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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

14 MAP 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DANIEL GEORGE TALLEY,

Appellant

Brief of *Amicus Curiae* the Allegheny County Public Defender's Office in Support of Appellant Daniel Talley

Appeal from the order of the Superior Court entered on July 17, 2020, at 2627 EDA 2018, affirming Mr. Talley's judgment of sentence of the Court of Common Pleas, Montgomery County, Criminal Division, entered on August 24, 2018, at CP-46-CR-0005241-2017.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Allegheny County Public Defender's Office is the second largest public defender's office in the Commonwealth of Pennsylvania. Employing approximately 90 attorneys and opening roughly 20,000 new criminal cases each year, it serves the needs of countless criminal defendants. The Office is committed to protecting the individual rights of the accused as guaranteed by the federal and state constitutions, and to ensuring that justice is achieved consistent with the rule of law.

Pursuant to Pa.R.A.P. 531(b), the Allegheny County Public Defender's Office represents that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

STATEMENT OF THE QUESTION PRESENTED

On March 9, 2021, this Honorable Court granted the petition for allowance of appeal filed by Daniel Talley ("Mr. Talley") at 541 MAL 2020. This *amicus* brief is limited to the first question:

> Is the Commonwealth required under Art. 1, [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 evidence or presumption great"?

Commonwealth v. Talley, --- A.3d ---, 2021 WL 868540, *1 (Table) (Pa. March 9, 2021) (brackets in original).

SUMMARY OF THE ARGUMENT

Article 1, Section 14 of the Pennsylvania Constitution establishes an accused's right to bail unless "the proof is evident or the presumption great" than an exception applies. While our law is clear that the Commonwealth has the exclusive burden of proving that bail should not be granted, it is entirely unclear what standard of proof the Commonwealth must meet.

34 other states use this phrase in the right-to-bail clauses of their own constitutions, and 19 have defined it. Two states require only probable cause or *prima facie* evidence to deny bail, but the remaining 17 require something more. Furthermore, of the 11 states that, like Pennsylvania, permit bail to be denied for reasons relating to public safety, four explicitly use the "clear and convincing" standard and four use a variation of it.

Prima facie evidence is far too low, as it gives inadequate weight to a defendant's fundamental right to liberty and to the vital presumption of innocence. And the standard of evidence beyond a reasonable doubt is simply too high, too early. The "middle" preponderance test is appropriate where the issue is just whether to

award compensation for some injury, the interests at stake are viewed by society as minimal, and both parties are allocated the risk of error. But, in sharp contrast, bail involves the very serious decision of whether to deny a defendant liberty, the interests of society and of the accused are enormous, and the burden rests exclusively with the Commonwealth. This standard, therefore, is also wrong.

"Clear and convincing" evidence is more demanding than the preponderance test but less demanding than proof beyond a reasonable doubt. Additionally, based on the commonly accepted meaning of "evident," the plain language of Article 1, Section 14 implies that "clear and convincing" evidence should be used in determining when "the proof is evident or presumption great" that an exception to bail applies. As this standard provides the appropriate significant protections to an accused regarding the setting or revoking of bail, it is undoubtedly the correct one under the law of Pennsylvania.

"Clear and convincing" evidence is also the correct standard from a policy standpoint. A lesser standard inordinately harms indigent and minority defendants. Individuals who are detained pre-trial are more

likely to be convicted, receive longer sentences, and enter unfavorable guilty pleas than those who are released.

First, pre-trial incarceration imposes significant barriers on the constitutional right of criminal defendants to participate in their own defense. Cut off from the outside world, incarcerated defendants cannot regularly meet with their lawyers, easily review discovery, or meaningfully assist in investigating case leads. Visitation restrictions imposed during the Covid-19 pandemic exacerbate these problems. Second, pre-trial incarceration can induce defendants to accept unfavorable plea deals or abandon defense strategies that involve delay because they are anxious to resolve their cases. Third, a standard less than "clear and convincing" evidence encourages overcharging. If a police officer knows that the bail-setting court will inquire only into the nature of the charges filed, it is easy to imagine inappropriate charging based simply on the desire to keep a defendant detained. Fourth, a lesser standard imposes myriad collateral consequences on detained individuals. These can include loss of employment, housing, or custody, as well as physical or mental health problems. Lastly, it leads to overcrowding and increased costs at jails.

Overly restrictive bail policies harm indigent and minority defendants the most. When courts use anything less than "clear and convincing" evidence to set bail, they are the least likely to gain release as even relatively low bail amounts are prohibitively expensive. In Allegheny County, the median bond amount is $5,000. That amount effectively prices out public defender clients, who generally survive on $18,735 per year, or $1,561.25 per month. Thus, failing to consider individuals' ability to pay creates *de facto* bail denials for indigents and minorities and ignores their equal protection rights.

Overly restrictive bail policies also ignore the fundamental tenant of our justice system that people are innocent until proven guilty. Although courts certainly have an interest in safeguarding the community, a standard less than "clear and convincing" evidence ignores the fact that means other than pre-trial incarceration, such as no-contact orders and house arrest, can achieve that goal while preserving the rights of the accused.

ARGUMENT

I. From a legal standpoint, to deny an accused his or her constitutional right to bail, the Commonwealth must present "clear and convincing" evidence that the "proof is evident or presumption great" that an exception to bail applies.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citations omitted).

A. Pennsylvania's standard of proof for establishing an exception to bail is entirely unclear.

In relevant part, Article 1, Section 14 of the Pennsylvania Constitution provides: "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. 1, § 14. This establishes an accused's right to bail—or, put another way, the right not to have bail denied completely—unless an exception applies.[1]

Our law is clear that the Commonwealth has the burden of demonstrating that bail should not be granted. *Commonwealth v. Truesdale*, 296 A.2d 829, 835-836 (Pa. 1972). *See Commonwealth v. Heiser*, 478 A.2d 1355, 1356 (Pa.Super. 1984) ("At a bail hearing, the Commonwealth bears the burden of proof."). While the focus of the Commonwealth's cause will necessarily depend on which bail exception it implicates, the plain language of Article 1, Section 14 dictates that the standard of proof is the same. Likewise, whether setting or revoking bail, the standard of proof is the same.

However, our law is entirely unclear what standard of proof the Commonwealth must meet to establish when "the proof is evident or presumption great" that a bail exception applies. A standard of proof

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[1] The Pennsylvania Constitution also provides that "[e]xcessive bail shall not be required[.]" Pa. Const. art. 1, § 13. The right not to have bail be excessive is implicit in Section 14 by providing that eligible individuals are to be bailable "by sufficient sureties[.]" Pa. Const. art. 1, § 14.

functions to "instruct the factfinder as to the level of confidence that society believes he should have in the correctness of his conclusion; furthermore, different standards of proof reflect differences in how society believes the risk of error should be distributed as between the litigants." *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003).

Previous Pennsylvania courts have attempted to define the phrase where the accused was charged with a crime punishable by death or life imprisonment, but they offer little clarity.[2] And no court has

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[2] *See Commonwealth ex rel. Alberti v. Boyle*, 195 A.2d 97, 98 (Pa. 1963) (without articulating a standard of proof, holding "the words in Section 14 'when the proof is evident or presumption great' mean that 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"); *Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971) (without discussing *Alberti*, holding: "Since evidence offered at the preliminary hearing in the Family Court Division established a *prima facie* case of murder in the first degree, the court below did not err in refusing to release Farris on bail pending trial, and its order to this effect will be affirmed."); *Commonwealth v. Caye*, 290 A.2d 244, 245 (Pa. 1972) (without analysis, holding: "The Constitution makes clear that unless the 'proof is evident or presumption great' that a capital offense has been committed, the defendant prior to trial is entitled to bail."); *Heiser*, 478 A.2d at 1356 (although noting that *Alberti* and *Farris* are at odds with one another, holding 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. Scarfo*, 43 Pa. D. & C.3d 339, 342 (Pa.Com.Pl. 1987) (defining the standard as *prima facie* evidence based on *Heiser*); *Commonwealth v. Hamborsky*, 75

interpreted the phrase where, as here, the Commonwealth claimed that bail should be denied to ensure the safety of the community. Consequently, to determine how to correctly construe the phrase, it is appropriate to look at other jurisdictions.

B. Well over half the states use the phrase "the proof is evident or presumption great" in the right-to-bail clauses of their constitutions.

Nearly every state, at some point in its history, has had a constitutional provision addressing an accused's right to bail. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Review 909, 921 (2013). Including Pennsylvania, 35 states presently use the phrase "the proof is evident or presumption great," or something remarkably similar, in the right-to-bail clauses of their

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Pa. D. & C.4th 505, 515 (Pa.Com.Pl. 2005) (concluding a *prima facie* standard "makes much of Article 1, Section 14 mere surplusage" and violates the Eighth Amendment); *Commonwealth v. O'Shea-Woomer*, 8 Pa. D. & C.5th 178, 223 (Pa.Com.Pl. 2009) (holding "the plain language of the evident proof standard in Article 1, Section 14 suggests a 'clear and convincing' standard"); *Commonwealth v. Pal*, 34 Pa. D. & C.5th 524, *14 (Pa.Com.Pl. 2013) (despite the "thoughtful policy arguments" advanced in the trial court opinions in *Hamborsky* and *O'Shea-Woomer*, concluding that appellate authority "reflects that the *prima facie* standard, as opposed to a more demanding 'clear and convincing evidence' requirement, is the appropriate standard of review in determining 'when the proof is evident or presumption great'").

constitutions. *Id.*[3] The phrase first appeared in a 1682 charter of colonial Pennsylvania entitled, "Charter of Liberties and Frame of

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[3] *See* Ala. Const. art. 1, § 16 ("the proof is evident or the presumption great"); Alaska Const. art. 1, § 11 ("the proof is evident or the presumption great"); Ariz. Const. art. 2, § 22 ("the proof is evident or the presumption great"); Cal. Const. art. 1, § 12 ("the facts are evident or the presumption great"); Colo. Const. art. 2, § 19 ("proof is evident or presumption is great"); Conn. Const. art. 1, § 8 ("the proof is evident or the presumption great"); De. Const. art. 1, § 12 ("the proof is positive or the presumption great"); Fla. Const. art. 1, § 14 ("the proof of guilt is evident or the presumption is great"); Idaho Const. art. 1, § 6 ("the proof is evident or the presumption great"); Ill. Const. art. 1, § 9 ("the proof is evident or the presumption great"); Ind. Const. art. 1, § 17 ("the proof is evident, or the presumption strong"); Iowa Const. art. 1, § 12 ("the proof is evident, or the presumption great"); Kan. Const. B. of R. § 9 ("proof is evident or the presumption great"); Ky. Const. § 16 ("the proof is evident or the presumption great"); La. Const. art. 1, § 18 ("the proof is evident and the presumption of guilt is great"); Me. Const. art. 1, § 10 ("the proof is evident or the presumption great"); MI Const. art. 1, § 15 ("the proof is evident or the presumption great"); Minn. Const. art. 1, § 7 ("the proof is evident or the presumption great"); Miss. Const. art. 3, § 29 ("the proof is evident or presumption great"); Mo. Const. art. 1, § 20 ("the proof is evident or the presumption great"); Mont. Const. art. 2, § 21 ("the proof is evident or the presumption great"); Neb. Const. art. 1, § 9 ("the proof is evident or the presumption great"); Nev. Const. art. 1, § 7 ("the proof is evident or the presumption great"); N.M. Const. art. 2, § 13 ("the proof is evident or the presumption great"); N.D. Const. art. 1, § 11 ("the proof is evident or the presumption great"); Ohio Const. art. 1, § 9 ("the proof is evident or the presumption great"); Okla. Const. art. 2, § 8 ("the proof of guilt must be evident, or the presumption thereof is great"); Or. Const. art. 1, § 14 ("the proof is evident, or the presumption strong"); R.I. Const. art. 1, § 9 ("the proof of guilt is evident or the presumption great"); S.D. Const. art. 6, § 8 ("proof is evident or presumption great"); Tenn. Const. art. 1, § 15 ("the proof is evident, or the presumption great"); Tex. Const. art. 1, § 11 ("the proof is evident");

Government of the Province of Pennsylvania in America." Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 975 (1965). It was subsequently copied in the Northwest Ordinance of 1787 and in many 19th-century state constitutions. *Id.* at 975-977. Yet, despite centuries of existence, there is a multitude of different conclusions as to what exactly the phrase means. Not every state has tried to apply a standard to it, but some have.

C. Three general approaches have been used to define the phrase.

According to the Court of Appeals of Arizona, "[t]he history of the phrase alone suggests that it is unique and that it establishes its own standard since there is no comparison for recourse. To state otherwise would be to put a 21st century gloss on or give a modern substitute definition to an historic legal phrase." *Simpson v. Owens*, 85 P.3d 478, 487-488 (Ariz. Ct. App. 2004). The Supreme Court of Indiana has similarly suggested "it would be improper to simply relabel this burden as one of our more traditional evidentiary standards like probable

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Vt. Const. Ch. 2, § 40 ("evidence...is great"); Wash. Const. art. 1, § 20 ("the proof is evident, or the presumption great"); Wyo. Const. art. 1, § 14 ("proof is evident or the presumption great").

cause, preponderance, clear and convincing, or beyond a reasonable doubt." *Fry v. State*, 990 N.E.2d 429, 444-445 (Ind. 2013).

Nevertheless, of the states that have defined the phrase, there are three general approaches: (1) those requiring some variation of probable cause or *prima facie* evidence[4] that an exception to bail applies; (2) those requiring some variation of "clear and convincing" evidence that an exception to bail applies; and (3) those requiring evidence beyond a reasonable doubt that an exception to bail applies. *See Brown v. People of Virgin Islands*, 50 V.I. 241, 260-261 (V.I. 2008) ("On the whole, states have defined the standard as requiring either probable cause, something akin to clear and convincing evidence, or evidence beyond a reasonable doubt.") (footnotes omitted).

D. An overwhelming majority of states require more than *prima facie* evidence.

In 2008 the Virgin Islands Supreme Court did a nationwide survey of case law and concluded "the overwhelming majority of states require evidence that is greater than probable cause but less than

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[4] *See Commonwealth v. McClelland*, 233 A.3d 717, 724 n. 3 (Pa. 2020) ("Pennsylvania courts have used the terms '*prima facie*' and sufficient 'probable cause' interchangeably in the context of modern preliminary hearings.").

beyond a reasonable doubt." *Id.* at 261. Based on *amici*'s independent research, this conclusion is still correct 13 years later.

Two states require only evidence establishing probable cause or *prima facie* evidence.[5] On the other hand, 17 states demand something more. Six states expressly apply a "clear and convincing" standard.[6] 10 states insist on evidence that is greater than probable cause but less than reasonable doubt.[7] One state actually requires the prosecution to

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[5] *See Harnish v. State*, 531 A.2d 1264, 1268 (Me. 1987) ("Requiring the state to satisfy the probable cause standard in a bail hearing, even after indictment, is consistent with the present day circumstances in which we must apply article 1, section 10."); *State v. Boppre*, 453 N.W.2d 406, 418 (Neb. 1990) (finding no error in denying bail where "there was certainly sufficient evidence presented at the preliminary hearing to support the district court's determination that 'the proof is evident or the presumption great' that Boppre had committed the murders of Valdez and Codon.").

[6] *See State v. Moyer*, 214 So.3d 1147, 1150 (Ala. 2014) (defining the standard as "clear and strong"); *Chantry v. Astrowsky*, 395 P.3d 1114, 1115-1116 (Ariz. Ct. App. 2017) (the burden of proof is "by clear and convincing evidence"); *In re Humphrey*, 482 P.3d 1008, 1020 (Cal. 2021) ("we agree with Humphrey that the standard of proof should likewise be clear and convincing evidence"); *Brill v. Gurich*, 965 P.2d 404, 408 (Ok. Crim. App. 1998) ("The burden of proof...is that of clear and convincing evidence.") (emphasis omitted); *Application of Haynes*, 619 P.2d 632, 636 (Or. 1980) ("evidence should at least be clear and convincing"); Wash. Const. art. 1, § 20 ("a showing by clear and convincing evidence").

[7] *See Yording v. Walker*, 683 P.2d 788, 791 n. 1 (Colo. 1984) ("the burden of proof upon the People to establish [an exception to bail] was greater

present evidence "to a degree of proof greater than that required to

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than probable cause but less than the standard of beyond a reasonable doubt required for conviction."); *In re Steigler*, 250 A.2d 379, 382 (Del. 1969) (defining the phrase to mean "after full hearing 'there is good ground to doubt the truth of the accusation'"); *Fry*, 990 N.E.2d at 449 (where the denial of bail is related to the charges, the standard is preponderance of the evidence, but where the issue is the accused's alleged risk to the community the state must meet "the greater showing of clear and convincing evidence"); *Marcum v. Broughton*, 442 S.W.2d 307, 309 (Ky. 1969) ("the Commonwealth must sustain its burden by proof competent under the ordinary rules of evidence"); *People v. Sligh*, 431 N.W.2d 395, 399 (Mich. 1988) ("That conviction shows that the trial court and jury, if any, were convinced of defendant's factual guilt. The same evidence should suffice for a showing that 'the proof is evident or the presumption great' under the constitutional provision."); *Huff v. Edwards*, 241 So.2d 654, 656 (Miss. 1970) ("Generally, if a reasonable doubt or well-founded doubt of guilt can be entertained, then the proof cannot be said to be evident nor the presumption great."); *Ex parte Spoor*, 173 S.W. 2d 943, 945 (Mo. 1943) ("the proper test is whether the evidence before the judge on the hearing for bail tends strongly to show guilt of a capital offence, which is only another way of saying the proof must be evident or such facts must be shown as to raise a strong presumption of guilt of the crime charged"); *Sewall v. Eighth Judicial District Court in and for County of Clark*, 481 P.3d 1249, 1251-1252 (Nev. 2021) ("The quantum of proof necessary to establish the presumption of guilt for purposes of defeating a bail request is considerably greater than that required to establish the probable cause necessary to hold a person answerable for an offense, but less than what is required at trial to prove guilt beyond a reasonable doubt[.]") (internal punctuation and citations omitted); *State v. Summons*, 19 Ohio 139, 141 (1850) ("if the evidence exhibited on the hearing of the application to admit to bail, be of so weak a character that it would not sustain a verdict of guilty"); *Fountaine v. Mullen*, 366 A.2d 1138, 1141-1142 (R.I. 1976) ("whether the facts adduced by the state, viewed in the light most favorable to the state (i.e. notwithstanding contradiction of them by defense proof), are legally sufficient to sustain a verdict of guilty").

establish guilt beyond a reasonable doubt." *Elderbroom v. Knowles*, 621 So.2d 518, 520 (Fla. Dist. Ct. App. 1993). Finally, of the 11 states that, like Pennsylvania, permit bail to be denied for reasons relating to public safety, four explicitly use the "clear and convincing" standard[8] and four use a variation of it.[9, 10]

E. Neither *prima facie* evidence nor proof beyond a reasonable doubt is the correct standard.

In rejecting the first general approach, the Supreme Court of Indiana explained:

> Clearly this standard requires something more than "probable cause," or otherwise the exception of Article 1§ 17, would have no meaning. Probable cause is the minimum standard by which an arrest or an individual may be made—there is probable cause that a crime was committed and the defendant is the one who committed it. 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.

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[8] Arizona, California, Oklahoma, and Washington.

[9] Colorado, Michigan, Mississippi, and Ohio.

[10] Illinois, Louisiana, and New Mexico are unsettled.

Fry, 990 N.E.2d at 445.

The same is true under the Pennsylvania Constitution. The *Alberti* Court "condemned" the practice of determining bail based on the testimony presented at the coroner's inquest or preliminary hearing.[11] *Alberti*, 195 A.2d at 98. Despite not defining the phrase "the proof is evident or presumption great," it drew a distinction between the Commonwealth's burden to hold a defendant for trial, and its burden to deny a defendant bail.

A separate hearing to address bail is necessary because potential defenses are not permitted to be considered at a preliminary hearing. *Commonwealth v. Sanchez*, 82 A.3d 943, 984 (Pa. 2013). *Prima facie* evidence merely means "that a crime has been committed and that the accused is probably the one who committed it." *Commonwealth v. Montgomery*, 234 A.3d 523, 533 (Pa. 2020) (citations omitted). But our Constitution requires that bail be inextricably tied to an accused's likelihood of flight or dangerousness. *Commonwealth v. Sloan*, 907 A.2d 460, 468 (Pa. 2006). *Prima facie* evidence simply "gives inadequate

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[11] A coroner's inquest is the functional equivalent of a preliminary hearing. *Commonwealth ex rel. Walls v. Maroney*, 205 A.2d 862, 864 (Pa. 1965).

weight to a defendant's fundamental right to liberty and to the vital presumption of innocence." *Browne*, 50 V.I. at 262 (citations omitted). As the Supreme Court of California correctly put it: "It is one thing to decide that a person should be charged with a crime, but quite another to determine, under our constitutional system, that the person merits detention pending trial on that charge." *In re Humphrey*, 482 P.3d at 1015.

The Supreme Court of Indiana also rejected the third approach, holding:

> Nor can this standard be as high as "beyond a reasonable doubt." Despite the importance of the presumption of innocence, we think it apparent that this would present an insurmountable burden on the State because at this stage its evidence would not necessarily be fully coalesced or verified. Setting the bar this high, this early, would effectively require the State to wait to arrest a defendant until their entire case-in-chief was assembled and prepared. Additionally, providing the defendant the full protection of the "beyond a reasonable doubt" standard would necessarily require the evidentiary rules and Due Process requirements attached to a full trial. If that were the standard, we might as well hold the trial right then and there.

Fry, 990 N.E.2d at 445. The Court's analysis convincingly establishes why evidence beyond a reasonable doubt is not the appropriate

standard. There is no reason to go over the same ground, and, therefore, *amici* respectfully forward it as our own.

"The answer, then, must lie somewhere in the middle." *Id.*

F. The preponderance test is also wrong.

This Honorable Court has called the "middle" preponderance test "'a more likely than not inquiry,' supported by the greater weight of the evidence; something a reasonable person would accept as sufficient to support a decision." *Commonwealth v. Batts*, 163 A.3d 410, 453 (Pa. 2017) (citations omitted). It has further explained:

> [W]hile private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Id. at 454 (citations omitted).

The preponderance test is appropriate where the issue is just whether to award compensation for some injury. In these situations the interests at stake are viewed by society as minimal. Both parties are

allocated the risk of error. In sharp contrast, bail involves the very serious decision of whether to deny a defendant liberty. As such, the interests of society and of the accused are enormous. The burden also rests exclusively with the Commonwealth. For these reasons alone, the preponderance test is wholly inadequate. But they are not the only reasons.

G. "Clear and convincing" evidence is undoubtedly the correct standard.

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (citations omitted). "The Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Id.* (citations and original brackets omitted). It should not be read in any "strained or technical manner[,]" *Id.* (citations omitted), and if "the constitutional language is clear and explicit, we will not 'delimit the meaning of the words used by reference to a supposed intent.'" *Id.* (citations omitted).

The word "evident" is defined by the Cambridge Dictionary as "easily seen or understood." Cambridge Dictionary, available at

https://dictionary.cambridge.org/us/dictionary/english/evident (last visited April 7, 2021). Synonyms for "evident" include "obvious, clear, apparent, plain, evident, manifest." *Id.* Thus, the plain language of Article 1, Section 14 implies a "clear and convincing" standard to determine whether a bail exception has been established.

This Honorable Court has described "clear and convincing" evidence as "an 'intermediate' test, which is more exacting than a preponderance of the evidence test, but less exacting than proof beyond a reasonable doubt." *Commonwealth v. Meals*, 912 A.2d 213, 219 (Pa. 2006). "Clear and convincing evidence requires proof 'that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Batts*, 163 A.3d at 453 (citations omitted).

Based on the above, this heightened "middle" standard of proof provides the appropriate significant protections to an accused regarding the setting or revoking of bail. "Clear and convincing" evidence, therefore, is undoubtedly the correct standard under Pennsylvania law.

II. From a policy standpoint, to deny an accused his or her constitutional right to bail, the Commonwealth must present "clear and convincing" evidence that the "proof is evident or presumption great" that an exception to bail applies.

A. A *prima facie* standard negatively affects case outcomes for incarcerated defendants.

i. Individuals cannot effectively exercise their constitutional right to participate in their defense.

A study of Philadelphia court records from 2006-2013 revealed that pre-trial detention led to a 13-percent increase in the likelihood of conviction for at least one charge, and an increase of 124 days in the length of maximum incarceration sentences. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case* Outcomes, 34 J.L. Econ. & Org. 511, 512-13, 534-535 (2018). One reason for this disparity is that pre-trial incarceration imposes significant barriers on the constitutional right of criminal defendants to participate in their own defense.

In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court recognized that "[t]he time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability

to gather evidence, contact witnesses, or otherwise prepare his defense." 407 U.S. at 532-533 (citations omitted).

Cut off from the outside world, detained individuals cannot easily assist their attorneys in finding ways to contradict the prosecution's claims. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail Reform from Defense Attorneys' Perspectives*, 32 Pace L. Rev. 800, 800-801, 846-847 (2012). They also may be less likely to speak candidly with their lawyers due to confidentiality concerns. *Id.* at 846-847. Meetings inside jails create logistical challenges, as attorneys must spend time traveling to the facility, fulfilling security protocols, and waiting for clients who may be unavailable due to counts or unexpected delays. *Id.* These burdens can reduce the frequency of in-person meetings, and make it difficult for attorneys to strategize with clients during recesses of multi-day trials. *Id.* at 801, 846-847. Visitation restrictions during the Covid-19 pandemic have exacerbated these problems. Pre-trial detention makes it more difficult for defendants to review their discovery, especially when it involves technology or large amounts of paper. *Id.* at 845-846. When attorneys review materials

alone, they lose the unique perspective of the person who may have the most firsthand knowledge of the allegations. *Id.* These disadvantages mean that the chance of acquittal for incarcerated defendants is lower. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 124-125 (2005).

ii. Pre-trial incarceration leads to unfavorable pleas and overcharging.

The lure of freedom can cause defendants to enter into unfavorable plea bargains instead of arguing potentially meritorious pre-trial motions or "employ[ing] legal strategies that involve delay," such as filing continuances with the hope that prosecution witnesses will fail to appear, or that charges will be dropped. Stevenson, 34 J.L. Econ. & Org. at 515-516. Incarcerated individuals also have limited opportunities to complete diversionary programs that could lead to favorable plea deals or sentences. Gupta, Arpit et al., *The Heavy Costs of High Bail: Evidence From Judge Randomization*, Working Paper, 4 (August 2016), available at https://bit.ly/3sltydh (last visited April 7, 2021).

Furthermore, when individuals bypass trial, potential defenses are not explored and the Commonwealth's evidence is not tested. In

effect, indigent defendants, based only on their inability to post bail, are deprived of their constitutional rights to the presumption of innocence and to trial due to the choice they must make between remaining incarcerated indefinitely or securing freedom quickly. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary[.]").

Moreover, a *prima facie* standard incentivizes police to overcharge defendants, which, in turn, leads to unfavorable pleas. If an officer believes that the bail-setting court will only inquire into the nature of the charges, it is easy to imagine inappropriate charging motivated by the desire to detain an individual pending trial. This standard can turn bail hearings into farces that do not reflect the weight of a bond decision, as judges can deny bail if charges that very easily could be meritless at trial are held at the preliminary hearing. Courts must employ the "clear and convincing" standard when determining if an exception to bail has been established, and must adhere to the adhere to the requirements of Pa.R.Crim.P. 523 (Release Criteria), to prevent such scenarios from becoming commonplace.

iii. Pre-trial incarceration has many collateral consequences.

Pre-trial incarceration also leads to other adverse consequences. As the United States Supreme Court has recognized: "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

Even people who are detained for just a few days may lose their job, their home, and access to their children. Alexander Holsinger, *Analyzing Bond Supervision Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, Crime and Justice Institute, 2-3, 8-9 (June 2016), available at http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf (last visited April 7, 2021). Pre-trial incarceration, and the loss of earning that follows, can cause food insecurity for defendants' families. Robynn Cox & Sally Wallace, *Identifying the Link Between Food Security and Incarceration*, 82 S. Econ. J. 1062, 1074 (2016).

Pre-trial incarceration negatively affects individuals' physical and mental health. In addition to the immense stressors of incarceration, defendants with chronic health problems or mental illness may lose

access to medications. Suicide is the leading cause of death in local jails, and about 40 percent of jail deaths occur within the first seven days of incarceration. E. Ann Carson & Mary P. Cowhig, *Bureau of Justice Statistics, Mortality in Local Jails and State Prisons, 2000-2016—Statistical Tables*, 1 (February 2020), available at https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf (last visited April 7, 2021).

The pandemic has increased physical and mental stressors. The Covid-19 precautions of the Allegheny County Jail ("ACJ") require many inmates to be isolated in their cells for 23 hours per day, and have cancelled many activities and visitations. Juliette Rihl, *'It almost broke me.' How the pandemic is straining mental health at Allegheny County Jail* (September 14, 2020), available at https://www.publicsource.org/covid-allegheny-county-jail-mental-health-strain/ (last visited April 7, 2021). Despites these measures, 341 ACJ inmates have contracted Covid-19. Allegheny County Jail Covid-19 Information, available at https://www.alleghenycounty.us/jail/index.aspx (last visited April 7, 2021).

Lastly, pre-trial incarceration contributes to jail overcrowding. A 2019 study showed that unconvicted individuals comprised 81 percent of the ACJ's population. *Punishing Poverty: Cash Bail in Allegheny County* ("*Punishing Poverty*"), American Civil Liberties Union Pennsylvania, 5 (October 2019), available at https://bit.ly/31RWpKI (last visited April 7, 2021). This is costly for taxpayers and can be dangerous, as such destabilization increases the likelihood of future criminal activity by 40 percent for low-risk defendants. Chris Lowenkamp et al., The Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention*, 3 (November 2013), available at https://bit.ly/2u0Lj5d (last visited April 7, 2021).

Requiring the Commonwealth to present "clear and convincing" evidence, rather than allowing bare accusations to suffice, will help insulate the poorest citizens from detention and the severe consequences that follow.

B. Overly restrictive bail policies inordinately harm indigent and minority defendants.

i. Even low bail is prohibitively expensive.

Indigent defendants are more likely to be detained pending trial than wealthy defendants. The median monetary bond amount in

Allegheny County is $5,000, which prices out many indigent individuals from securing bond. *See* Appendix A. Public defender clients here generally earn less than $18,735 per year, or $1,561.25 per month, meaning that a $5,000 bond requires more than three months' income. Accordingly, the imposition of monetary bond acts as a *de facto* bail denial for many indigent clients.

This practice disproportionately affects black people, whom Allegheny County initially assesses monetary bail on at a 12.5 percent higher rate than on white defendants. *Punishing Poverty*, *supra*, at 6. Although black people comprise only 13 percent of the local population, they are 60 percent of the ACJ's population. *Id.*

Problematically, the $5,000 median is the same for public defender clients and non-public defender clients. This fact disregards the requirements of Pa.R.Crim.P. 523(A)(2) and Pa.R.Crim.P. 528 (Monetary Condition of Release on Bail) that a defendant's ability to pay must factor into the bail decision. This is not happening if the median bond is the same for all defendants regardless of income.

Compounding this problem, public defender clients have monetary bail set in 12.4 percent more cases than privately-represented clients.

Punishing Poverty, *supra*, at 7. As any monetary bail is too high for many indigent clients, these individuals stand a greater chance of being detained than those with more means.

A hypothetical scenario exposes this inequity. If two co-defendants have the exact same charges, and there are no material differences in their mitigating factors or prior record score, only the defendant with access to money could secure release. Thus, the poorer defendant would be incarcerated purely due to his or her inability to pay bond, a reason that neither Pennsylvania law nor federal law condones.

A bail system that penalizes indigent defendants solely because of their inability to pay raises palpable Equal Protection concerns. The United States Supreme Court has held:

> To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. .... It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. .... Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release.

Bandy v. United States, --- U.S. ---, 81 S.Ct. 197, 197-198 (1960) (citations and unnecessary paragraphing omitted). Requiring merely

prima facie evidence to establish an exception to bail is at least partly to blame for the disparate impact of bail determinations on indigent defendants. The Commonwealth could not effectively deny bail to indigent defendants if it was required to support its contentions with something more than bare accusations.

ii. Alternatives to pre-trial incarceration can ensure public safety while preserving defendants' rights.

Less-restrictive alternatives to pre-trial incarceration can promote public safety while, at the same time, preserving defendants' rights. For instance, courts can order no contact with alleged victims, house arrest with electronic monitoring, alternative housing, drug and alcohol treatment, mental-health counseling, and regular reporting by phone or in person. Pa.R.Crim.P. 527.

Importantly, the conditions of pre-trial release are similar to those available to defendants on probation. It defies logic to think that a defendant who is deemed a safety risk pre-trial is no longer one at sentencing. Yet, many defendants who are detained pre-trial receive only probationary sentences.

Defendants with charges where probation is appropriate should not have significant rates of pre-trial incarceration. This often happens, however, and results in individuals who would not have spent any time incarcerated if they could afford bail, or if the Commonwealth had to establish a safety risk by "clear and convincing" evidence.

Bail is not meant to punish, yet that is precisely what happens to many defendants, especially indigents. Because bail practices disproportionately impact poor and minority defendants, ensuring adequate process through the standard of "clear and convincing" evidence will better protect these individuals from the devastating effects of pre-trial incarceration.

CONCLUSION

Based on the above, to deny an accused his or her constitutional right to bail, the Commonwealth must present "clear and convincing" evidence that the "proof is evident or presumption great" that an exception to bail applies.

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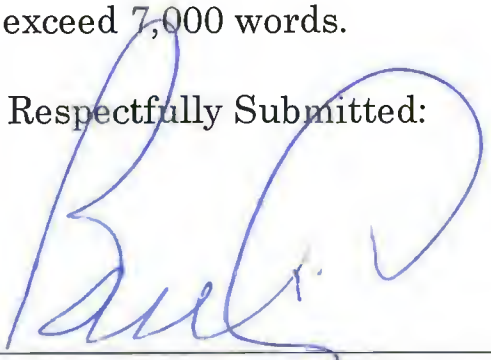
CERTIFICATE OF COMPLIANCE PURSUANT TO Pa.R.A.P. 531(b)(3)

I, Brandon P. Ging, Esquire, hereby certify that this *amicus* brief complies with the word count requirement pursuant to Pa.R.A.P. 531(b)(3), as it does not exceed 7,000 words.

Respectfully Submitted:



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

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The Fifth Judicial District of Pennsylvania's Criminal Division (Criminal Division) calculated median bond amounts sets on **monetary bonds only**, between January 1st, 2019 and March 31st, 2021. During this period, monetary bonds represented only 35% of all bonds set – in total, 38,261 bonds were set or denied during this period. Using administrative data from the Magisterial District Judge System (MDJS,) as well as validated datasets provided by the Allegheny County Public Defender's Office (PD,) Criminal Division looked at median bond amounts for all defendants, defendants represented by the PD, and defendants not represented by the PD. For each population, **the median monetary bond amount set was $5,000**. Median is an appropriate value because it is the statistical middle of the dataset, as opposed to mean/average, which would skew the bond amount based on disproportionately low or high bonds set on a small subset of cases.

For **all set bonds** between January 1st, 2019 and March 31st, 2021 (including any bond type except denied bonds,) **the median bond amount was $0** as the majority of defendants in each cohort (all defendants, PD defendants, and non-PD defendants) were either released on recognizance or received nonmonetary bonds. These two bond types accounted for approximately 59% of bond decisions in the period when excluding denied bonds.

APPENDIX A