearance, and directed that "justices must take care that, under

[14] PA. CONST. Chapter II § 28-29 (1776). The framers did not incorporate the right to sue prosecutors for double damages into the constitution.
[15] SCHNACKE, *supra* note 6, at 28.
[16] *Grimaud v. Commonwealth*, 865 A.2d 835, 842-844 (Pa. 2005) (analyzing the impact of the 1998 amendment on the constitutional right to bail and concluding that it only altered the categories of cases in which bail may be disallowed).
[17] Timothy Schnacke, *A Brief History of Bail*, 57 JUDGES J. 4, 6 (2018).

pretence [sic] of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of bail; for this is looked upon as a great grievance."[18]

Historically, sureties did not mean an upfront monetary payment to secure an accused's release. Rather, a surety was a *person* who guaranteed the accused's presence at court.[19] Sureties were unpaid, unreimbursed, nonprofessionals, often friends and family, who promised to guarantee the accused's future attendance and who sometimes agreed to provide payment upon default. Even when a court required "security in advance," this meant only finding people who agreed to pay some amount of money upon the defendant's failure to appear, it did not mean payment in advance of release.[20] This system resembles what we call today "unsecured bonds."[21]

James Wilson, drafter of both the United States Constitution and 1790 Pennsylvania Constitution, summarized bail and sureties:

> To bail a person is to deliver him to his sureties, who give sufficient security for his appearance: he is intrusted to their friendly custody, instead of being committed to the confinement of the gaol. At the common law, every man accused or even indicted of treason or of any felony whatever, might be bailed upon good surety…[22]

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[18] Anthony A. Highmore, *Digest of the Doctrine of Bail; In Civil and Criminal Cases* VI, 193, 196 (1783).
[19] Lermack, *supra* note 8, at 486. For example, during the same period in England, one charged with a felony could not be bailed without two sureties, and treason required four. Highmore, *supra* note 18, at 195-96.
[20] Lermack, *supra* note 8, at 488.
[21] Schnacke, *supra* note 17, at 6.
[22] JAMES WILSON, COLLECTED WORKS OF JAMES WILSON, VOLUME 2 1177 (Kermit L. Hall & Mark David Hall eds., 2007).

In fact, making an upfront monetary payment to secure an accused's release was not officially accepted in Pennsylvania until 1919. In a 1918 opinion, the Court of Quarter Sessions of Northampton County rejected a request from a defendant's brother that the clerk return to him cash he paid to obtain his brother's pretrial release.[23] The court noted, "we have no statute in Pennsylvania that permits cash bail," and, therefore, concluded that the transaction had been an "illegal proceeding" and the brother had no right to recover the money.[24]

Despite the court's recognition that upfront monetary payments were illegal transactions, the practice of "cash bail" began in the late 1800s.[25] Cash bail arose as "America began running out of those people who were willing to take responsibility for no money" and professional bail bondsmen, sensing an opportunity for profit, stepped in to fill this gap.[26]

In 1919, the Pennsylvania General Assembly, likely in response to the nascent practice of counties permitting monetary payments to secure pretrial release, passed an act declaring cash bail "lawful" and repealing inconsistent laws.[27]

b. Pennsylvania Courts Have Long Recognized that Bailable Defendants Have a Right to Pretrial Release Under Article I, Section 14.

[23] *Commonwealth v. Atriano*, 16 Northampton Cnty. Rep. 149 (1918).
[24] *Id.* at 151.
[25] In *Atriano,* the court recognized that Northampton County had been accepting cash bail as a practice for some time despite the lack of statutory authorization. *Id.* at 150.
[26] Schnacke, *supra* note 17, at 6.
[27] 919 Pa. Laws 102, § 2 (1919).

Pennsylvania courts have long recognized that the Pennsylvania Constitution creates a broad and fundamental right to pretrial release for those who are "bailable."

Commonwealth v. Keeper of the Prison is a Philadelphia Court of Common Pleas case from 1838 that is one of the earliest to examine our constitutional language. Two men held without bail, William Nixon, the employer of an unmarried pregnant young woman who encouraged her to have an abortion, and Henry Chauncey, the physician who administered the illegal abortion that resulted in the young woman's death, filed a *writ of habeas corpus* seeking their release. In finding both these men bailable, the court wrote:

> If any faith is to be placed on human language, in expressing the intentions of a lawgiver, nothing can be clearer than that these provisions . . . of the constitutions of 1776 and 1790, intended to guaranty the right to the citizens of the state, that for all offences charged, bail by sufficient sureties should be received, except for capital offenses…. The language is peremptory: "all persons shall be bailable." In the class of cases not within the exception**, nothing is left to judicial discretion, except of course the ascertainment of the "sufficiency of the sureties"**….

Commonwealth v. Keeper of the Prison, 2 Ashm. 227, 232 (Phila. Comm. Pls. Ct. 1838 (emphasis added).

The court found Nixon was bailable because the Commonwealth charged him with accessory after the fact, a non-capital offense, and Chauncey was bailable because the Commonwealth failed to present the "proof evident, or the presumption great" that he had the necessary intent to kill. Thus "according to the constitution

and laws of the state, we [the court] are bound to admit the defendants to bail; having by them no discretion vested in us to refuse them the benefit of this great chartered right." *Id.* at 236.

This Court echoed this interpretation over a hundred years later in *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1972). Reaffirming that "the fundamental purpose of bail is to secure the presence of the accused at trial," the *Truesdale* court stated that "[i]n the absence of evidence the accused will flee, certain basic principles of our criminal law indicate bail should be granted." *Id.* at 834. "[U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 835 n.13, (quoting *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951)).

In 1987, the Superior Court reaffirmed the principle that all defendants determined to be bailable are entitled to pretrial release:

> Prior to conviction, in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial. Pa. Const., Art. 1, sec. 14. Absent evidence that the accused will flee, the importance of the presumption of innocence, the principle that punishment should not be imposed prior to conviction, and the need to provide an accused an unhampered opportunity to prepare a defense, dictate that bail should be granted prior to trial.

Commonwealth v. Bonaparte, 530 A.2d 1351, 1353 (Pa. Super. 1987); *see also* KEN GORMLEY, THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 533-34 (2004) ("The guarantee of bail has been considered so

fundamental because it promotes the presumption of innocence, prevents the imposition of sanctions prior to trial and conviction and provides the accused the maximum opportunity to prepare his defense.").

c. The 1998 Constitutional Amendment Altered the Categories of Non-Bailable Defendants But Not the Fundamental Right to Pretrial Release.

Prior to 1998, this Court reasoned that the framers of the Pennsylvania Constitution provided a limited exception to the rule of pretrial release for capital offenses because the risk of flight was so significant given the seriousness of the charge. For someone facing death, nothing or no one could assure the accused's presence at trial. "The framers of our constitution recognized the virtual certainty of flight in the face of a possible death penalty." *Commonwealth v. Martorano*, 634 A.2d 1063, 1066 (Pa. 1993).[28]

The 1998 constitutional amendment added two limited exceptions to the bailability mandate for those charged with non-capital offenses. The amendment allowed for detention of defendants facing life imprisonment and for those rare defendants who posed such a threat to an individual or a community that no condition or combination of release conditions could ameliorate that threat.

[28] In 1972, this Court noted that the framers "did not feel the urge to flee was as great where the maximum penalty was life imprisonment, as indicated by the failure to draft the Constitution to read, bail may be denied in cases of 'capital offenses or life imprisonment.'" *Truesdale*, 296 A.2d at 835.

The amendment required the same standard of proof as the original constitutional language. As the Attorney General of Pennsylvania explained at the time, the amendment:

> would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.

Statement of the Attorney General Regarding Joint Resolution 1998-1, 28 Pa.B. 3925, 3926 (Aug. 14, 1998).

This Court, analyzing the 1998 constitutional amendment, held the substantive constitutional rights undergirding the right to bail, the presumption of innocence, the right to defend oneself, and the right to be free from excessive bail, all remained inviolate. *Grimaud v. Commonwealth*, 865 A.2d 835, 842-43 (Pa. 2005).

II. AS DETENTION IS THE EXCEEDINGLY RARE EXCEPTION TO THE RIGHT TO PRETRIAL RELEASE, DENIALS OF PRETRIAL RELEASE MUST BE JUSTIFIED BY CLEAR AND CONVINCING EVIDENCE.

Unless the defendant faces a capital offense or life imprisonment, or if no conditions would ensure attendance at trial, a court may not refuse to release a person facing criminal charges unless "no other condition or combination of conditions can reasonably assure safety of any person and the community" and the "proof is evident

or presumption great." PA. CONST. art. I, § 14. In all cases except for homicide, the bail authority must start with the presumption that a defendant is entitled to pretrial release.

When the government seeks to deny pretrial release, both the United States and Pennsylvania constitutions require a different magnitude of proof. As Chief Justice Rehnquist wrote in *United States v. Salerno*, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987).

Before a court may order pretrial preventative detention, the Commonwealth must prove by clear and convincing evidence that a substantial threat exists for an individual or a community and that no conditions of release can reasonably assure their safety. Because constitutional protections preclude pretrial punishment, the proof required to detain a defendant pretrial is substantial—proof that is "evident or the presumption great." The Commonwealth must demonstrate such proof to establish both a specific and articulable threat to an individual or a community *and* that no condition or combination of conditions can reasonably assure their safety. Ordering pretrial detention based on vague allegations of dangerousness or assumptions regarding certain offenses falls woefully short of the constitutional standard.

Amici recognize there is limited Pennsylvania case law addressing the proper burden of proof required to support the denial of pretrial release. In *Commonwealth ex rel. Alberti v. Boyle*, 195 A.2d 97 (Pa. 1963), this Court addressed the narrow question of whether the record from a coroner's inquest—i.e. the functional equivalent of a preliminary hearing—was sufficient basis in and of itself to deny a defendant bail. This Court answered the question in the negative and held that:

> [T]he practice followed in the present case and in a number of lower Court cases of deciding this very important question [whether to deny bail] on the basis of the testimony presented at a coroner's inquest is condemned and is no longer to be followed. In application for bail in a homicide case, a decision should be made on the basis of the *testimony which is presented* by the Commonwealth at that hearing . . .

Id. at 98 (emphasis added).

In rejecting the challenged practice, the Court clearly distinguished the Commonwealth's burden of proof at preliminary arraignment from the burden for justifying pretrial detention. However, after so holding, this Court nonetheless stated if "the Commonwealth's evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused." *Id.* This statement has been "misread" and subject to divergent interpretations because the "test of a prima facie case, and the test of sufficiency of the evidence to sustain a jury's verdict are currently identical." *Commonwealth v. Hamborsky*, 75 Pa. D. & C.4th 505, 515 (Fayette Comm. Pls. Ct. 2005).

Eight years after *Alberti*, this Court, without citation to *Alberti* or discussion, affirmed the denial of bail for a juvenile charged with first degree murder on the basis that the "evidence offered at the preliminary hearing in the Family Court Division established a prima facie case of murder in the first degree." *Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971). The Superior Court subsequently stated that the Commonwealth can "satisfy its burden to prove that a defendant is not entitled to bail by establishing a prima facie case of murder in the first degree." *Commonwealth v. Heiser*, 478 A.2d 1355, 1356 (Pa. Super. Ct. 1984). Without explanation or analysis, the Superior Court cited *Alberti* and *Farris* for this proposition. However, several lower courts have persuasively argued that *Alberti* does not establish that the "proof is evident or the presumption great" equates to a prima facie case. *Hamborsky*, 75 Pa. D. & C.4th at 515-16 n.1 (concluding that the statement in *Heiser* is "not an accurate or controlling statement of law in determining whether an offense is bailable."); *Commonwealth v. O'Shea-Woomer*, 8 Pa. D. & C.5th 178, 221 (Lancaster Comm. Pls. Ct. 2009) ("the prima facie standard identified in *Farris* and *Heiser* is lower than the one announced by the Supreme Court in *Alberti*"); *but see Commonwealth v. Pal*, 34 Pa. D. & C.5th 524, 552 (Lackawanna Comm. Pls. Ct. 2013) (finding the analysis in *O'Shea* and *Hamborsky* "thoughtful" but ultimately applying a prima facie standard in light of the language in *Alberti* as a matter of stare decisis).

In a thorough and well-researched opinion, Judge David Ashworth of the Court of Common Pleas, Lancaster County, found, "the plain language of the evident proof standard in Article 1 § 14 suggests a 'clear and convincing standard.'" *O'Shea-Woomer*, 8 Pa. D. & C.5th, at 223. The court held that the Commonwealth bears this heavy burden. *Id.* at 216-217 (citing *Truesdale*, 296 A.2d at 836, 449 Pa. at 338). In finding that our Constitution requires clear and convincing evidence before a court may hold a defendant without bail, Judge Ashworth acknowledged that a few Pennsylvania cases found, without analysis, that the Commonwealth can satisfy its burden by establishing a *prima facie* case. *Id.* at 219-220.[29]

Explaining his rationale for why clear and convincing must be the constitutionally required standard, Judge Ashworth notes,

> I must agree with the reasoning found in … a myriad of other court decisions from around the country that the language "proof is evident or the presumption great" means something more than *prima facie* evidence, for to read it in this manner would do nothing to advance the constitutional rights of the accused, since a suspect may not be held without a showing of *prima facia* [sic] evidence in any case.

[29] *See e.g.*, *Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971) (where the Commonwealth presented a prima facie case of homicide and defendant had previously escaped from a correctional institution, it was not error to deny bail); *Heiser*, 478 A.2d, at 1356 (relying on *Farris* to find the Commonwealth "can satisfy its burden to prove that a defendant is not entitled to bail by establishing a prima facie case of murder in the first degree); *Pal*, 34 Pa. D. & C. 5th, at 548 (noting a "paucity of appellate case law" and relying on *Farris* and *Heiser* to find the Commonwealth need only establish a prima facie case).

Id. at 222. *See also Hamborsky,* 75 Pa. D. & C.4th at 521 (holding that "the proof is evident or presumption great" language indicates that guilt should be shown by clear and convincing evidence).

Interpreting "proof is evident or presumption great" as a lower standard, such as probable cause or prima facie, would render the fundamental constitutional provision meaningless. Reading *Alberti* as establishing a prima facie or probable cause standing for pretrial detention would mean that:

> [T]he Common Pleas Court would have no decision at all to make on bail. If a defendant was charged with first or second-degree murder, and the district justice found sufficient evidence to bind the case for trial, bail would automatically be prohibited. Such an interpretation makes much of Article I, Section 14 mere surplusage.

Hamborsky, 75 Pa. D. & C.4th at 515-16. As such, if a showing of probable cause to support a homicide charge was sufficient to justify pretrial detention, Article I, Section 14 would read, "All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment" and not include the additional requirement that the proof be evident or presumption great. *0'Shea-Woomer,* 8 Pa. D. & C.5th at 222-23; *see also Fry v. State*, 990 N.E.2d 429, 445 (Ind. 2013) ("Probable cause is the minimum standard by which an arrest of an individual may be made . . . . If this were to be the same standard by which a person arrested for murder is denied the right of bail, Article 1, § 17, would simply say 'murder or treason are not bailable.' For this same reason,

the State may not simply rest upon the indictment by a grand jury, or a prosecutor's charging information. There must be something more."); *Fountaine v. Mullen*, 366 A.2d 1138, 1141 (R.I. 1976) ("First we think it clear from the language itself that 'proof is evident or the presumption great' means something more than probable cause for if it were to be read in such a manner, the guarantee would add nothing to the accused's rights, since a suspect may not be held without a showing of probable cause in any instance.").

Consistent with this rejection of a prima facie standard, the vast majority of jurisdictions with constitutional provisions similar to Article I, Section 14 have held that the "proof is evident or the presumption great" language requires clear and convincing evidence or its functional equivalent. *See, e.g., Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Crim. App. 1998) ("[T]he court must determine by clear and convincing evidence if 'the proof of guilt is evident, or the presumption thereof is great"); *In re Haynes*, 619 P.2d 632, 636 (Or. 1980) ("While for this purpose guilt need not be shown 'beyond a reasonable doubt,' as it must for conviction, the evidence should at least be clear and convincing."); *Nguyen v. State*, 982 S.W.2d 945, 947 (Tex. App. 1998) ("The term 'proof is evident' means clear and strong evidence"); *Browne v. People of Virgin Islands*, 50 V.I. 241, 260-263 (2008)

(cataloguing states with similar constitutional language that employ a clear and convincing standard).[30]

In the federal system, the government is also required to prove by clear and convincing evidence that "no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 742 (citing 18 U.S.C.S. § 3142(f)(2)).

Finally, the ABA Standard for pretrial detention likewise requires the government prove that pretrial detention is necessary by "clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person." ABA Standards for Criminal Justice, Pretrial Release, Standard 10-5.8.

CONCLUSION

Pennsylvania provides robust constitutional protections for all those accused of a crime. The right to pretrial release, enshrined in our Commonwealth's laws since 1682, protects the presumption of innocence, the right to a jury trial, and the right to prepare a defense. This right to bail also protects the accused from wrongful punishment. To permit the denial of pretrial release on any standard of proof less than clear and convincing evidence would ignore our Commonwealth's

[30] A small handful of courts have held that proof evident or presumption great represents its own standard that cannot be shoehorned into the modern proof scheme. However, these courts generally apply something greater than prima facie and akin to clear and convincing evidence.

unique history, erode fundamental rights for all accused persons, and render language within the Pennsylvania Constitution mere surplusage.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated: May 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* consists of 5910 words, excluding those portions of the brief not required to be counted, and thus complies with the word limit requirement of Pennsylvania Rule of Appellate Procedure 531(b)(3), which limits this Brief to no more than 7000 words.

Dated: July 6, 2021

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