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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 FOR APPELLEE

APPEAL FROM THE JULY 17, 2020 SUPERIOR COURT ORDER AT NO. 2627 EDA 2018, AFFIRMING THE JUDGEMENT OF SENTENCE IMPOSED ON AUGUST 24, 2018 BY THE HONORABLE RICHARD P. HAAZ, IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, CRIMINAL DIVISION, AT NO. CP-46-CR-0005241-2017.

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether the standard for denial of nominal bail under Pa. Const. art. I, § 14—*i.e.*, where the "proof is evident or the presumption great"—requires a prima facie case; but, even if the standard is clear and convincing evidence, the evidence was still sufficient for the trial court's exercise of discretion in denying defendant nominal bail because of his demonstrated risk to his victim's safety?

(Suggested answer: Yes. Answered in the affirmative by the Superior Court (different rationale).)

II. Whether defendant's real objection to the inculpatory text messages is based on authentication, not the best evidence rule; but, even if defendant had raised a proper best evidence rule objection, the trial court properly exercised its discretion in admitting the messages?

(Suggested answer: Yes. Answered in the affirmative by the Superior Court.)

COUNTER-STATEMENT OF THE CASE

Appellant Daniel Talley ("defendant") appeals from the Superior Court's order affirming his judgment of sentence, following his conviction by jury of two counts of stalking, terroristic threats, and harassment. He subjected his ex-girlfriend Christa Nesbitt to a torrent of sexually explicit—and, at times, racially charged—and threatening text messages. He enabled a tracking feature on her phone and followed her. He was seen driving by Nesbitt's home the night someone fired a bullet at her parked car. He continued to send threatening messages to Nesbitt even after making bail following his first arrest. He now appeals the trial court's later order denying nominal bail after his second arrest, as well as the admission, at trial, of the harassing, violent, and frightening messages he inflicted on Nesbitt.

In March 2016, Nesbitt was working as a waitress in a diner in Oreland, Pennsylvania, called the Whistle Stop. N.T., 7/23/2018, 75. Defendant started coming into the diner with his daughter and Nesbitt would take their orders and chitchat with them. Defendant became a regular. He started intimating to her that he wanted to spend more time with her, and they would joke about her coming over to his place and

making them breakfast. He gave her his phone number, but she paid it no mind because she was not interested in him. *Id*. She tried to avoid him going forward, but about a month later he and his daughter were driving by Nesbitt and her daughter, and defendant started socializing with her and they agreed to a play date for their daughters. *Id*. at 75-76.

After a couple of play dates, defendant asked Nesbitt out for dinner, and she—still not interested in defendant romantically—said she would have to take her daughter R.M. with them. N.T., 7/23/2018, 77. They went to dinner a handful of times. *Id*. Within a month of the dinners, defendant started inviting Nesbitt and R.M. to spend the night and watch movies and the relationship between defendant and Nesbitt eventually became sexual. *Id*. at 77-78.

Nesbitt went on vacation around September 2016 and when she returned, she began to distance herself from defendant, because she did not feel ready to give defendant the level of commitment he wanted. N.T., 7/23/2018, 78. She told him she was not interested in continuing to "hang[] out." *Id*. After a few days of Nesbitt "blowing him off," defendant persuaded Nesbitt to come to his house, and, as she put it, he "convinced me that I didn't want to break up with him, I just didn't know what an

actual relationship was supposed to be. So I just didn't understand how I was feeling at the time. And then he gave me a house key and was like, [l]et's actually try this. And we went from there." *Id*. at 78-79. Nesbitt moved in with defendant and things became "difficult," because he started to become more controlling. N.T., 7/23/2018, 80. He required her to come home right after work and ask permission before going out with friends. *Id*. He would forbid her from giving people rides home from work; there were "just a lot of rules that I had to follow…." *Id*.

Nesbitt later told defendant she was unhappy and that things were not working out and he "constantly made it seem like I owed him something; I owed him a conversation; I owed him a closure that wasn't really necessary…he was really angry at me for wanting to not be with him." N.T., 7/23/2018, 81.

The day before Nesbitt moved out, defendant sent a message to his friend, David Wolf, saying,

> Thank god my kid is home. Thank fucking God. She hasn't moved out yet. She was supposed to come home, have dinner, and we were going to talk and see how we could part ways amicably. Trying to remain friends as we obviously are close after a year of living together with two kids involved. She said she had to get some parts her mechanic buddy

told her needed for her car after work and she'd be late. She's back on Pratt Street.

Is there a way to spam a Phone with so many texts and call[s] it just totally fucks it up?

N.T., 7/24/2018, 348-49. The conversation continued:

Wolf:	Yes. But it can get you in trouble as it's easy to get bused for [it].
Defendant:	How much trouble can you really get in? What law is it against?
Wolf:	Interfering with interstate communications. Harassment. Other stuff.
Defendant:	That's what TOR is for.[1]
Wolf:	I guess. Then you'd have to find an online script that sends SMS anonymously, and will accept input from an anonymized browser….FYI, TOR crawls with NSA.

[1] As Detective Chiarlanza explained, TOR "comes from a project that started many years ago…It [] tries to send your Internet traffic left and right and wherever, and it distracts the internet traffic so you can't track it…Basically, it is a modified web browser to hide your Internet browsing." N.T., 7/24/2-018, 311-12.

N.T., 7/24/2018, 248-50.[2]

Nesbitt moved out on May 27, 2017. N.T., 7/23/2018, 82. And defendant would not let her come back to get her belongings—such as her bed, her dresser, and R.M.'s bed—without paying him money to get them back. *Id*. at 83. Nesbitt went to the Springfield Township Police Department and spoke to Detective Corporal Robert Chiarlanza on May 30th. *Id*. *See also* N.T., 7/24/2018, 282. After a few attempts, Detective Chiarlanza successfully got in touch with defendant who told him he had "seized her property under civil law, and that if anyone were to come near the house, he would, in fact, enforce his castle doctrine rights." N.T., 7/24/2018, 281. Defendant eventually agreed to give Nesbitt back her property; he put it on the front lawn under a tarp. *Id*. at 282.

Nesbitt started receiving threatening text messages after moving out on May 27th. N.T., 7/23/2018, 82.[3] Prior to leaving defendant, she had

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[2] Despite his anger at Nesbitt's plan to move out, defendant would later testify he asked her to move out supposedly because he "just had enough. I had enough. It felt like I was being held hostage by her…." N.T., 7/24/2018, 412.

[3]Text messaging "is the act of typing and sending a brief[] electronic message between two or more mobile phones or fixed or portable devices over a phone network." McCormick on Evidence § 227 (8th ed. 2020).

received nothing of the sort. *Id*. At first, she "figured…this is how somebody needs to get over it. You know how people handle things in their own way? I figured these text messages are just him handling them in his own way." *Id*. She would ultimately receive hundreds of messages over the next month and a half. *Id*. at 97.

The documented messages begin as early as the day after Nesbitt moved out of defendant's home. And the day after that, she received one reading, "u think because u block me text you can win wit me [sic]. Im gonna give you baboon but again u luv it wen I do dat u a whore like to be held down and get it in da ass." N.T., 6/27/2017, Ex. CH-1. Overall, several messages referenced anal sex, which defendant had performed on Nesbitt while they were together, even though she had not wanted it because it was painful and made her cry. N.T., 7/23/2018, 119-20.

The next day, May 29th, Nesbitt received many messages, including one saying, "that's why I fuck ur baboon ass so much calm down let u know I the bos when you tryna shit[.] GIMME BACK RORI. u never [sic][.]" N.T., 6/27/2017, Ex. CH-1. On May 30th, Nesbitt received a text message from an email address purportedly linked to her own name which

had a subject line of, "My daughter," and said, "Hi, slut. Where my daughter at?" N.T., 7/23/2018, 95.

She continued to receive the messages, and on June 2, 2017, one of them said that the sender was watching her at a Friendly's restaurant. N.T., 7/23/2018, 85. "And it was scary because I was. I was there with my friend and my daughter." *Id*. This one caused her to go back to the police. *Id*. Detective Chiarlanza looked through her phone and found that the location sharing was on and that her location was being shared with "Daniel Talley." *Id*. at 86-88. While defendant had access to her phone when they were living together, she never permitted him to use a phone app to share her location with him. *Id*. at 89. Chiarlanza advised Nesbitt to start documenting the harassing text messages. N.T., 7/24/2018, 283.

Chiarlanza personally observed some messages on Nesbitt's phone. He observed that these were not "standard text message[s]." N.T., 7/24/2018, 284. He later explained, "Most of them were like an e-mail-to-text message; so someone [] would send an e-mail to your phone number. So it doesn't come up as a phone number, like I text you and you can see it is my phone number. It was an e-mail sent to the text message." *Id*.

Another message had a subject line of "You get good," and read, "You get good dick today, slut? You get to suck some cum? 3, 4, 5, 6, how many? You ain't fit to." N.T., 7/23/2018, 95. This matched defendant's pattern—during the relationship—of accusing Nesbitt of cheating on him with other men, whenever he "got this inkling that one of my friends had to be my guy on the side." *Id*. at 96. Still another text, with a subject of "Cunt," read, "I don't care 'bout yo bullshit. You a slut. Da world know it. Fuck you. Go suck nigger cock." *Id*. at 112-13. One was styled as a poem:

> Twinkle, twinkle little whore.
> Close your legs. They're not a door.
> You're gonna get an STD.
> They only like you cuz you're [free].

Id. at 140-41.

Some messages were threatening: "Yes, we know where you at. Yes, we see you all day. We are legion. If you was smart, you'd see us, but you a dumb cunt." *Id*. at 96. Another with no subject simply stated, "I'm coming, cunt." *Id*. at 98. A different one threatened, "I am gonna take dat tight asshole agan [sic]. I'm gonna rip it up like last time and make you cry, you slut." *Id*. at 123. And another read, in part, "Maybe I e-mail you

later. Maybe I come to your mom's and get [R.M.] tonight. You want some D, if I do? Clean your ass I a [sic]." *Id*. at 132-33.

Defendant made inconsistent attempts to masquerade as someone else. Some messages were sent from email addresses associated with Nesbitt's name. N.T., 7/23/2018, 95. Some referenced Nesbitt's daughter and were written as if from R.M.'s father, Korey McClellan. *Id*. at 122. One message was sent from an address incorporating Nesbitt's daughter's name and its subject was "Y." It said, "Mom, why you no let me see my dad?" *Id*. at 135.

But defendant could not avoid referencing things that disclosed his identity. On May 31, 2017, he sent her a text with lyrics from a song called "Such a Waste of a Pretty Face" by the metal band "It Lives, It Breathes": "Here we go again. / I grind my teeth. / Clench your wrists. / We'll be the same. / We'll be the same again." N.T., 7/23/2018, 126-27, 130-31. This was a song Nesbitt had heard several times in the car with defendant after he would put it on. *Id*. at 127-28.

Defendant also sent a text saying, "You know you miss my dick. Pool boy ain't got nuthin'…." N.T., 7/23/2018, 108. Defendant had previously called Nesbitt's friend Chris "pool boy." *Id*. at 109-10. And he

also later sent a message to Nesbitt saying, "porn [better] den you ever was. No cryin' when your asshole hurts. No bullshit fak[e] love from den like you do…." *Id*. at 133. Defendant had used before the term "fake love," Nesbitt testified, "When he thought I was sleeping with one of my friends, telling me that I was doing fake love and that I didn't actually—he just kept telling me it was fake love." *Id*. at 133-34. And there were of course the repeated references to the painful anal sex he had performed on her.

Nesbitt would sometimes stop by the police station between early- and mid-June to report the harassing messages. Police advised her to "keep documenting them and we will see what we can do." N.T., 7/24/2018, 285. On June 14th, Detective Chiarlanza decided to stop by defendant's house "and knock on the door and actually talk to him in person for once." *Id*. Chiarlanza told him, "[T]he communication with Christa has to stop. I know it is you. Knock it off. If you don't knock it off, we're going to arrest you." Defendant told him to have a nice day and closed the door in his face. *Id*.[4]

[4] Nesbitt later mistakenly told police the messages had stopped briefly after Chiarlanza's talk with defendant; instead, the messages continued more or less unabated. *See, e.g.*, N.T. 7/24/2018, 366-69; *id*. at 381-82.

Later that same day—after Chiarlanza's visit—defendant installed a new copy of the then-current Windows operating system, Windows 10, on an "old Dell computer" that could not have possibly had that software on it originally. N.T., 7/24/2018, 290-91. He also installed private internet access software which securely sends a user's information to another country which makes it appear to have originated from that secure location, thereby making it harder to trace. *Id*. at 311. And that same day he performed several internet searches for questions such as "When do texts and e-mails become harassment?" *Id*. at 329-30. The next day he performed another internet search for the question of, "Can a Mac address be traced[?]" *Id*. at 328.[5]

Two days after Chiarlanza's visit, defendant searched on his computer for "Tor Project, VPN for virtual machine, private Internet access," which is notable both for its timing—shortly after the detective's visit to defendant's home—and because "[w]hen you bundle all three of those together, it allows you to anonymize or hide your presence for

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[5] Detective Chiarlanza described a Mac address as "basically a serial number for the actual network in your computer. So it is a unique number on your computer…That's how the computer itself is recognized on the Internet…." *Id*. at 320-21.

surfing the Internet. It covers your tracks on your computer. It makes your address or your IP [internet provider] information appear to come from another state, another country, another continent. It makes it very hard to find someone's identity or computer." *Id*. at 308-09.

On June 19, 2017, Nesbitt's friend and neighbor Ashley-Lynn Donnelly was sitting on her neighbor's porch outside between 11:30 p.m. and midnight. N.T., 7/23/2018, 197.[6] She saw defendant's truck then—and recognized it because of its distinctive "zombie decals on the left-hand corner, in the back," which she had seen several times before. *Id*. at 196-97, 203. The power was out on in the neighborhood, at the time, but Donnelly's neighbor had a solar light that was always on. *Id*. at 198. There were no other cars out at the time, except for defendant's truck, which Donnelly saw idling between the houses where she was sitting. *Id*. It had no headlights on. *Id*. at 200. Then it "started driving down the street [and then] it came right back down[,] but going faster than it was before. And then the third time, it had cut through [a] side street…made a right, and

[6] Donnelly's house was about 434 feet away from Nesbitt's. *Id*. at 202.

passed me again, speeding. And that is when I heard two loud bangs…."

Id. at 200-01.

Donnelly recognized the noises as gunshots but rationalized it away as probably being fireworks neighborhood kids had set off. N.T., 7/23/2018, 207. Donnelly still sent a text to Nesbitt about what she had seen, and she also gave a statement to police the next day. *Id*. at 208. The morning before the shooting, Nesbitt received the following message:

> Subject: bad choic [sic]
>
> the choics u made
> dis weeknd will have
> negative impact on
> ever1 u love u need 2
> make it rite NOW or
> else dey all pay 4.[7]

Earlier that same morning defendant sent Nesbitt another message, with the subject "Tonite," saying, "I was up da stre[e]t from your house. My gun was loaded, and I was going to end everything. We cld die to geter [sic] Den I." *Id*. at 139. He sent a similar message around the same time:

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[7] The next message references Nesbitt making Facebook posts, which is notable because defendant, who testified in his own defense, accused Nesbitt of posting false things about him on Facebook. He described himself as "furious." *See, e.g.*, N.T., 7/24/2018, 411.

"chrisa u made sum rly bad choice dis weeknd nd u n dur luv 1s gona pay, fix it 2day or what gona start in cple day i." *Id*. at 140. And later that day, hours before the shooting, he sent another message titled "tik toc," threatening, "it gona happen slut u gona pay comin soon maybe on fox stret u seem 2 like it der, maybe u 'fal' off mybe de b." *Id*.

Though Donnelly told Nesbitt defendant had been driving around the area, Nesbitt only discovered the fresh bullet hole in her car door later that day after work. N.T., 7/23/2018, 141-42. Nesbitt reported the gunshot to police who took statements from Donnelly and performed an investigation. N.T., 7/24/2018, 293.

Detective Chiarlanza determined that a bullet had pierced the driver's side door and entered the passenger compartment. N.T., 7/24/2018, 293-94. Officers recovered "a small bullet fragment in the…rear passenger compartment of the vehicle." *Id*. at 295. Chiarlanza contacted the Montgomery County Detectives Bureau to see if further testing was possible, since he was not an expert in ballistics, but the detectives concluded the bullet fragment was too small for testing. *Id*. at 297.

On June 20th, police executed search warrants at defendant's house and arrested him. N.T., 7/24/2018, 299.[8] While at the scene, officers discovered defendant was armed with a loaded Kel-Tec .380 on his person. *Id*. at 299-300. The caliber could produce the hole in Nesbitt's car. *Id*. at 301. Defendant's own surveillance equipment caught him pulling back onto his property—between a half- and full-mile from where Donnelly observed him—around 11:57 p.m. the night of the shooting. *Id*. at 305-06.

Nesbitt received no more messages between when police arrested defendant on June 20th and when he was released on June 22nd. N.T., 6/27/2018, 90. *Accord* N.T., 7/24/2018, 308. But after defendant's release from county jail, the messages resumed. She continued to receive harassing messages into the middle of July. *Id*. at 350. After defendant's final arrest on July 18, 2017, the harassing messages to Nesbitt stopped. *Id*. at 351.

On August 7, 2017, the district magistrate judge set defendant's bail at $250,000. He later moved for nominal bail on January 8, 2018, citing Rule

[8] Defendant continued to stalk Nesbitt; that same day, he accessed her work schedule. *Id*. at 334.

600.[9] Def.'s Mot. For Release on Nominal Bail, 1/8/2018. The trial court held a hearing on defendant's motion, at which defendant argued for nominal bail under Rule of Criminal Procedure 600.

At the nominal-bail hearing, defendant at first objected to "getting too into detail about the allegations because…there is no evidence to support that it [ostensibly the harassing messages] came from my client." N.T., 5/1/2018, 9. He soon elaborated, "So I think that they can use those charges, the specifics of which, that's where I start to have a problem." *Id.* at 11. Next:

> Trial Court: Well, if you're conceding [the Commonwealth] is allowed to argue the charges, why wouldn't he be allowed to make reference to the Affidavit of Probable Cause which supports the charges?
>
> [Defense Counsel]: *I suppose the affidavit is fine*. I am just concerned he is going to argue their case, deviating or expanding on—

[9] Defendant mentioned no Pennsylvania or federal constitutional grounds in support of his motion. When he moved for nominal bail, only 175 days had elapsed since his July 17th arrest.

Id. at 11 (emphasis added). While the trial court asked the attorneys what the standard of proof was, and who bore the burden of proof, notably, defendant never supplied an answer, and he made no objection on either basis at the hearing. *Id*. at 10.

After defendant's concession, the Commonwealth argued the motion using the contents of the affidavit. It argued defendant had sent Nesbitt hundreds of harassing messages, some of which were also threatening. N.T., 5/1/2018, 15-16. There was evidence he had fired a gun into her car. *Id*. at 16. Defendant—after being arrested once and bailing out two days later—resumed sending harassing messages to Nesbitt about an hour after his release. *Id*. at 12. And when defendant had earlier been "confronted by Springfield Township Police about property [at his] house that needed to go back to the victim, [] he threatened the Castle Doctrine if he found anybody on his property…." *Id*. at 13-14.

The affidavit detailed defendant's harassing and threatening messages and his willingness to use violence, and the threat of violence, against Nesbitt as well as the police. It also showed he was fixated on Nesbitt so much so that a few days in jail did not dissuade him from continuing to send Nesbitt threatening messages. The Commonwealth

thus argued defendant presented a "high risk to the victim and the community," especially given—at the time of the hearing—defendant's trial was about two weeks away, and so the risk to Nesbitt was higher at that time. *Id*. at 6, 13.

The trial court asked whether defendant could be put on GPS and house arrest pretrial. Defense counsel admitted he had not investigated it, and the Commonwealth represented that the county probation department would not put defendant on electronic monitoring before sentencing. N.T., 5/1/2018, 20. The court took the matter under advisement and issued an order denying bail.

Defendant moved for reconsideration under Rule 600. Def.'s Mot. to Reconsider Mot. for Release on Nominal Bail, 5/11/2018, ¶ 20. He also argued that his bail was "a form of punishment" in violation of Pennsylvania Constitution art. I, § 13 and U.S. Const. amend. VIII. Def.'s Mot. to Reconsider, ¶ 24.[10]

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[10] Defendant also filed several other motions including an earlier petition for writ of habeas corpus, an omnibus pretrial motion, and a suppression motion.

The trial court held hearings on defendant's motions over two days. The Commonwealth called Detective Chiarlanza who testified to, and elaborated on, the contents of the affidavit of probable cause. The parties agreed that Chiarlanza's testimony would be "incorporated and cross-referenced and applied to all the motions." N.T., 6/28/2018, 61. Defendant raised no objection based on the standard, or burden, of proof and he made no due process arguments. Instead, he reiterated his prior arguments for release. *Id*. at 81-83. The court denied defendant's motion for reconsideration on July 11, 2018. Defendant did not petition under Rules of Appellate Procedure 1762(b) and 1610 for appellate review of the orders denying him nominal bail.

On the first day of trial, the court heard argument on the Commonwealth's motion to admit defendant's text messages. There, defendant raised a best evidence objection:

> Trial Court: Are you objecting to that [the screenshots]?
>
> Defense Counsel: Yes, Your Honor.
>
> Trial Court: What is the basis of your objection?

Defense Counsel: Well, they're screenshots. They're hearsay. They're not properly authenticated. The best evidence would be something besides a screenshot. The Court needs to rely on something better than a screenshot.

[…]

And these are anonymous messages….This is kind of a tough situation because their whole case is there is no proof that these messages came from the alleged sender. That's their case; they're saying that my client sent the stuff….

I have not seen the original phone that the messages were received on. In fact, there was no effort by the Commonwealth to get that information and to provide [it] in discovery….

And they're screenshots, Judge. There is nothing from a carrier; there is nothing to authenticate those screenshots besides Ms. Nesbitt saying I received these and these are screenshots.

[…]

[A] photo, a screenshot[,] [t]hose things can be altered or faked….

> [T]here are traceable and recoverable messages out there that haven't been done. So the best evidence isn't a photograph of said text messages. It is actually the electronic verification and the proper authentication of those messages.

N.T., 7/20/2018, 6-9.

The trial court declined to give a ruling in advance and said the objections would need to come at trial on a "message-by-message basis." *Id*. at 10. At trial, defendant merely repeated his "previously stated objection." N.T., 7/23/2018, 93.

Later at trial, Detective Chiarlanza—concluding the harassing text messages Nesbitt had received had originated from an email address—contacted Nesbitt's carrier, Sprint, and asked for an "emergency copy of her call detail records; specifically, I was looking for the e-mail-to-text message information. And I was informed by Sprint that, sorry, we don't have that kind of stuff." N.T., 7/24/2018, 307-08. After seizing defendant's phone, Chiarlanza asked the county detectives' bureau to analyze it, and they did, which is how they recovered the deleted text messages between defendant and his friend Wolf. *Id*. at 344-50.

A jury convicted defendant of two counts of stalking and harassment. N.T., 7/26/2018, 632-33.[11] The trial court sentenced him on August 24, 2018, to an aggregate of time-served to twenty-three months' imprisonment with five years of consecutive probation. N.T., 8/24/2018, 22-24. Defendant filed no post-sentence motions and instead filed a notice of appeal on August 30, 2018.

In his amended concise statement of errors complained of on appeal, defendant—along with presenting some preserved claims—for the first time raised several new theories of relief, including that there is no evidentiary standard for a denial of nominal bail and therefore Pennsylvania Constitution art. I, § 14 violates federal due process. *See* Def.'s Amended Concise Statement, 10/25/2018.

After briefing and oral argument, the Superior Court affirmed defendant's judgment of sentence. *Commonwealth v. Talley*, 236 A.3d 42 (Pa. Super. 2020). That court determined "the affidavit of probable cause linked [defendant] to numerous harassing text messages and violent threats [] to

[11] The jury deadlocked on recklessly endangering another person and simple assault. *Id*.

Ms. Nesbitt and set forth compelling proof that [defendant] used a firearm to damage Ms. Nesbitt's vehicle." *Id*. at 52. Given that the trial court understood that house arrest with electronic monitoring was unavailable before sentencing, the Superior Court concluded the lower court did not abuse its discretion in denying defendant's motion for nominal bail. *Id*.

The Superior Court also concluded that though defendant had nominally raised a best evidence issue on appeal, in fact, his "challenge [was] wholly focused on the potential probative value of the omitted features in showing the source of the offending communications," not that the screenshots were substantively inaccurate. *Talley*, 236 A.3d at 62. The court thus concluded that the messages were properly authenticated and defendant had not even raised a cognizable best evidence claim, and so the trial court did not abuse its discretion in admitting the screenshots over defendant's best evidence rule objection. *Id*.

Defendant moved for reargument before the Superior Court and the court denied his motion. *See* Super. Ct. Order, 9/23/2020. He petitioned this Court for allowance of appeal, which the Court granted. *Commonwealth v. Talley*, 541 MAL 2020 (Pa. Mar. 9, 2021).

SUMMARY OF THE ARGUMENT

The standard for denial of nominal bail under Pa. Const. art. I, § 14 is where the "proof is evident or the presumption great"—*i.e.*, a prima facie case—that, among other things, no condition or combination of conditions will reasonably assure the safety of any person and the community. But even if the standard is clear and convincing, the trial court still did not abuse its discretion in denying defendant nominal bail.

Defendant argues the trial court admitted the harassing and threatening text messages he sent to Nesbitt in violation of the best evidence rule. He is mistaken. His real objection is to the authentication of the author of the messages—he has not leveled a specific claim that the writings' content is inaccurate. His challenge thus falls outside the scope of the best evidence rule.

But even if defendant had raised a best evidence rule objection to the text messages, the screenshots (and their printouts) are originals or duplicates under the rule; and so the court properly admitted them after Nesbitt authenticated them by affirming they came from her phone and accurately depicted the messages she had received.

ARGUMENT

I. THE STANDARD FOR DENIAL OF NOMINAL BAIL UNDER PA. CONST. ART. I, § 14 IS WHERE THE "PROOF IS EVIDENT OR THE PRESUMPTION GREAT"—*I.E.*, A PRIMA FACIE CASE, NOT CLEAR AND CONVINCING EVIDENCE; BUT EVEN UNDER THE HIGHER STANDARD, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT NOMINAL BAIL.

Rule of Criminal Procedure 600(B)(1) gives defendants a rule-based right to nominal bail after being incarcerated for more than 180 days following filing of a criminal complaint.[12] Rule 600(D)(2) permits defendants to file a motion for release on nominal bail, per Rule 600(B)(1). But Pennsylvania Constitution article I, § 14 supersedes Rule 600(B)(1) so that a defendant—who otherwise would have a right to nominal bail under the rule—may be denied bail if the "proof is evident or the presumption great" that he or she is charged with a capital offense or with an offense for which the "maximum sentence is life imprisonment," or "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." *Commonwealth v. Jones*, 899

[12] The rule provides, "Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of [] 180 days from the date on which the complaint is filed…." Pa.R.Crim.P. 600(B)(1).

A.2d 353, 356 (Pa. Super. 2006) (citing Pa. Const. art. I, § 14 and, *inter alia*, *Commonwealth v. Hill*, 736 A.2d 578, 583 (Pa. 1999)), *superseded on other grounds by statute*. *Accord Hill*, 736 A.2d at 583 ("Pursuant to Article I, section 14 of the Pennsylvania Constitution, a defendant charged with a capital crime is not eligible to be released from pretrial incarceration on bail.").[13]

At a hearing following a defendant's Rule 600(B)(1) motion for nominal bail, the Commonwealth has the burden to prove defendant should remain incarcerated under Article I, § 14. *See, e.g.*, *Commonwealth v. Heiser*, 478 A.2d 1355, 1356 (Pa. Super. 1984) ("At a bail hearing, the Commonwealth bears the burden of proof.").

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[13] Article I, § 14 provides, in its entirety, "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; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."

While defendant was not denied bail—his bail remained set at $250,000—this Court has applied Article I, § 14 when a defendant remained incarcerated past 180 days on $75,000 bail. *Commonwealth v. Sloan*, 907 A.2d 460, 462 (Pa. 2006).

A. The standard for denial of nominal bail under Pa. Const. art. I, § 14 is where the "proof is evident or the presumption great"—*i.e.*, a prima facie case, not clear and convincing evidence.

This Court in *Commonwealth ex re. Alberti v. Boyle*, 195 A.2d 97, 98 (Pa. 1963), interpreted the words "proof is evident or presumption great" to 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." This is one meaning of "prima facie case." Black's Law Dictionary, for example, defines "prima facie case" as a "party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor" (10th ed. 2014).[14]

In *Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971), this Court affirmed denial of pretrial bail because the evidence at a preliminary hearing "established a prima facie case of murder in the first degree." Citing *Alberti* and *Farris*, the Superior Court likewise applied Article I, § 14

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[14] Its entry for "prima facie evidence" is: "Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." *Id.* McCormick on Evidence notes that "prima facie" case is ambiguous and may "mean evidence that is simply sufficient to get to the jury, or it may mean evidence that is sufficient to shift the burden of producing evidence." McCormick on Evidence § 342 n.4 (8th ed. 2020).

and concluded 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. 1984).[15]

So under this Court's precedent, the standard of proof for denial of bail under Article I, § 14 is prima facie case. Though this provision was amended in 1998, the standard remains the same.[16]

In the 1998 general election, a majority of the electorate voted for, among other things, an amendment to Article I, § 14 which added, "or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will

[15] It is of no moment that the *Heiser* Court said in a footnote that "this statement should be considered limited to the facts of this case." *Id*. at 1356 n.3. The court clarified that it only meant that it was an open question whether there must also be prima facie showing of a first-degree murder charge *and* aggravating circumstances, since aggravating circumstances had become necessary for first-degree murder to be a capital offense. In other words, that court's cautionary statement had no bearing on the evidentiary standard, so much as what needed to be proven.

[16] Apart from the 1998 amendments, "[p]rior Constitutions of this Commonwealth have contained identical language with respect to bailable offenses.
See Pennsylvania Constitution of 1776, § 28; Pennsylvania Constitution of 1790, Art. 9 § 14; Pennsylvania Constitution of 1838, Art. 9 § 14." *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972), *superseded on other grounds by constitutional amendment*.

reasonably assure the safety of any person and the community." *See, e.g.*, *Grimaud v. Commonwealth*, 865 A.2d 835, 839 (Pa. 2005) (discussing the history of the amendment and upholding it against a constitutional challenged). The Attorney General's "plain English statement" indicating the "purpose, imitations and effects of the ballot question on the people of the Commonwealth," explained, "The purpose of the ballot question is to amend the Pennsylvania constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail." *Id*. at 842. It did not signal that the burden of proof had changed. In fact, it stated,

> The ballot question 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 the 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.

Id. at 843.[17] In other words, the amendment broadened *who* could be denied bail under Article I, § 14, but there is no indication that the

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[17] Bail began as part of the Anglo-Saxon "monetary fine system," where "freemen were subject only to monetary fines for most crimes," and so bail was set at the amount of the

standard—discussed by *Alberti, Farris,* and *Heiser*—had changed. The Superior Court concluded as such in *Jones*: After the 1998 amendments, "All of the Article I, section 14 exceptions to bail are contained in the same sentence. Therefore, it appears that the legislature intended to treat those exceptions similarly." 899 A.2d at 356.[18]

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fine to ensure the accused's appearance and also payment of the fine after conviction. Rebecca D. Spangler, *Prisoners to be Bailable; Habeas Corpus*, *in* The Pennsylvania Constitution: A Treatise on Rights and Liberties 612-13 (Ken Gormley and Joy G. McNally, eds., 2d. ed. 2020). After the Norman conquest, punishment shifted from monetary to corporal, and "personal surety" came to be "a reputable person into whose custody the accused was released and who would be responsible for the monetary penalty if the accused fled." *Id*. at 613. Bail became further restricted as the likelihood of flight increased because of the increased shift to corporal punishment. *Id*. Around 1682, Quakers in Pennsylvania made all offenses, except capital, bailable following abusive pretrial detention practices in England. A defendant became entitled to bail except in capital cases in which the proof was evident and the presumption great. *Id*. The policy up to and after the 1776 Pennsylvania Constitution was to ensure the accused's presence. *Id*. at 615.

[18] Pennsylvania is not alone in interpreting "proof is evident or the presumption great" to mean prima facie case, or something similar. Article I, § 10 of the Maine Constitution provides, "No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be." The Supreme Judicial Court of Maine accordingly held, "We conclude that the State's showing of probable cause defeats a capital defendant's constitutional right to bail. *Harnish v. State*, 531 A.2d 1264, 1266 (Me. 1987). California also interprets Article I, § 12 of its constitution, which includes the same language, to mean "evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal." *In re White*, 463 P.3d 802, 808-09 (Ca. 2020). The California Court makes clear that this standard is "whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of reasonable, credible, and solid value to sustain a guilty of verdict on one or more of the qualifying crimes." *Id*. at 809. While Article I, § 12(a) applies just "proof is evident or presumption is great" to

In *United States v. Salerno*, 481 U.S. 739, 748-49 (1987), the United States Supreme Court recognized that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest…Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons." That is, "The government's interest in preventing crime by arrestees is both legitimate *and compelling*." *Id*. at 749 (emphasis added). The government's compelling interest in assuring the safety of specific persons, as well as the community, is reflected in the 1998 amendment to Pa. Const. art. I, § 14 broadening who may be denied bail. *See generally Grimaud*, 865 A.2d 835.

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capital crimes, § 12(b) incorporates a two-prong test for other crimes, with two evidentiary standards: "A person shall be released on bail by sufficient sureties, except for:…Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others…."

But several states interpret the phrase to be something in between probable cause and beyond a reasonable doubt. *See, e.g.*, *Browne v. People of Virgin Islands*, 50 V.I. 241, 260-62 (V.I. 2008).

To the extent that the question arises, trial courts are split in this Commonwealth. *Commonwealth v. O'Shea-Woomer*, 8 Pa. D. & C.5th 178 (Pa. Com. Pl. 2009) (Lancaster County) applied a clear and convincing standard. But the court in *Commonwealth v. Pal*, 34 Pa. D. & C.5th 524 at *15 (Pa. Com. Pl. 2013) (Lackawanna County), cited *Farris* and *Heiser* and applied the prima facie standard.

While most states reportedly employ some heightened standard—*see, e.g., Browne*, 50 V.I. at 261 (describing it as an "overwhelming majority")—Pennsylvania is not alone in its use of prima facie standard. In *State v. Hill*, 444 S.E. 255, 257 (S.C. 1994), the South Carolina Supreme Court held that—for capital defendants, who, in this Commonwealth are in one of three similarly situated categories—the standard for denial of pretrial release is "preponderance of the evidence." That Court cited the Georgia Supreme Court, which held the same, in *Ayala v. State*, 425 S.E.2d 282, 285 (Ga. 1993) ("To protect this presumption of innocence, we hold that the state has the burden of persuasion in convincing the superior court that a defendant is not entitled to pretrial release. This requirement means the state has the burden of proving by a preponderance of the evidence that the trial court should deny bail either to secure the defendant's appearance in court or to protect the community."). *Accord Ex Parte Shires*, 508 S.W.3d 856 (Tex. 2016) (upholding constitutionality of a statute permitting bail denial when there it is shown by a preponderance of the evidence that defendant is a risk to the safety of the community and no conditions would reasonably assure the safety of the community). *See also Weatherspoon v. Oldham*, No. 17-cv-2535-SHM-cgc, 2018 WL 1053548 at *4 (W.D. Tenn. Feb. 26, 2018)

(unreported) ("In Tennessee pretrial bail proceedings, the State must meet a preponderance of the evidence standard.") (internal quotation omitted).[19]

Defendant suggests that the U.S. Supreme Court, in *Salerno* held that the burden of proof required by the Due Process Clause of the United States Constitution is "clear and convincing," and so anything falling short of that is unconstitutional. For that reason, defendant argues, this Court should overrule its precedent and interpret Article I, § 14's "proof is evident or presumption great" clause as requiring "clear and convincing evidence." But defendant conflates sufficiency with necessity; that the safeguards in *Salerno* were enough to for the federal Bail Reform Act of 1984 to withstand a due process challenge does not mean its procedures are necessary under the federal Constitution.

[19] Some courts have argued that the preponderance standard would "add nothing to the accused's rights, since a suspect may not be held without a showing of probable cause in any instance." *Browne*, 50 V.I. at 262. But it is only those charged with capital or life imprisonment offenses who are categorically denied bail under Article I, § 14. This follows the traditional rule that "only those charged with capital offenses were not bailable." Spangler, *Prisoners to be Bailable; Habeas Corpus* 615. Every other criminal defendant is entitled to nominal bail under Rule 600 after 180 days unless the Commonwealth makes a further showing—which it may not have done previously — that no condition or combination of conditions would assure the safety of any person or the community.

Other courts have concluded the same. For example, the Texas Supreme Court in *Shires* held,

> We disagree with Appellant's assertion that *Salerno* establishes the minimum requirements for due process protections in situations involving pretrial bail. *Salerno* addressed the particular provisions of a federal act…and held that those provisions passed constitutional due process muster. We do not read *Salerno* to require every trial court to apply a clear and convincing evidence standard….

Shires, 508 S.W.3d at 862. *Salerno* supports the *Shires* Court's conclusion. After all, *Salerno* concludes, "We think these extensive safeguards *suffice* to repel a facial challenge." 481 U.S. at 752 (emphasis added). To "suffice" is to "meet present needs or requirements; be sufficient." The American Heritage Dictionary of the English Language 1742 (5th ed. 2018). The Court could have held the clear and convincing standard was necessary for due process. Instead, it held that that standard suffices to withstand a due process challenge. Indeed, a federal district court in Tennessee likewise observed that the defendant there, making the same argument as defendant here, "cites no authority, and the [c]ourt has found none that requires a clear and convincing standard as part of a state's pretrial release procedure. Numerous state courts have concluded that a lower

evidentiary standard is permissible under the Due Process Clause." *Weatherspoon*, 2018 WL 1053548 at *8.[20]

B. Even under the clear and convincing standard, the trial court did not abuse its discretion in denying defendant nominal bail.

But even if this Court should determine that "proof is evident or the presumption great" should mean "clear and convincing evidence," the evidence justifying defendant's continued detention at $250,000 bail was sufficient.

On appeal, the standard of review for a trial court's bail order is "abuse of discretion and [appellate courts] will only reverse where the trial court misapplies the law, or its judgment is manifestly unreasonable, or the evidence of record show that [its] decision is a result of partiality, prejudice, bias, or ill will." *Commonwealth v. Bishop*, 829 A.2d 1170, 1172 (Pa. Super. 2003).

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[20] *But see United States v. Munchel*, 991 F.3d 1273, 1282 (D.C. Cir. 2021) (describing the evidentiary standard as the "crux of the constitutional justification for preventative detention," though not holding that it is necessary for a bail procedure to withstand a constitutional challenge). *Cf. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) ([The Act] satisfied heightened scrutiny because it was a carefully limited exception, not a scattershot attempt at preventing crime by arrestees.").

This Court has described the "clear and convincing" standard as requiring "evidence 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." *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003). But "clear and convincing" evidence goes by many similar names, including "clear, convincing and satisfactory," "clear, cogent and convincing," and "clear, unequivocal, satisfactory and convincing." McCormick on Evidence § 340. Still, "[n]o high degree of precision can be attained by these groups of adjectives." *Id*. Instead, a simpler and more intelligible translation is "highly probable." *Id*. Black's Law Dictionary defines "clear and convincing evidence" as that which indicates "the thing to be proved is highly probable or reasonably certain," *i.e.*, "greater…than preponderance of the evidence [] but less than [] beyond a reasonable doubt…." 674 (10th ed. 2014). *Accord Maldonado*, 838 A.2d at 715 (observing "clear and convincing" is between preponderance of the evidence and beyond a reasonable doubt).

Here, defendant agreed the trial court could consider the affidavit of probable cause in adjudicating his nominal bail motion. N.T., 5/1/2018,

11.[21] The affidavit laid out the Commonwealth's proffer: defendant had been dating Nesbitt, and after their relationship ended, Nesbitt began receiving harassing messages, some of which threatened physical violence, including one with "mention of firearms and Killing Nesbitt." The messages did not begin until after the two broke up. Along with the threatening messages, someone also fired a bullet into Nesbitt's car, and a witness saw defendant's truck driving by when she heard a loud bang. The next day, police stopped defendant, who was driving the truck seen

[21] Defendant was bound in the trial court, and now on appeal, by his stipulation that the trial court could consider the factual averments in the affidavit of probable cause. *See, e.g.*, *Tyler v. King*, 496 A.2d 16, 21 (Pa. Super. 1985) ("The court will hold a party bound to his stipulation: concessions made in stipulations are judicial admissions, and accordingly may not later be contradicted by the party who made them.") (string citation omitted).

But even if defendant had not stipulated to the affidavit of probable cause, the Commonwealth could still rely on it. Even in *Salerno*—where there are enhanced protections—the government litigated its bail motion by proffer. 481 U.S. at 743 ("The District Court held a hearing at which the Government made a detailed proffer of evidence."). *Accord Munchel*, 991 F.3d at 1278 ("During the detention hearing in the District Court, the government proceeded by proffer rather than calling live witnesses."); *United States v. Davis*, 845 F.2d 412, 415 (2d Cir. 1988) ("A bail revocation hearing…is not to serve as either a mini-trial or as a discovery tool for defendant…[W]e do not suggest that it would be an abuse of discretion for the district court to permit the government to proceed by proffer alone."). "Proffer" is a term used to describe an "offer of proof," McCormick on Evidence § 51 n.4, which is an explanation to the judge of "what [a] witness would say if the witness were permitted to answer the question and what the expected answer is logically relevant to prove. *Id*. at § 51.

the night before, and he was armed. After executing a search warrant, police found multiple firearms, weapons, cell phones, and a laptop computer. The messages to Nesbitt stopped while defendant was incarcerated from June 20 to June 22, 2017. The evening of his release, the harassing messages to Nesbitt recurred. Police later executed a search warrant on his computer and cell phones and found he had downloaded software used to anonymize internet activity, and that he had been exchanging text messages with a friend about how to "totally fuck[] up" a phone, and characterizing himself, at one point, as having "raw rage."

The trial court did not abuse its discretion—even under the clear and convincing standard—that no condition or combination of conditions would assure Nesbitt's safety, given the harassing and threatening content of defendant's messages, the fact that he had been driving armed in his truck the day after his truck was seen at the location and time a bullet was fired into Nesbitt's car, and that the harassing conduct continued even after defendant had been arrested (and then released). This is especially so since

trial was scheduled for mere weeks away at the time the trial court held its bail hearing.[22]

The trial court accordingly concluded, "Given the nature of the allegations in this case and the substantial evidence that appeared in the affidavit of probable cause…the court determined that no combination of conditions could ensure the safety of the community and in particular the victim, Christa Nesbitt." Trial Ct. Op. 7-8. The Superior Court observed that the affidavit of probable cause linked defendant to the "numerous harassing text messages and violent threats issued to Ms. Nesbitt and set forth *compelling* proof [he] used a firearm to damage Ms. Nesbitt's vehicle." *Talley*, 236 A.3d at 52 (emphasis added). Given that, along with the trial court's belief that house arrest and electronic monitoring was unavailable to defendant, it held "the trial court did not abuse its discretion in denying nominal bail to [defendant]." *Id.* [23]

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[22] The trial court considered whether it could place defendant under house arrest and electronic monitoring, but the Commonwealth advised it that this was impossible pretrial. N.T., 5/1/2018, 19-20. Defendant conceded he had not looked into it. *Id.* at 19. The trial court proceeded with the understanding they were not options.

[23] Because defendant is no longer in pretrial detention, his case is "technically moot," and there is no remedy available to him. *See, e.g., Sloan*, 907 A.2d at 463-65 (finding an Article I, § 14 case "technically moot," where defendant was no longer detained

II. DEFENDANT'S CHALLENGE TO ADMISSION OF THE TEXT MESSAGES IS BASED ON AUTHENTICATION, NOT THE BEST EVIDENCE RULE.

Defendant argues the trial court violated the best evidence rule by admitting the harassing and threatening text messages he sent to Nesbitt. Defendant is mistaken. His real objection is to the authentication of the author of the messages; he has not presented a specific challenge to the writings' content, so his claim falls outside the scope of the best evidence rule.

But even if defendant had raised a best evidence rule objection to the text messages, the screenshots (and their printouts) are originals, or alternatively duplicates, under the rule, and so the court properly admitted them after Nesbitt authenticated them by affirming they came from her phone and accurately depicted the messages she had received.

The standard of review for a trial court's evidentiary rulings is abuse of discretion. *Commonwealth v. Housman*, 986 A.2d 822, 839 (Pa. 2009)

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pretrial); *Commonwealth v. Goldman*, 70 A.3d 874, 879 (Pa. Super. 2013) ("To be clear, a violation of Rule 600 does not automatically entitle a defendant to a discharge….[T]he only occasion requiring dismissal is when the Commonwealth fails to commence trial within 365 days of the filing of the written complaint….") (internal citations and quotations omitted).

(internal citation omitted). A trial court abuses its discretion by "misapplying the law, exercising unreasonable judgment, or basing its decision on ill will, bias, or prejudice." *Commonwealth v. In re E.F.*, 995 A.2d 326, 332 (Pa. 2010) (internal citation omitted).

A. Defendant's real objection is authentication.

The Superior Court correctly concluded defendant's claim is not a best evidence rule objection: "Because [defendant's] claims surrounding the features omitted from the screenshots implicate only the identity of the individual who sent the messages, and not the accuracy with which the screenshots depicted the contents of the original communications, we conclude that [his] claims fall outside the scope of the best evidence rule." *Talley*, 236 A.3d at 61.

The best evidence rule focuses on how a party may prove the terms or contents of a writing. The best evidence rule,

> now established in Pa.R.E. 1002, *limits the method of proving the terms of a writing* to the presentation of the original writing, where the terms of the instrument are material to the issue at hand, unless the original is shown to be unavailable through no fault of the proponent. The rule applies to the proof of the contents of documents when the contents of those documents are material to, rather than mere

evidence of, the issues at bar.

Commonwealth v. Townsend, 747 A.2d 376, 379–80 (Pa. Super. 2000) (emphasis added). *See also* McCormick on Evidence § 231 ("The rule is this: *In proving the content of a writing*, recording or photograph, where the terms of the content are material to the case, the original document must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent, or unless secondary evidence is otherwise permitted by rule or statute.") (emphasis added). *Accord* Charles B. Gibbons, Pennsylvania Rules of Evidence with Trial Objections 18 (8th ed. 2021) ("The general rule in Pennsylvania is that when the *contents of a writing, recording or photograph* are directly in issue, the *original writing* must be produced unless the original is unavailable through no fault of the proponent.") (emphasis in original, citations omitted); Stephen M. Feldman and Lawrence P. Kempner, Pennsylvania Trial Guide: Evidence (4th rev. ed. 2021) ("[T]he Best Evidence Rule is limited to those situations where the contents of a document *are at issue* and must be proved to establish a case or defense, and is not applicable where the contents of a document are merely evidence of, rather than material to, the issues in the case.") (emphasis added).

The rule is sometimes "incorrectly" cited: "[M]erely because the existence of a fact is capable of being proved by documentary evidence does not prohibit a witness from testifying about the fact, nor does it necessitate production of the document *where the contents of the document are not at issue*." Gibbons, Pennsylvania Rules of Evidence 22 (emphasis added). This is in line with the policy recognized by "most modern commentators," which is,

> the basic premise justifying the rule is the central position which the written word occupies in the law. Because of this centrality, presenting to a court the exact words of a writing is of more than average importance, particularly in the case of operative or dispositive instruments such as deeds wills or contracts, where a slight variation of words may mean a great difference in rights…The danger of mistransmission of critical facts through the use of written copies or recollection justifies preference for original documents.

McCormick on Evidence § 232 (notes omitted).

Defendant never contested the specific content, or the exact words, of the text messages. In his initial objection before trial, counsel's first statement of the objection was, "Well, they're screenshots. They're hearsay. *They're not properly authenticated, and they can't be properly authenticated*. The best evidence would be something besides a screenshot."

N.T., 7/20/2018, 6 (emphasis added). Defendant reiterated, "This is kind of a tough situation, because their whole case is there is no proof that these messages came from the alleged sender. That's their case; they're saying that my client sent stuff." *Id*. He reiterated, "And they're screenshots, Judge. There is nothing from a carrier; *there is nothing to authenticate those screenshots* besides Ms. Nesbitt saying I received these and these are screenshots." *Id*. at 7 (emphasis added). Counsel later noted in passing, "Those things [a photo, a screenshot] can be altered or faked." *Id*. at 8. But—apart from the asserted hypothetical possibility that screenshots can be faked— he never contested any specific contents of the screenshots. He returned immediately back to authentication: "The difference is that there is a better way to properly authenticate electronic messages…there are traceable and recoverable messages out there…So the best evidence isn't a photograph of said text messages. It is actually the electronic verification *and the proper authentication* of those messages." *Id*. at 8-9 (emphasis added). When the Commonwealth moved for introduction of the messages

and the court asked defendant whether he has an objection, he replied, "For the record, the previously stated objection." N.T., 7/23/2018, 93.[24]

The Superior Court similarly concluded that defendant had only pursued an authentication claim:

> [I]n point of fact [defendant's] challenge is wholly focused on the potential probative value of the omitted features in showing the source of the offending communications.[14.] [He] does not claim that omissions in the screenshots lead to inaccuracies in their depiction of the substantive content of the original text messages.
>
> [14] As we stated above, the Commonwealth properly authenticated the screenshots by introducing direct and circumstantial evidence to show that they were what they purported to be and that they could be linked to [defendant] as the author and sender of the communications.

Talley, 236 A.3d at 62 n.14.

Email and text messages "are documents and subject to the same requirements for authenticity as non-electronic documents, generally."

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[24]Defendant made the same arguments before the Superior Court. *See, e.g.*, Appellant's Br., 1/24/2019, 19 ("The entire case against [defendant] hinged on whether he was the sender of a slew of vulgar and anonymous text messages. [He] maintained that not only was he not the sender, but that, in fact, his ex-girlfriend Ms. Nesbitt had been receiving similar messages even before they had broken up. Therefore, any evidence which could pinpoint the sender of the messages would be critical.").

Commonwealth v. Mangel, 181 A.3d 1154, 1160 (Pa. Super. 2018) (citing *Commonwealth v. Koch*, 39 A.3d 996, 1000 (Pa. Super. 2011)). Circumstantial evidence is sufficient to authenticate electronic instant messages and cell phone text messages. *Id*. (citing *In the Interest of F.P., a Minor*, 878 A.2d 91, 96 (Pa. Super. 2005)). Evidence of this sort is to be evaluated "on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." *In re F.P.*, 878 at 96. Circumstantial evidence that can corroborate the identity of the author includes "testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender." *Mangel*, 181 A.3d at 1162 (internal citation omitted).[25]

Consistently, effective October 1, 2020, the Pennsylvania Rules of Evidence now include a new provision: 901(b)(11), which states,

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[25]Emails can be authenticated by information, taken together, including a signature, "the address that an email bears, the use of the 'reply' function to generate the address of the original sender, the content of the information included in the email and other circumstances such as appearance, contents, substance, internal patterns, or other distinctive characteristics …." McCormick on Evidence § 227. The same rule goes for authenticating text messages. *Id*. *Accord* Hon. Daniel J. Anders, Bobby Ochoa III, Ohlbaum on the Pennsylvania Rules of Evidence 1139-42 (LexisNexis 2021) (describing various cases involving authentication of electronic evidence).

(11) Digital Evidence. To connect digital evidence with a person or entity:

(A) direct evidence such as testimony of a person with personal knowledge; or

(B) circumstantial evidence such as:

(i) identifying content; or

(ii) proof of ownership, possession, control, or access to a device or account at the relevant time when corroborated by circumstances indicating authorship.

Pa.R.E. 901(b)(11). The comment to the rule clarifies, "'Digital evidence,' as used in this rule, is intended to include a communication, statement, or image existing in an electronic medium. This includes emails, text messages, social media postings, and images. The rule illustrates the manner in which digital evidence may be attributed to the author." *Id*. at cmt. The comment also confirms that electronic messages may be authenticated by circumstantial evidence. *Id*. ("Circumstantial evidence of identifying content under Pa.R.E. 901(b)(11)(B)(i) may include self-identification or other distinctive characteristics, including a display of knowledge only possessed by the author. Circumstantial evidence of content may be sufficient to connect the digital evidence to its author.").

Finally, the comment reiterates, "The proponent of digital evidence is not required to prove that no one else could be the author. Rather, the proponent must produce sufficient evidence to support a finding that a particular person or entity was the author." *Id*. *Accord* Jay E. Grenig and William C. Gleisner, III, eDiscovery and Digital Evidence § 14:20 (Thomson Reuters 2020) ("Electronic correspondence, including text messages, does not warrant different or more stringent authentication rules than those used to authenticate other sorts of correspondence.").

Here, the Superior Court correctly concluded the Commonwealth had

> offered sufficient direct and circumstantial evidence to establish the authenticity of the screenshots. Ms. Nesbitt, as the recipient of the text messages depicted in the screenshots, offered direct authenticating testimony in which she confirmed that the screenshots accurately reflected the messages she received.
>
> In addition, the Commonwealth proffered circumstantial evidence that identified [defendant] as the sender of the messages. Ms. Nesbitt testified that she never received harassing [text] messages before terminating her relationship with [defendant]. [She] also testified that she received a harassing text message stating that the sender was observing her in a restaurant and police officials were later able to determine that an application

> installed on her cellular telephone was sharing her location with an individual named "Daniel Talley."
>
> In addition, the text messages received by Ms. Nesbit referred to specific sexual acts that occurred during intimate moment sin the relationship between [defendant] and Ms. Nesbitt. Apart from Ms. Nesbitt, only [defendant] had knowledge of those acts. The [] messages…also included phrases such as "fake love," an idiom commonly used by [defendant]. Lastly, police officials uncovered software on [defendant's] computer that enabled him to send anonymous text messages.

Talley, 236 A.3d at 60.

Defendant suggested below that metadata was contained in the "original messages," so its omission—which could have helped identify the sender of the message—violated the best evidence rule. Appellant's Br., 1/24/2019, 20. The Commonwealth argued this was inaccurate:

> "[M]etadata" is something that by definition is outside of the content of a message: metadata has been defined as, "Secondary data that organize, manage and facilitate the use and understanding of primary data." Black's Law Dictionary (10th ed. 2014). In other words, the text in the text message is the primary data, i.e., the writing; and the metadata is secondary data, i.e., extrinsic information related to the writing. So, a screenshot is an accurate representation of the primary data, that is, the message, though it does not capture extrinsic secondary information.

Com.'s Br., 6/11/2019, 13-14.[26] More specifically, metadata

> are information *about* the [electronic] document or file recorded by the computer to assist the computer, and often the user, in storing and retrieving the document or file at a later date. Metadata may be useful for the system administration, as they provide information regarding the generation, handling, transfer, and store of the electronically stored information.

Grenig and Gleisner, eDiscovery, § 4:12 (emphasis added).[27] Metadata is "important in authenticating electronically stored information." *Id*. at § 4:14. Still, it can "easily be altered"; for example, "[c]opying a file from one location to another can change a file's metadata." *Id*.

The consensus is that metadata is by definition extrinsic to the document at issue. It is secondary data that "organize[s], manage[s], and facilitate[s] the use" of a document; it is data that "describes" other data; it

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[26]*Accord* The American Heritage Dictionary of the English Language 1105 (defining "metadata" as "Data that describes other data, as in describing the origin, structure or characteristics of computer files, webpages, databases, or other digital resources.").

[27] There are three categories of metadata: system metadata, application metadata, and user metadata: "System metadata is information generated and maintained by the computer operating system, including file creation, file modification, and file access times. Application metadata are information generated and maintained by software applications. Files included are author, recipient, organization, title, and subject. User metadata is user-created information describing files or their classification, and changes and comments in a document." *Id*.

is "information about [a] document"; but it is not the content of a document. So metadata, while relevant to authenticating a document, is outside the content of a writing; and its absence cannot make what the Superior Court called the "substantive content" inaccurate, and so it cannot constitute a best evidence rule violation.

Defendant called his objection a best evidence rule objection. But that does not make it one. He really raised an authentication claim. The Superior Court correctly concluded he had not raised a best evidence claim, but instead authentication, and that the messages were properly authenticated by the circumstantial evidence discussed above.[28]

B. Even if defendant's claim is a proper best evidence rule objection, the screenshots were properly admitted originals or duplicates.

Even if defendant had raised a proper best evidence rule objection to the text messages, the trial court properly exercised its discretion in admitting them, since the printed screenshots were originals, or alternatively duplicates, under the best evidence rule.

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[28] It is "well settled that an appellate court has the ability to affirm a valid judgment or verdict for any reason appearing as of record." *Commonwealth v. Allshouse*, 36 A.3d 163, 182 (Pa. 2012) (internal quotations and citation omitted). *Accord Commonwealth v. Hamlett*, 234 A.3d 486, 492 (Pa. 2020) (approving *Allshouse*).

Pennsylvania Rule of Evidence 1002, which embodies the common law "best evidence rule," provides, "An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise."

Rule 1001(a) defines a writing as "letters, words, numbers, or their equivalent set down in any form." A text message fits within the definition of a "writing" under Rule 1001(a), since it is a message consisting "of letters, words, numbers, or their equivalent"; and a printed screenshot of the text message is an "original," which is defined as, "[f]or electronically stored information…any printout—or other output readable by sight—if it accurately reflects the information." Pa.R.E. 1001(d). But it may also be considered a "duplicate," given that a printout of the screenshot is "a copy produced by a mechanical, photographic, chemical, electronic or other equivalent process…." Pa.R.E. 1001(e). (Under Rule 1003, "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.")

As discussed above, the text in the text message is the primary data, *i.e.*, the writing; and the metadata is secondary data, *i.e.*, extrinsic information related to the writing. So a screenshot is an accurate representation of the primary data, that is, the message, though it does not capture extrinsic secondary information. That secondary data was not preserved does not somehow render the screenshots incapable of properly preserving the primary data, *i.e.*, the text in the text message.

But even if the text message itself, or even the digital screenshot, is the original, a printout of the screenshot—as a "printout [that] accurately reflects the information"—can still be an original under the rule. (And if the printout were not an original, it would be a duplicate, since it is "a copy produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Pa.R.E. 1001(e). That the printout would be a copy of the screenshot, which is also a copy, matters not: "A duplicate need not have been created during the original impression [which created the first copy]." Hon. Mark I. Bernstein, Pennsylvania Rules of Evidence 1067 (Gann Law Books 2019).)

As a result, the screenshots of the text messages at issue were admissible as originals or duplicates. The Superior Court correctly concluded as much:

> Insofar as the screenshots were introduced to establish the substantive content of the original text messages, we agree with the trial court that the screenshots were admissible, either as authenticated printouts of the original electronic text messages under Pa.R.E. 1001(d), or as authenticated duplicates generated through a photographic process that accurately reproduced the original messages within the contemplation of Pa.R.E. 1001(e).

Talley, 236 A.3d at 62. And the trial court aptly elaborated that a printout of electronically stored information constitutes an "original" under Rule 1001, because "in the traditional sense, it is not clear what the original of an electronic record would be." Trial Ct. Op. 22. And since Nesbitt "testified that they accurately reflected the messages that she received…the

printouts…are the originals." *Id.*[29] (Further, "printouts of the messages as contemplated in Pa.R.E. 1001 do not include metadata." *Id.*)[30]

The trial court is not alone in finding that the best evidence rule requires flexibility when dealing with electronic information because of the lack of a conventional "original." In Massachusetts, for example, their courts have held, "The best evidence rule does not forbid the use of 'copies' of electronic records (including e-mails and text messages and other computer data files), because there is no 'original' in the traditional sense." *Commonwealth v. Gilman*, 54 N.E.3d 1120, 1127 (Mass. App. Ct. 2016). That court rejected nearly the same argument as defendant's, namely, "the premise implicit in the defendant's argument that the best evidence of the writings contained in the Facebook chat conversations between the

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[29] *See also* Grenig and Gleisner, eDiscovery § 13:2 ("The Federal Rules of evidence provide that a computer printout is an original copy of a business record.[8] [N.8:] Fed. R. Evid. 1001(d). *See also Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002) (printouts of online instant message chats between defendant and undercover detective posing as 13-year old boy were best evidence of conversation and admissible in prosecution for attempted child solicitation, despite fact text was not an original preserved by Internet provider's logging feature, but a copy cut and pasted into a word processing program).").

[30] The trial court also cited the comment to Rule 1003 and observed, "The significance of the best evidence rule as applied to copies of writings has diminished with the advancement of technology and improved methods for generating accurate copies." *Id.* at 22.

defendant and the victim 'somehow ... is found in the [Facebook] servers' or that there is a 'need to bring in the computer [hard] drive itself' from which the messages were downloaded." *Id*. at 1128.[31]

This position—discussed by the trial court, the Superior Court, and the appellate courts in, for example, Massachusetts—is mainstream. McCormick on Evidence § 236 notes, "Obviously, where data are originally entered and stored in a computer, nothing akin to a conventional documentary original will be created." It observes that courts have admitted printouts where, *inter alia*, there are "hardcopy printouts of images displayed on a computer screen." *Id*.[32] It would otherwise be

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[31] The *Gilman* court, as the trial court here did, concluded that even if some messages were incomplete, that did not make the evidence admitted any less accurate: "We recognize that by virtue of the manner in which the conversations were retrieved, downloaded from the "Internet cache" folders on the hard drives of the computers used by the victim and defendant, the conversations were incomplete in some respects, in the sense that there were gaps in some conversations. However, that does not make the files that were retrieved any less accurate or reliable as copies of the portions of the conversations they reflected. The defendant makes no claim that so much of the conversations as were admitted were misleading or unintelligible by reason of any such gaps, so as to implicate the doctrine of verbal completeness." *Id*. at 1128.

[32] *See also Steele v. Lyon*, 460 S.W.3d 827, 831 (Ark. App. 2015) ("If data are stored in a computer or similar device, an "original" includes any printout or other output readable by sight that accurately reflects the data. Ark. R. Evid. 1001(3). As such, the trial court did not abuse its discretion by allowing screenshots of the text messages taken from the phone to be admitted as evidence."); *Pierce v. State*, 807 S.E.2d 425, 434 (Ga. 2017) ("What appeared on the screen of the cell phone was analogous to a printout

impractical—and uncalled for by the policy behind, and a plain reading of, the best evidence rule—to require production of an electronic device or accompanying metadata. For these reasons, defendant's claim—even if it can be construed as a best evidence objection—lacks merit.

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or other output [of the cell phone] readable by sight, and therefore an original…And the digital photographs of what appeared on the screen of the cell phone are duplicates…and admissible to the same extent as the original."); *State v. Legassie*, 171 A.3d 589, 599 (Me. 2017) ("[B]ecause each [Facebook] message constituted 'electronically stored information,' the rule treats '*any* printout' of such data as an 'original,' so long as the content of the printout 'accurately reflects the information.'"); *People v. Javier*, 62 N.Y.S.3d 324, 325 (N.Y. App. Div. 2017) ("The admission of the email, which was properly authenticated by the officer's testimony that he copied and pasted the entirety of the text message conversation, did not violate the best evidence rule, which requires the production of an original writing where its contents are in dispute and sought to be proven. Here, the best evidence rule did not apply because there was no genuine dispute about the contents of the underlying text messages."); *State v. Giacomantonio*, 885 N.W.2d 394, 402–03 (Wis. Ct. App. 2018) ("The State argues that the screen shots can be considered "originals"…We agree. A cell phone is a 'computer or similar device,' the screen shots are 'output readable by sight,' and according to testimony, the screen shots reflected the data accurately. We also agree with the State that even if the screen shots were considered duplicates, there is no 'genuine question ... as to the authenticity of the original" barring their use.').

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the Superior Court's order affirming defendant's judgment of sentence.

RESPECTFULLY SUBMITTED:

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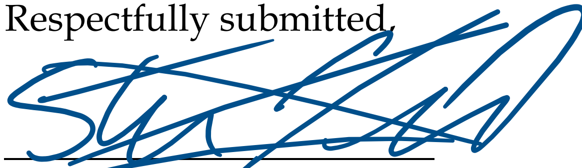
IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DANIEL TALLEY,	:	14 MAP 2021
APPELLANT,	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
APPELLEE.	:	

Certification of Compliance

I, Stanley Joseph Konoval, Montgomery County Assistant District Attorney, do hereby certify that the within brief in the above-captioned matter, filed today, contains 12,749 words, in compliance with Pa.R.A.P. 2135.

Respectfully submitted,



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