Received 8/30/2023 3:57:47 PM Supreme Court Middle District

Filed 8/30/2023 3:57:00 PM Supreme Court Middle District
11 MM 2023

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

11 MM 2023

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

MICHAEL NOEL YARD,

Respondent.

BRIEF OF PETITIONER

Appeal from the Order dated January 25, 2023, granting the Defendant's Motion to Set Bail and Motion for Nominal Bail, in the Court of Common Pleas for Monroe County by the Honorable Judge Jennifer Harlacher Sibum, at Docket Number 1222 CRIMINAL 2022.

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STATEMENT OF JURISDICTION

This Honorable Court assumed jurisdiction over the instant matter pursuant to 42 Pa.C.S. § 726 which provides, "Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726.

ORDER IN QUESTION

COURT OF COMMON PELASE OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA:	:	**NO. 1222 CRIMINAL 2022**
vs.	:	
MICHAEL YARD,	:	
Defendant	:	

ORDER

AND NOW, this 25th day of January, 2023, after hearing on Defendant's Motion to Set Bail and Motion for Nominal Bail Pursuant to Rule 600, and for the reasons set forth in the attached Opinion, it is **ORDERED** that the Motions are **GRANTED**.

Defendant's bail is set at One Dollar ($1.00). As special conditions of Defendant's bail, he shall:

1. Be placed on Pre-Trial Services and shall contact Pre-Trial Services immediately upon his release at 570-807-0427.
2. Have no contact with minor children, with the exception of his child(ren), pursuant to the conditions set forth below.
3. Have no unsupervised contact with his child(ren).

4. Shall be permitted to have supervised contact with his children at JusticeWorks, at such time and such days as may be arranged through JusticeWorks. Defendant shall pay all associated costs.
5. Shall not reside in the marital home or in a home where minor children reside.
6. Defendant's residence shall be pre-approved by Pre-Trial Services, and shall not be in a hotel or motel without kitchen facilities.
7. Shall be prohibited from leaving his residence without prior approval of Pre-Trial Services.
8. Shall wear a GPS ankle monitor, and pay the associated costs.
9. Shall not possess or reside in a home where firearms are located.
10. Shall be prohibited from utilizing any drugs or alcohol, except for those medications prescribed to the Defendant by a treating physician.
11. Shall be subject to random drug testing by Pre-Trial Services.
12. Shall undergo a mental health evaluation and comply with all treatment recommendations, including those for the taking of prescribed medications.
13. Shall remain in Monroe County, Pennsylvania.
14. Shall sign any and all releases requested by Pre-Trial Services.

15. Shall surrender any passport that may be issued in his name and/or to him.

BY THE COURT:

/S/

Jennifer Harlacher Sibum, Judge

cc: District Attorney (MB)
Public Defender (JL)

STANDARD AND SCOPE OF REIVEW

The matter before this Honorable Court is a question of law and thus the standard of review is *de novo* and the scope is plenary. *Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430, 441 (2014).

STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Is the holding in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), inapplicable to cases where the Commonwealth opposes the setting of bail on the basis that the defendant committed an offense punishable by life imprisonment under Article I Section 14 of the Pennsylvania Constitution?

   Suggested Answer: YES

2. In deciding whether the life imprisonment bail exception under Article I Section 14 applies, should a bail court consider all legally competent evidence to include evidence admissible at *prima facie* proceedings, such as a preliminary hearing or hearing on *habeas corpus* relief, as outlined in *Commonwealth v. McClelland*, 660 Pa. 81, 233 A.3d 717 (2020)?

   Suggested Answer: YES

STATEMENT OF THE CASE

Michael Yard, hereinafter "Defendant," was denied bail on April 8, 2022, by the Honorable Magisterial District Judge Daniel Kresge due to the Defendant being charged with an open count of Criminal Homicide to include Murder in the First Degree, an offense for which a defendant is not entitled to bail pursuant to Pa. Const. Art. I Section 14. (R. 4a) On May 9, 2022, a preliminary hearing was held in the above-captioned matter before the Honorable Magisterial District Judge Brian Germano. (R. 5a) The preliminary hearing, which was audio recorded and ultimately transcribed, included testimony subject to cross examination from Monroe County Coroner Thomas Yanac, Jr., Chief Deputy Coroner Maurice Moreno, Pennsylvania State Police Trooper Audra Schmidt, Dr. Samuel Land, M.D., and Dr. Michael Johnson, M.D. (R. 200a - R. 301a)

Pennsylvania State Police Trooper Audra Schmidt was called to investigate the circumstances surrounding the death of A.Y., 3 months of age, on August 1, 2021. (R. 248a – R. 249a) That same evening, Trooper Schmidt interviewed the Defendant and A.Y.'s mother, Krystal Ginel, together in their home. (R. 249a) Ginel indicated that earlier that day she left the residence at approximately 2:00 PM for her 3:00 PM shift at the Bath and Body Works located in Tannersville. (R. 250a)

After Ginel left for work, the only individuals in the home would have been A.Y., the Defendant, and Ginel's grandmother. (R. 250a, R. 253a) Ginel's grandmother is unable to reach the second floor of the residence as her oxygen dependence makes her unable to go up the stairs. (R. 253a)

The Defendant indicated that after Ginel left for work, he was taking care of A.Y. (R. 250a – R. 251a) After feeding A.Y., he took the baby upstairs to the master bedroom. (R. 251a) The Defendant was playing video games while A.Y. was playing nearby in what he described as a bouncy seat. *Id.* After attempting to feed A.Y. again, the baby fell asleep in his arms. *Id.* The Defendant indicated he put A.Y. down on the queen sized bed in the room with a pillow on either side to prevent him from rolling. *Id.* He described A.Y. as laying on his stomach with his head turned to the right, facing the doorway to the bedroom. (R. 251a – R. 252a) After laying A.Y. down, the Defendant proceeded to the bathroom just outside the master bedroom. (R. 252a) The Defendant returned to the bedroom to check on A.Y., but did not see his back rising and falling. *Id.*

The Defendant indicated he checked for a pulse, did not feel one, and turned the baby over. *Id.* He indicated he was certified in CPR and began performing CPR on A.Y. while calling 911. *Id.* The 911 call made by the Defendant was played. (R. 255a) The Defendant claimed that he was actively performing CPR on the Victim, however, the call was devoid of any actual evidence (i.e. counting,

rescue breaths, distress or fatigue) to suggest that CPR was being performed. The Defendant also presented no distress or emotion despite being present with his deceased child.

The Defendant made clear that he was the sole person taking care of A.Y. from the time Ginel left for work until he called 911. (R. 253a)

Chief Deputy Moreno testified regarding his response to Lehigh Valley Hospital – Pocono Campus on August 1, 2021. (R. 242a) In large part, his testimony recounted an interview with the Defendant that same evening regarding the circumstances surrounding A.Y.'s death. Chief Deputy Moreno testified to an account offered by the Defendant substantially similar to that reflected in Trooper Schmidt's interview above. (R. 245a – R. 247a) In particular, the Defendant specified he would have been in the bathroom for approximately 12-15 minutes after placing A.Y. on the bed. (R. 246a)

On or about February 17, 2022, Dr. Samuel Land, M.D., an expert in Forensic Pathology, issued an autopsy report regarding his findings following examination of A.Y.'s remains. (R. 262a – R. 300a) Dr. Land's conclusions were based, in part, on a neuropathological examination of the Victim's remains conducted by Dr. Michael Johnson, M.D., an expert in the field of Forensic Pathology and Neuropathology. (R. 295a – R. 300a) Both Dr. Land and Dr.

Johnson testified at the May 25, 2022, preliminary hearing and were received as experts in their respective fields without objection. (R. 210a – R. 211a, R. 227a)

Dr. Land and Dr. Johnson agreed that the Victim died as a result of blunt force trauma to the head resulting in acute bleeding in the brain. (R. 215a, R. 220a, R. 231a, R. 233a) Both doctors testified that the onset of death for A.Y. would have been rapid following infliction of the fatal injury. (R. 220a, R. 223a, R. 233a) Further evidence was offered through the experts' testimony showing that, though the Victim did present with healing rib fractures at autopsy approximately 2-3 weeks in age, the Victim was otherwise healthy, had no genetic conditions, toxicological concerns, or other medical conditions that could explain the child's death. (R. 215a-R. 219a) Despite extensive cross-examination by the defense into other potential causes of death, both Dr. Land and Dr. Johnson reaffirmed their findings that the Victim died as a result of blunt force trauma. (R. 221a – R. 224a, R. 237a – R. 240a)

Monroe County Coroner Thomas Yanac testified regarding his role as coroner. (R. 202a – R. 203a) Coroner Yanac indicated that following review of the autopsy report authored by Dr. Land and Dr. Johnson, he issued a death certificate for A.Y. as statutorily required. (R. 205a – R. 206a). With regard to A.Y.'s death, the certificate indicated the cause of death as blunt force trauma, and the manner of death homicide. (R. 206a).

On April 1, 2022, following receipt of Dr. Land's autopsy report for A.Y., the Defendant appeared at the Pennsylvania State Police Stroudsburg Barracks for a follow-up interview. (R. 254a) The Defendant gave the same account of the events as he did originally. *Id.* He again confirmed that he was the only one upstairs with A.Y. prior to the 911 call. *Id.* The Defendant could offer no explanation for the three (3) healing rib fractures discovered at autopsy. (R. 254a – R. 255a) When asked if anything had happened to A.Y. to explain the head trauma discovered, he insisted that nothing had happened. (R. 255a)

After full hearing, all charges were bound over to the Monroe County Court of Common Pleas to include an open count of Criminal Homicide, 18 Pa.C.S. 2501(a) (to include Murder in the First Degree), Endangering the Welfare of Children, 18 Pa.C.S. 4303(a)(1), and Aggravated Assault – Victim Less Than 6 Years of Age, 18 Pa.C.S. 2702(a)(8). (R. 5a – R. 6a, R. 259a – R. 260a) The status of bail was not challenged and remained unchanged. (R. 4a, R. 260a)

On May 10, 2022, the Defendant filed a Motion with the Court of Common Pleas requesting that bail be set arguing the applicability of *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021). (R. 195a, R. 302a – R. 307a) On May 24, 2022, a hearing was held on the Defendant's Motion before Judge Jennifer Harlacher Sibum at which time counsel for the Defendant conceded that there was no dispute as to the facts, resulting in both parties entering into a binding stipulation on the

record substantially similar to the facts testified to at the May 9 Preliminary Hearing. (R. 34a - R. 53a) The factual stipulation was received and accepted by the court as the underlying facts for the court's bail determination. (R.48a - R. 50a)

The Commonwealth argued against the applicability of *Talley* as the facts and holding in that case addressed the denial of bail based on the "dangerousness exception" embodied in the Pennsylvania Constitution as opposed to the facts at issue in the above-captioned case alleging the commission of Murder in the First Degree, invoking instead the life imprisonment exception. (R. 53a - R. 64a) Based on the above, the Commonwealth opposed the setting of any bail as Murder in the First Degree was substantiated as a charge in the above-captioned case based on the stipulated facts of record and longstanding case law, as found by MDJ Germano following testimony subject to cross examination at preliminary hearing, and, therefore, the Defendant was not entitled to bail pursuant to the plain language of Article I Section 14. *Id.*

Following said Hearing, Judge Sibum took the matter under advisement and ultimately scheduled a hearing on May 27, 2022, to announce her decision. At said hearing, Judge Sibum granted the Defendant's Motion, indicated that this offense appeared to be a "blip" for the Defendant, and set bail at $200,000 Secured, with additional non-monetary conditions. Specifically, Judge Sibum stated:

> I have listened, or I have read the motion again and again, and the facts that were stipulated to by counsel, and regardless of whether this is a [sic] offense that bail could be denied I don't, I'm not going to even address that issue, because I believe that bail is appropriate. So even if this was an offense for which bail could be denied, I would not deny bail, and that is primarily because of the defendant having no prior record and this being the only blip on his criminal record...Again, the only thing that's ever happened is injury to a child...

(R. 78a, R. 84a - R. 85a) The Commonwealth respectfully requested during the hearing that the court stay its decision granting bail pending an appeal to the Pennsylvania Superior Court. (R. 84a) The court denied the Commonwealth's request for stay. *Id.*

On May 27, 2022, the Commonwealth filed an Emergency Motion for Stay and Petition for Review with the Pennsylvania Superior Court. The stay was immediately granted. On July 12, 2022, following submissions on behalf of the Defendant, a Statement of Reasons by the trial court, and consideration of the filings, the Superior Court issued an order stating, "the trial court's May 27, 2022 bail order is hereby VACATED, and the case is REMANDED for further proceedings." (R. 87a) No opinion was authored by the Superior Court, and the aforementioned order made no mention of a further hearing on bail or referenced or commented on the reasoning contained in the trial court's Statement of Reasons in any way.

During the pendency of the Commonwealth's Petition for Review, Judge Sibum accused the Commonwealth of acting in bad faith by filing pretrial appeals without a good faith basis as required under Pennsylvania Rule of Appellate Procedure 311. (R. 99a) In the court's Statement Pursuant to Pa.R.A.P. 1925(a) in *In Re: Four Pennsylvania Skill Amusement Devices and One Ticket Redemption Terminal Containing $18,692.00 In U.S. Currency*, No. 6673 Civil 2021, Judge Sibum stated: "Further, the Commonwealth's use of Pa.R.A.P. § 311(D) to obtain de facto continuance or delays is not new to the Monroe County bench. See *Commonwealth v. Mack*, No. 2402 CR 2014; *Commonwealth v. Haywood*, Nos. 115 CR 2016 and 876 CR 2016; and *Commonwealth v. Clark*, 892 CR 2015." (R. 99a) It should be noted that the matters of *Commonwealth v. Mack* and *Commonwealth v. Clark* were joined for trial and, in fact, joined as a single pretrial appeal. Further, the Commonwealth's appeal in those matters was not dismissed by the Superior Court as improperly taken, but instead resulted in the trial court's pretrial ruling being reversed and the matters remanded for trial. *See 1977 EDA 2016* and *2006 EDA 2016*. This Statement was filed on July 11, 2022. (R. 88a)

On July 29, 2022, following remand and prior to any other motion having been filed or hearing being held, including Formal Arraignment on August 3, 2022, the Commonwealth filed a Motion for Recusal. (R. 10a - R. 11a, R. 185a - R. 192a)

On June 6, 2022, Attorney Elizabeth Weekes, Esq., solicitor for Children and Youth Services, filed a Motion to Quash a subpoena sent by the Defendant requesting records pertaining to the minor victim. (R. 9a) A hearing was held on said motion between Attorney Weekes and the Defendant at the same date and time scheduled for Formal Arraignment, August 3, 2022, at which time the matter was taken under advisement for in-camera review. (R. 10a, R. 12a) An order was issued addressing these records on September 6, 2022. (R. 14a). Additionally, a pretrial conference was scheduled and held on September 14, 2022. *Id.* This conference was scheduled and held as a matter of course. There was no substantive decision rendered pertaining to disposition of the case at that time.

Following remand in the present matter, no additional motion with regard to bail was filed by any party. (R. 11a - R. 13a, R. 198a) On August 15, 2022, Judge Sibum *sua sponte* entered an Order scheduling a new bail hearing for October 25, 2022. (R. 198a) On October 3, 2022, the Commonwealth filed a Motion for Hearing as a hearing had not yet been held or scheduled to address the still pending Motion for Recusal. (R. 16a) On October 17, 2022, the Commonwealth filed a Motion to Continue requesting that the October 25, 2022, Bail Hearing be rescheduled, as a hearing had yet to be scheduled or held on the pending Motion for Recusal. *Id.* On October 18, 2022, Judge Sibum issued an order, without hearing, denying the Commonwealth's Motion for Recusal and dismissing the

Motion for Hearing as moot. *Id.* There was no opinion authored in conjunction with this denial.

On October 19, 2022, the Commonwealth timely filed a Notice of Appeal to the Superior Court requesting review of Judge Sibum's denial of the Commonwealth's Motion for Recusal. (R. 17a) The Commonwealth additionally filed with the Superior Court a request for stay of the bail proceedings pending resolution of the recusal appeal. The same was denied. (R. 19a) That same day, Judge Sibum issued an Order denying the Commonwealth's Motion for Continuance of the bail hearing. (R. 18a)

On October 20, 2022, following the filing of the Notice of Appeal and Judge Sibum's denial of the Commonwealth's Motion for Continuance, the Defendant filed a Motion for Nominal Bail. (R. 18a) Said Motion was scheduled for hearing on October 31, 2022. (R. 20a)

On October 25, 2022, a hearing was held in accord with Judge Sibum's *sua sponte* order at which time the Commonwealth submitted a full audio recording of the preliminary hearing held before Magistrate Germano, a transcript of the same, a full copy of the minor victim's autopsy report, and the criminal complaint. (R. 325a) The Commonwealth additionally drew Judge Sibum's attention to the prior factual stipulation entered into by counsel and received by the court during the initial May 24, 2022, bail hearing addressing the same issues. (R. 312a) Counsel

for the Defendant attempted to withdraw the previously agreed on and received factual stipulation and objected to the offered exhibits despite having previously agreed to receipt of the same.[1] (R. 311a - R. 312a, R. 314a, R. 318a, R. 319a) The Commonwealth again opposed the applicability of *Talley* to the above-captioned case, but argued, *in arguendo*, that even should *Talley* apply, the audio recording and transcription of sworn testimony at the May 9, 2022, Preliminary Hearing, subject to full and fair cross examination, coupled with the previously agreed on and received factual stipulation, was competent evidence for the court's consideration. The matter was taken under advisement and the Judge ordered that memoranda be submitted addressing whether she may even consider the evidence offered by the Commonwealth. (R. 20a, R. 323a - R. 324a)

On November 4, 2022, the Commonwealth timely filed a Memorandum presenting to the court longstanding case law and practice supporting consideration of the submitted exhibits and stipulation, including a recent opinion by a judge of concurrent jurisdiction, the Honorable Stephen M. Higgins, who was met with an identical issue regarding bail and the applicability of *Talley* to a charge of Murder

[1] Though the reason for this change in position regarding an agreed on and received stipulation of fact was unclear at the time, it should be noted that on February 10, 2023, the Defendant filed an Answer to the Commonwealth's Application for Relief filed in the Pennsylvania Supreme Court regarding the bail issue. In said Answer, the Defendant expressly indicated that "The Respondent's objection to the original stipulation was based upon this request [for remand made by Judge Sibum] and the Court's understanding that *Talley* required live testimony." (R. 182a, R. 320a)

in the First Degree, and received almost identical evidence and relied on the same in denying the defendant's release. (R. 23a, R. 142a - R.150a)

On October 31, 2022, a hearing was held on the Defendant's Motion for Nominal Bail at which time both counsel advised Judge Sibum that said motion could only be resolved after she made a determination as to whether the charge of Murder in the First Degree was substantiated. The Commonwealth in no way conceded the applicability of *Commonwealth v. Talley* to the above-captioned matter. In the event that Judge Sibum decided whether Murder in the First Degree was substantiated as a charge in the case, the Commonwealth submitted secured copies of the docket in the above-captioned matter as exhibits as there was significant delay attributable to the Defendant's request for Children and Youth records as well as an extension of the period to file Omnibus Pretrial Motions. (R. 1a - R. 33a, R. 193a - R. 199a) The matter was taken under advisement.

On December 20, 2022, Judge Sibum *sua sponte* issued an Order scheduling the above-captioned matter for pretrial conference on January 18, 2023, and for trial beginning February 7, 2023. (R. 27a - R. 28a) This Order was entered despite the Commonwealth's timely filing of a Notice of Appeal and perfecting the appeal through compliance with the court's 1925(b) Order and filing of the criminal docketing statement. Moreover, the record in the above-captioned matter was certified and transferred by the Monroe County Clerk of Courts, and received by

the Superior Court on December 14, 2022. (R. 26a) On January 18, 2023, the pretrial conference was held at which time the Commonwealth presented legal argument advising Judge Sibum that the matter could not proceed to trial as the trial court lacked jurisdiction as a result of the appeal and the matter could not proceed until adjudication of the same and return of the record. The Judge took this under advisement.

On January 25, 2023, at approximately 5:13 PM, approximately three (3) months after hearing on the bail motion, after the close of business, Judge Sibum issued an Order granting the Defendant's Motion for Nominal Bail and set bail at $1 with non-monetary conditions. (R. 152a - R. 153a, R. 331a - R. 338a)

On January 26, 2023, the Commonwealth filed a second Emergency Motion for Stay and Petition for Review with the Pennsylvania Superior Court. On January 27, 2023, the Commonwealth's Motion for Stay was granted pending resolution of the Petition for Review. (R. 30a - R. 31a) On that same date, the Superior Court directed Judge Sibum to submit a Statement of Reasons for granting bail. On January 30, 2023, Judge Sibum submitted a Statement of Reasons, which was the same opinion she filed on January 25, 2023, in conjunction with her bail order. In her opinion, Judge Sibum indicates her reason for granting bail was the Commonwealth's failure to present live testimony at the October 25, 2022, hearing. (R. 331a - R. 336a)

On February 3, 2023, the Pennsylvania Superior Court issued orders denying the Commonwealth's Petition for Review and lifting the temporary stay. (R. 32a, R. 339a - R. 343a) On that same date, the Commonwealth filed an Emergency Motion for Stay with the Pennsylvania Supreme Court requesting stay of the January 25, 2023, bail order pending review of the same. At approximately 7:23 PM that evening, Justice Mundy entered an order temporarily granting a stay pending review. On February 9, 2023, the Commonwealth filed an Application for Relief with the Pennsylvania Supreme Court requesting review of the January 25, 2023, bail order. (R. 115a - R. 180a) On February 10, 2023, the Defendant filed an Answer to the Commonwealth's Application for Relief. (R. 181a - R. 184a) On July 3, 2023, the Defendant filed an Application to Expedite Review and Lift Temporary Stay. On July 5, 2023, the Commonwealth filed an Answer to the same. On July 24, 2023, this Honorable Court issued an order accepting jurisdiction of the above-captioned matter and directed briefs be filed to address the legal issues raised.

SUMMARY OF ARGUMENT

This Honorable Court's holding in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021) should be inapplicable to circumstances where the Commonwealth opposes the setting of bail on the basis that a defendant has committed, "offenses for which the maximum sentence is life imprisonment…" Pa. Const. Art. I § 14. The *Talley* decision should be limited only to cases where the Commonwealth asserts that a defendant is non-bailable on the ground that there exists, "no condition or combination of conditions other than imprisonment [that] will reasonably assure the safety of any person and the community..." Pa. Const. Art. I § 14. This limitation is supported by an analysis of Article I Section 14 through consideration of legislative intent, the cannons of statutory construction, and examination of the plain language of the *Talley* Court's holding and accompanying rationale.

When invoking the life imprisonment exception under Article I Section 14, the Commonwealth should be required to establish a *prima facie* case that the Defendant has committed an offense punishable by life imprisonment. Use of this standard finds supports in analysis of the language and structure of Article I Section 14, as well as the historic use and purpose of the *prima facie* standard in assuring, "sufficient Commonwealth evidence exists to require a defendant to be held in government custody until he may be brought to trial." *Commonwealth v.*

Lambert, 2020 Pa.Super 297, 244 A.3d 38, 42 (2020), *appeal denied*, 260 A.3d 71 (Pa. 2021). In making this determination, a bail court should consider all evidence admissible during *prima facie* proceedings as outlined in *Commonwealth v. McClelland*, 660 Pa. 81, 233 A.3d 717, 736 (2020), as well as that traditionally received in addressing release criteria.

ARGUMENT

This Honorable Court's holding in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021) should be inapplicable to circumstances where the Commonwealth opposes the setting of bail on the basis that a defendant has committed, "offenses for which the maximum sentence is life imprisonment…" Pa. Const. Art. I § 14. This limitation is supported by an analysis of Article I Section 14 through consideration of legislative intent, the cannons of statutory construction, and examination of the plain language of the *Talley* Court's holding and accompanying rationale. When invoking the life imprisonment exception under Article I Section 14, the Commonwealth should be required to establish a *prima facie* case that the defendant has committed an offense punishable by life imprisonment. In making this determination, a bail court should consider all evidence admissible during *prima facie* proceedings as well as that traditionally received in addressing release criteria.

I. This Honorable Court's Holding in *Commonwealth v. Talley* Should be Limited Only to Cases Where the Commonwealth Opposes the Setting of Bail on the Basis that No Condition or Combination of Conditions Other than Imprisonment Will Reasonably Assure the Safety of Any Person and the Community.

The holding issued in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), should be limited only to cases where the Commonwealth opposes the setting of bail on the ground that there exists, "no condition or combination of conditions

other than imprisonment [that] will reasonably assure the safety of any person and the community..." (hereinafter "Dangerousness Exception") Pa. Const. Art. I § 14. This conclusion is supported by analysis of Article I Section 14 when examined through the lenses of legislative intent and the cannons of statutory construction. Moreover, the plain language of the Court's holding as well as the rationale attendant thereto constrain the opinion to the Dangerousness Exception. As such, the *Talley* holding should not be applicable to cases where a defendant is charged with, "offenses for which the maximum sentence is life imprisonment..." *Id.* In such circumstances, the Commonwealth should be required to establish a *prima facie* case that the defendant committed an offense punishable by life imprisonment.

A. This Honorable Court's holding in *Talley* is limited only to cases where the Commonwealth opposes the setting of bail on the basis of the Dangerousness Exception based on review of the legislative intent and subject to the cannons of statutory construction.

This Honorable Court's holding in *Talley*, *supra.*, pertained only to, and should be applied only to, cases wherein the Commonwealth opposes the setting of bail on the basis of the Dangerousness Exception. This conclusion is supported by examination of Article I Section 14 with consideration to the underlying legislative intent and subject the cannons of statutory construction outlined in Title 1 Chapter 19. "In matters of statutory interpretation, the General Assembly's intent is

paramount." *Commonwealth v. Hacker,* 609 Pa. 108, 15 A.3d 333, 335 (2011) (internal citation and quotation marks omitted) (*citing* 1 Pa.C.S. § 1921(a)). Generally, such "intent is best expressed through the plain language of the statute." *Commonwealth v. Hart,* 611 Pa. 531, 28 A.3d 898, 908 (2011) (citations and internal quotation marks omitted). Thus, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

Both the original Pennsylvania Constitution of 1790, and the subsequent Constitution of 1838, contained Article IX, Section 14, which provided that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great." Pa. Const. Article IX, § 14 (1790 & 1838). This provision remained unchanged, though reorganized to Article I Section 14, through the constitutional conventions of 1874 and 1968. Pa. Const. Article I, § 14 (1874 & 1968).

In 1995, the Governor of the Commonwealth of Pennsylvania convened a special session of the General Assembly to address crime in the Commonwealth by, *inter alia*, "[i]mprov[ing] public safety by denying bail to dangerous prisoners[.]" Pennsylvania General Assembly, House, Legis. J., 1995-1996 First Special Session, No. 1, at 1 (Jan. 23, 1995). To that end, the Senate of the Commonwealth of Pennsylvania introduced Senate Bill 12 of 1995, a proposed

amendment to Article I Section 14 of the Pennsylvania Constitution with the intent of adding to the list of non-bailable offenses by including those crimes for which life imprisonment could be imposed. Pennsylvania General Assembly, House, Legis. J., 1995-1996 First Special Session, No. 26, at 245 (Apr. 18, 1995). Ultimately, Senate Bill 12 became Joint Resolution Number 1995-3 by which the General Assembly resolved to amend Article I Section 14 to provide that: "[a]ll 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 the presumption great[.]" Pennsylvania General Assembly, Joint Res. 1995-3, 1995-1996 First Special Session (1995) (emphasis in original).

Thereafter, in the 1997 Regular Session of Pennsylvania General Assembly, House Bill 1520 of 1997 was introduced to place the amendment of Article I Section 14 on the ballot for the citizens of the Commonwealth of Pennsylvania, and that amendment was passed by the people on November 3, 1998. As originally set out in Joint Resolution 1995-3, the current version of Article I Section 14 provides that all prisoners may be granted bail with three distinct exceptions to the rule; "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 the presumption great[.]" Pa. Const. Art. I § 14 (emphasis added). The three uses of the disjunction "or" in Section 14 in its ordinary usage and subject to the rules of grammar creates three separate and distinct clauses: (1) capital offenses; (2) offenses for which the maximum sentence is life imprisonment; (3) unless no other condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when proof is evident or presumption great. (*See* 1 Pa. C.S.A. § 1903 instructing that when constructing and interpreting statutory language, "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage...")

Notably, when the General Assembly drafted the amendment, they specifically separated out those charged with capital offenses or offenses carrying a maximum of life imprisonment. *See Commonwealth ex rel. Specter v. Vignola*, 446 Pa. 1, 285 A.2d 869, 871 (Pa. 1971) (Noting that in statutory interpretation the disjunctive "'or' means 'or,' not 'and.'"), *See also In re Paulmier*, 594 Pa. 433, 937 A.2d 364, 373 (2007) (holding that the use of the word "or" is disjunctive and "means one or the other of two or more alternatives."). Neither of those categories carry any burden of proof beyond the probable cause necessary to charge those offenses. Rather, the proof evident or presumption great language modifies only

the third category of offender that is not constitutionally entitled to bail; the offender so dangerous that "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 the presumption great[.]" Pa. Const. Art. 1 § 14. *See Commonwealth v. Packer*, 568 Pa 481, 798 A.2d 192 (2002) (It is a "well-established cannon of construction that courts should generally apply qualifying words or phrases to the words immediately preceding them.") (*citing* 1 Pa. C.S.A. § 1903).

This interpretation is further supported by examination of Section 5701 of the Judicial Code. Section 5701 is derived from Article I Section 14 and is the statutory provision providing for the right to bail. Originally enacted in 1976, and effective 1978, the prior version of Section 5701 provided that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." 42 Pa.C.S.A. § 5701 *amended by* 2009 Pa. Legis. Serv. Act 2009-39 (West). This provision mirrored the constitutional provision that was in effect at the time of its passage. *See* Pa. Const. Article I, § 14 (1968), *supra.*

Following the above referenced constitutional amendments, the General Assembly passed Act 39 of 2009, which amended Section 5701 to match the

purpose of the amendment to Article I Section 14. The current version of Section 5701 provides that:

> All prisoners shall be bailable by sufficient sureties, unless:
>
> (1) for capital offenses or for offenses for which the maximum sentence is life imprisonment; or
>
> (2) 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.

42 Pa.C.S.A. § 5701. This amendment makes clear the legislative intent in drafting the current iteration of Article I Section 14.[2]

B. This Honorable Court's holding in *Talley* is limited only to cases where the Commonwealth opposes the setting of bail on the basis of the Dangerousness Exception based on the plain language of the Court's holding and attendant rationale.

Examination of the circumstances, rationale, and the plain language of the Court's holding in *Talley* reveals its applicability only to the Dangerousness Exception. On June 20, 2017, Daniel Talley was arrested and charged with Aggravated Assault, Stalking, Harassment, and related offenses, "and he 'was remanded to the Montgomery County Correctional Facility in lieu of $75,000 cash

[2] It is a basic tenant of statutory interpretation that it should be presumed that the General Assembly did not intend absurd or unreasonable results, and that it passed legislation in compliance with the Constitutions of the United States and this Commonwealth. 1 Pa. C.S.A. § 1922(1); (3). Finding the proof evident presumption great language applicable to capital offenses or those punishable by life imprisonment would mean that the legislature, in passing the current Section 5701 of the Judicial Code, passed a law in contradiction to a constitutional provision that was proposed and drafted by the same body.

bail,' which he posted on June 22." *Talley*, 265 A.3d at 501. The defendant was alleged to have engaged in a course of conduct sending harassing messages to the victim from various anonymous sources, culminating in a vehicle consistent with the defendant's being seen in the area of her residence shortly before a gunshot was heard and bullet hole observed in the victim's vehicle. *Id.* at 500. Within hours of the defendant's release on June 22, the victim began to again receive more harassing messages from anonymous sources. *Id.* at 501. On July 18, 2017, following the issuance of a second arrest warrant, the defendant was taken back into custody and his bail set at $250,000. *Id.* A supplemental affidavit of probable cause was appended to the original supporting additional charges of Criminal Use of a Communication Facility, Terroristic Threats, Recklessly Endangering Another Person, and Simple Assault. *Id.* Notably, the defendant in *Talley* was not charged with any capital offenses or offenses punishable by life imprisonment.

On January 8, 2018, the defendant filed a motion for release on nominal bail pursuant to Pennsylvania Rule of Criminal Procedure 600(B), alleging the passage of 180 days following the filing of the criminal complaint. *Id.* at 502. On May 1, 2018, the trial court heard argument on the bail motion. *Id.* The Commonwealth conceded the passage of 180 days, but opposed the setting of bail based on the Dangerousness Exception. *Id.* In support of its position, the Commonwealth relied solely upon facts alleged in the affidavit of probable cause to the criminal

complaint and the Commonwealth's position at trial. *Id.* at 502-503. "The Commonwealth did not submit any exhibits, testimony, or other evidence during the hearing." *Id.* at 503.

After taking the matter under advisement, the trial court issued an order on May 9, 2018, denying the defendant's motion for release. *Id.* On May 11, 2018, the defendant moved for reconsideration of the bail denial; the same was denied on July 11, 2018. *Id.* at 504. On July 20, 2018, the defendant's case proceeded to jury trial, at the conclusion of which the Defendant was found guilty of two (2) counts of Stalking, and one (1) count each of Terroristic Threats and Harassment. *Id.* at 505. On August 24, 2018, the trial court sentenced the defendant to time served followed by five years' probation. *Id.*

The defendant appealed to the Pennsylvania Superior Court who unanimously affirmed his judgement of sentence. *Id.* The defendant filed a petition for allowance of appeal to the Pennsylvania Supreme Court which was granted specifically and "limited to the following" issue:

> Is the Commonwealth required under Art I. Section 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"?

Id. at 507. Indeed, in his perambulatory remarks in authoring the Court's opinion, Justice Wecht stated:

> Since 1682, one's right to bail could not be denied unless "the proof was evident or presumption great." In this case, we must determine the meaning of that colonial-era phrase as it relates to an assertion that the accused should be denied bail because "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community."

Id. at 499.

The Court further clarified this limited scope and constrained its holding, stating:

> As Talley was not charged with either a capital offense or an offense that carries a life sentence, the Commonwealth invoked the third category of nonbailable persons, which applies when "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." *Id.* The instant dispute is whether the "proof [was] evident or presumption great" that Talley fell within that category.

Id. 507

The narrow scope of the Court's review is apparent throughout the Court's analysis and reasoning. The Commonwealth attempted to rely on *Commonwealth ex rel. Alberti v. Boyle*, 412 Pa. 398, 195 A.2d 97 (1963), a case analyzing the denial of bail to a defendant charged with a capital offense, in arguing for a *prima facie* evidentiary standard. *Id.* at 511. Though the Court does conduct some analysis of *Alberti* and its implications, its applicability was ultimately rejected.

The Court first noted that, "the Commonwealth offers no explanation as to what constitutes a *prima facie* case in the context of a request that bail be denied based upon an assertion that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community..." *Id.* at 512. The Court goes on to reason that:

> ...the *Alberti* Court could not have anticipated applying the standard it articulated to the right-to-bail clause's contemplation of denials based upon *potential* risks to specific individuals and the community, which was added by constitutional amendment in 1998, long after *Alberti* was decided. It seems unlikely that the legal sufficiency of the evidence supporting the underlying charge also can establish automatically that the accused presents a risk of future dangerousness that no condition of bail can mitigate. Article I, Section 14's future dangerousness provision is not limited to specific offenses, and not all offenses indicate a risk of future harm. Additionally, it is unintelligible to suggest that a court must probe whether the Commonwealth's evidence presented at the bail hearing is sufficient in law to sustain a verdict that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." What evidence possibly could suffice to sustain a guilty verdict for a crime that has yet to be committed? Of course, the answer is none.

Id. at 519-520.

Moreover, the plain language of the Court's holding is specific to the Dangerousness Exception:

> Accordingly, we hold that when the Commonwealth seeks to deny bail due to the alleged safety risks the

> accused poses to "any person and the community", those qualitative standards demand that the Commonwealth demonstrate that it is **substantially more likely than not** that (1) the accused will harm someone if he is released and that (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm.

Id. at 525 (emphasis included in original). Therefore, it is clear from the express wording of the holding that it is "those qualitative standards" i.e., the risk posed by the accused to any person and the community, which necessitate the substantially more likely test.

Because the holding and issue in question in *Talley* is so intricately bound with the Dangerousness Exception, the Court's discussion of the other exceptions to bail, in particular, the life imprisonment exception, is nothing more than *obiter dictum*. Blacks' Law Dictionary provides that:

> *Obiter dictum* is defined as a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and, therefore, not precedential. (though it may be considered persuasive). Often shortened to *dictum* or less commonly *obiter*...strictly speaking an *obiter dictum* is a remark made or opinion expressed by a judge in his decision upon a cause by the way – that is incidentally or collaterally and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion...in the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as *dicta* or *obiter dicta* these two terms being used interchangeably...

Black's Law Dictionary, 7th Edition, West Group (1999).

In *Commonwealth v. Romero*, 646 Pa. 47, 183 A.3d 364 (2018), in an opinion delivered by Justice Wecht, the legal principle of *obiter dictum* was relied on to limit the scope of the holding in *Payton v. New York*, 100 S.Ct. 1371, 445 U.S. 573 (1980). *Payton* involved the search of a home where an arrest warrant was issued and the police had reason to believe the arrestee was located. Justice Wecht cautioned against reliance on *dicta*, reasoning that, "*dicta* often present risks of unforeseen complications and unintended consequences, which is why reliance upon them to resolve those same complications can be difficult to justify, if not ill advised." *Romero*, *supra*. at fn. 18. Justice Wecht continued by cautioning and calling for a careful analysis of subsequent case law which seemingly adopted the "*Payton dictum*" to ensure that those decisions involved the precise issues at bar, stating:

> To be sure, the several references to the *Payton dictum* in the High Court's subsequent decisions complicate the interpretive task. However, none of those subsequent decisions concerned the rights of third parties in the privacy interests in their homes...none of those cases addressed the critical inquiry of how the determination of residency is to be made, and by whom...none of those cases involved the question now under consideration.

Id.[3] The same is true here. The question addressed and resolved in *Talley* involved a vastly different bail exception, one requiring markedly different and unique qualitative determinations than those implicated by the capital offense or life imprisonment exceptions.

C. To invoke the life imprisonment exception to bail, the Commonwealth should be required to show *prima facie* evidence subject to applicable evidentiary standards that a defendant has committed an offense punishable by life imprisonment.

Invocation of the life imprisonment exception to bail under Article I Section 14 should require a *prima facie* showing that the defendant has committed an offense punishable by life imprisonment. Use of this standard finds supports in analysis of the language and structure of Article I Section 14, as well as the historic use and purpose of the *prima facie* standard. "At a bail hearing, the Commonwealth bears the burden of proof." *Commonwealth v. Heiser*, 330 Pa.Super. 70, 478 A.2d 1355, 1356 (1984). It is well established that a *prima facie* case, by way of a preliminary hearing or *habeas corpus* filing, is primarily focused, "on whether sufficient Commonwealth evidence exists to require a defendant to be held in government custody until he may be brought to trial." *Commonwealth v. Lambert*, 2020 Pa.Super 297, 244 A.3d 38, 42 (2020), *appeal denied*, 260 A.3d 71

[3] *Romero* also cites the following regarding *dicta* "Dictum settles nothing, even in the court that utters it. *Jama vs Immigration & Customs Enf't*, 124 S.Ct. 694, 543 U.S. 335 (2005)... And mere repetition of *dicta* in later decisions, where it does not control the disposition of a litigated issue, does not transform that *dicta* into controlling law. Breath spent repeating *dicta* does not infuse it with life. *Metro. Stevedore Co. vs Rambo*, 115 S.Ct. 2144, 515 U.S. 291 (1995)."

(Pa. 2021). "The primary reason for the preliminary hearing is to protect an individual's right against unlawful arrest and detention." *Commonwealth v. McClelland*, 660 Pa. 81, 233 A.3d 717, 736 (2020), *citing Commonwealth ex rel. Maisenhelder v. Rundle*, 414 Pa. 11, 198 A.2d 656, 567 (1964). "The preliminary hearing 'seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection.'" *Id.*

In analyzing the parameters of a *prima facie* consideration, this Honorable Court has stated:

> A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. *McBride,* 595 A.2d at 591 (citing *Commonwealth v. Wojdak,* 502 Pa. 359, 466 A.2d 991 (1983)). Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Huggins,* 836 A.2d at 866.

Commonwealth v. Karetny, 583 Pa. 514, 880 A.2d 505, 514 (2005), *See also Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991, 996 (1983). "Further, the evidence must be considered in the light most favorable to the Commonwealth so that inferences that would support a guilty verdict are given effect." *Commonwealth v. Santos*, 583 Pa. 96, 876 A.2d 360, 363 (2005), *citing Commonwealth v. Huggins*, 575 Pa. 395, 836 A.2d 862, 866 (2003). The language

cited above in *Karetny* and *Santos*, is substantially similar to that referenced in the *Alberti* opinion addressing the denial of bail in a capital case, indicating that a bail court should consider, "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." *Alberti*, 195 A.2d at 400-01.

The Commonwealth recognizes that the Court in *Talley* rejected the use of a *prima facie* case as the applicable standard, however, as noted above, *Talley* addressed evidentiary standards and burdens applicable only to the Dangerousness Exception. Indeed, in large part the Court's rejection of a *prima facie* standard stems from its inapplicability to the analysis required under that admittedly more amorphous exception, stating, "the Commonwealth offers no explanation of what constitutes a *prima facie* case in the context of a request that bail be denied upon an assertion that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community..." *Talley*, 265 A.3d at 512. The Court expanded that reasoning, stating:

> Moreover, the *Alberti* Court could not have anticipated applying the standard it articulated to the right-to-bail clause's contemplation of denials based upon *potential* risks to specific individuals and the community, which was added by constitutional amendment in 1998, long after *Alberti* was decided. It seems unlikely that the legal sufficiency of the evidence supporting the underlying charge also can establish automatically that the accused

> presents a risk of future dangerousness that no condition of bail can mitigate. Article I, Section 14's future dangerousness provision is not limited to specific offenses, and not all offenses indicate a risk of future harm. Additionally, it is unintelligible to suggest that a court must probe whether the Commonwealth's evidence presented at the bail hearing is sufficient in law to sustain a verdict that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." What evidence possibly could suffice to sustain a guilty verdict for a crime that has yet to be committed? Of course, the answer is none. The Constitution does not permit punishing a person for a crime that has not been proven, let alone in anticipation of one that has not yet been committed. *Cf. Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)

Id. at 519–20. While *prima facie* may be a problematic standard as applied to the Dangerousness Exception due to its ambiguity, it is perfectly suited for invocation of life imprisonment exception. This exception requires establishment that the defendant committed an offense that is punishable by life imprisonment. As expressed above, the *prima facie* standard is employed regularly by magisterial, common pleas, and appellate courts in determining whether the Commonwealth possess sufficient evidence to, "warrant the belief that the accused committed the offense…" and permit the case to proceed to a jury determination. *Karetny*, *supra.*

Moreover, the current state of the law with regard to evidence sufficient to establish a *prima facie* case mirrors that suggested as sufficient by the Court in *Talley*. In satisfying the Commonwealth's burden, the *Talley* Court references

evidence that is, "legally competent, meaning evidence that is facially admissible." *Talley*, 265 A.3d at 519. The use of the term "legally competent" is further clarified, "meaning evidence that is admissible under…the evidentiary rules…" *Id.* at 524. By way of further clarification, the *Talley* Court included a footnote expanding on "evidentiary rules," stating:

> While the bulk of the Commonwealth's proof must consist of admissible evidence, the Commonwealth is not entirely barred from using evidence that otherwise might be inadmissible under our Rules of Evidence. Given that a right-to-bail hearing typically occurs at an early stage of the case, the use of some inadmissible evidence may be necessary. For example, the Commonwealth may rely upon hearsay to present scientific, technical, or forensic information, to introduce laboratory reports, or to corroborate competent witness testimony. Nonetheless, the Commonwealth must introduce admissible evidence in order to establish the material factual claims implicated by the principal asserted ground for the bail denial.

Id. at fn. 35.

The explanation offered in Footnote 35 mirrors the Court's recent decision in *Commonwealth v. McClelland*, 660 Pa. 81, 233 A.3d 717 (2020), considering evidence sufficient for establishing a *prima facie* case. In *McClelland*, the Commonwealth established a *prima facie* case at both preliminary hearing and *habeas corpus* proceedings relying solely on hearsay testimony from the affiant. *McClelland*, 233 A.3d at 724-25. The defendant filed an interlocutory appeal arguing that the Commonwealth's reliance solely on hearsay testimony violated the

Court's holding in *Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990). The Superior Court affirmed and the Supreme Court ultimately accepted jurisdiction. The Court began by expressly acknowledging *Verbonitz* as controlling authority, holding that, "a *prima facie* case cannot be established by hearsay evidence alone…[b]ecause hearsay does not constitute legally competent evidence…" *Id.* at 732, (citation omitted). The Court went on to examine the application of *Verbonitz* in the context of the subsequently enacted version of Pennsylvania Rule of Criminal Procedure 542. Rule 542 provides, in pertinent part:

> …(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it.
>
> (E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property…

Pa. R. Crim. P. 542. Ultimately, the Court found Rule 542 and *Verbonitz* to not be in conflict. The Court concluded bringing both in line, stating, "…[Rule 542] subsection (E) is intended to allow some use of hearsay. The plain language of the rule does not state a *prima facie* case may be established solely on the basis of hearsay." *Id.* at 735. Turning to the facts at bar, the Court reversed, finding that,

"the Commonwealth relied exclusively and only on evidence that could not be presented at trial." *Id.* at 736.

As stated above in *McClelland*, the aim of the *prima facie* standard is "to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection." *McClelland*, *supra.* The current and well established standard for establishing a *prima facie* case as reflected in *Karetny*, *Verbonitz*, *McClelland*, and Rule 542, mirrors the evidentiary standards suggested by *Talley*, in a similar though distinct context, to ensure adequate constitutional protections. To move beyond a *prima facie* standard for invocation of the life imprisonment exception would be to institute a higher evidentiary standard at a bail hearing, which may temporarily deprive a defendant of his or her liberty, than that required to submit the same charge to a jury and potentially deprive a defendant of his or her liberty for the remainder of his or her life.

Applying this standard to the case at bar, the Commonwealth has made a *prima facie* showing that the Defendant has committed an offense punishable by life imprisonment, Murder in the First Degree. The factual stipulation entered and received on May 24, 2022, recounting the testimony and evidence offered at the preliminary hearing, along with the evidence offered at preliminary hearing including the audio recording and written transcription of the sworn testimony

offered, A.Y.'s autopsy report, and the 911 call made by the Defendant show *prima facie* evidence of Murder in the First Degree.

Dr. Samuel Land, M.D., and Dr. Michael Johnson, M.D., were received as experts, without objection, in the fields of Forensic Pathology (Dr. Land and Dr. Johnson) and Neuropathology (Dr. Johnson) and opined that the Victim, the Defendant's three month old son A.Y., died as a result of blunt force trauma to the head resulting in acute bleeding in the brain. Both physicians agreed that the onset of death would have been quick following the infliction of the head trauma. Further evidence was offered through the experts' testimony showing that, though the Victim did present with healing rib fractures at autopsy approximately 2-3 weeks in age, the Victim was otherwise healthy, had no genetic conditions, toxicological concerns, or other medical conditions that could explain the child's death. Despite lengthy cross-examination by the defense into other potential causes of death, both Dr. Land and Dr. Johnson reaffirmed their findings that the Victim died as a result of blunt force trauma.

Monroe County Coroner Thomas Yanac testified regarding his role as coroner, indicating that his office reviewed the autopsy report authored by Dr. Land and Dr. Johnson, and that as a result a death certificate was issued for the minor Victim indicating the cause of death as blunt force trauma to the head and the manner of death as homicide.

Additional testimony was offered by Chief Deputy Coroner Maurice Moreno as well as Trooper Audra Schmidt recounting their response to the death of A.Y. on August 1, 2020. Included in their testimony were statements made by the Defendant indicating he was the sole individual providing care and in custody of the minor Victim for the time span surrounding the child's death and that the Victim was in good health, playing, and eating immediately prior to his death. Indeed, the Defendant claimed he had left the Victim on the bed for approximately 15 minutes with his head turned and airways unobstructed, utilized the bathroom, and returned to find the Victim in the same location and position but not breathing or responsive. The Defendant claimed to have absolutely no information concerning what caused the Victim's death, and denied any accidental or other reason or event to explain the child's trauma or death.

Also presented at hearing was the 911 call made by the Defendant claiming that he was actively performing CPR on the Victim, however, the call was devoid of any actual evidence (i.e. counting, rescue breaths, distress or fatigue) to suggest that CPR was being performed. The Defendant also presented no distress or emotion despite being present with his deceased child.

These facts are undisputed for the purposes of the bail determination by virtue of the May 24, 2022, factual stipulation and memorialized in audio and written transcription of the May 9, 2022, preliminary hearing testimony. In

supporting the charge of Murder in the First Degree, due consideration need be given to long established legal principles. The longstanding "sole caretaker" presumption is applicable, standing for the proposition that, "Where, as here, an adult has sole custody of a child for a period of time, and, during that time the child suffers wounds which unquestionably are neither self-inflicted nor accidental, the evidence is sufficient to allow a jury to infer that the adult inflicted the wounds." *Commonwealth v. Paquette*, 451 Pa. 250, 301 A.2d 837, 840 (Pa. 1973), *See also Commonwealth v. Turner*, 491 Pa. 620, 421 A.2d 1057 (Pa. 1980); and *Commonwealth v. Meredith*, 490 Pa. 303, 416 A.2d 481 (Pa. 1980). As the Defendant by his own admission was the sole individual in care and custody of the minor Victim at the time the fatal trauma was inflicted, it can be inferred that he inflicted the fatal wounds.

Moreover, the specific intent to kill required for proof of Murder in the First Degree can be inferred due to the deadly force inflicted on a vital area of the child's body, in this case the Victim's head and brain, and that said force may be deemed "deadly" based on factors such as the seriousness and type of injury as well as the nature and severity of the blows and the tender age of the victim. *See Meredith, supra.*; and *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078 (Pa. 1993) (overruled on other grounds *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003)).

Even assuming, *in arguendo*, the applicability of the standard announced in *Talley* with regard to the Dangerousness Exception, the above-referenced evidence in light of the applicable legal principles makes it "substantially more likely than not," that the Defendant is non-bailable by virtue of committing Murder in the First Degree, an offense punishable by life imprisonment.

II. In Making a Bail Determination Under the Life Imprisonment Exception in Article I Section 14, a Bail Court Should Consider All Traditionally Accepted Legally Competent Evidence in Making a Bail Determination to Include Prior Sworn Testimony, Expert Reports, Authenticated Photographic and Documentary Evidence, and Stipulations of Fact.

In making a determination as to the applicability of the life imprisonment exception delineated in Article I Section 14, a bail court should consider all legally competent evidence accepted in *prima facie* proceedings and evidence traditionally received in making a bail determination. Though the holding and rationale in *Talley* focused on and addressed the standard applicable to the Dangerousness Exception, the analysis contained therein regarding evidentiary considerations is informative.

In *Talley*, the Commonwealth proffered only the affidavit of probable cause and averments regarding the Commonwealth's position at trial, which the Court categorically rejected and found insufficient. Indeed, this evidentiary proffer would have been insufficient to support a *prima facie* case under Rule 542, *Verbonitz*, and *McClelland*, *supra*. The *Talley* Court went on to reason that

evidence supporting the denial of bail under Article I Section 14, "must be legally competent, meaning evidence that is facially admissible." *Talley*, 254 A.3d at 519. In further analyzing *Alberti*, a case involving denial of bail based on the capital offense exception, the Court explained, "As our pronouncements in *Alberti* suggest, the Commonwealth cannot sustain its burden at a bail hearing with hearsay or otherwise legally incompetent evidence..." *Id.* Instead, the Court called for, "legally competent evidence, meaning evidence that is admissible under either the evidentiary rules or that is encompassed in the criminal rules addressing the release criteria." *Id.* at 524. The Court further expanded on the meaning of "legally competent evidence," in a footnote immediately following, stating:

> While the bulk of the Commonwealth's proof must consist of admissible evidence, the Commonwealth is not entirely barred from using evidence that otherwise might be inadmissible under our Rules of Evidence. Given that a right-to-bail hearing typically occurs at an early stage of the case, the use of some inadmissible evidence may be necessary. For example, the Commonwealth may rely upon hearsay to present scientific, technical, or forensic information, to introduce laboratory reports, or to corroborate competent witness testimony. Nonetheless, the Commonwealth must introduce admissible evidence in order to establish the material factual claims implicated by the principal asserted ground for the bail denial.

Id. at fn. 35. As referenced above in the previous section, this evidentiary standard closely mirrors that required for establishment of a *prima facie* case by Rule 542, *Verbonitz*, and *McClelland*. As such, evidence competent and admissible to

establish a *prima facie* case should be similarly admissible and sufficient for invocation of the capital offense or life imprisonment exceptions.

Transcription and audio recording of sworn preliminary hearing testimony, offered under penalty of perjury and subject to cross-examination, should be considered legally competent evidence. The Superior Court in *Commonwealth v. Lambert* explained that, "[t]he focus of a pretrial *habeas* petition is on whether sufficient Commonwealth evidence exists to require a defendant to be held in government custody until he may be brought to trial." *Lambert, supra.* It has long been held that in the context of *habeas corpus* proceedings, "[t]o meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof...the Commonwealth may meet this burden by introducing the preliminary hearing record and/or by presenting evidence at the *habeas corpus* hearing." *Id.* The Pennsylvania Supreme Court has similarly received and made *prima facie* determinations with regard to *habeas corpus* appeals based solely on review of evidence offered at preliminary hearing. *See Commonwealth v. Santos*, 583 Pa. 96, 876 A.2d 360 (2005) and *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991(1983).

In addition, in making a bail determination under Article I Section 14, a bail court should both receive and consider factual stipulations. "A stipulation is a declaration that the fact agreed upon is proven, and a valid stipulation must be

enforced according to its terms." *Commonwealth v. Mitchell*, 588 Pa. 19, 902 A.2d 430, 460 (2006). "The Pennsylvania rule on stipulations is long-settled: parties may bind themselves, even by a statement made in court, on matters relating to individual rights and obligations, so long as their stipulations do not affect the court's jurisdiction or due order of business." *Tyler v. King*, 344 Pa.Super. 78, 496 A.2d 16, 21 (1985), *citing Foote v. Maryland Casualty Co.,* 409 Pa. 307, 186 A.2d 255 (1962); *Foley Brothers, Inc. v. Commonwealth, Department of Highways,* 400 Pa. 584, 163 A.2d 80 (1960). "The court will hold a party bound to his stipulation: concessions made in stipulations are judicial admissions, and accordingly may not later in the proceeding be contradicted by the party who made them." *Id.*, *citing Tops Apparel Manufacturing Co. v. Rothman,* 430 Pa. 583, 244 A.2d 436, 438 (1968). *See Also Dale Manufacturing Co. v. Bressi,* 491 Pa. 493, 421 A.2d 653 (1980); *In re Estate of Monheim,* 451 Pa. 489, 304 A.2d 115 (1973). Moreover, trial courts routinely instruct jury panels in determining proof beyond a reasonable doubt at trial that a stipulation of fact between counsel, "is evidence of that fact. You should regard the stipulated or agreed fact as proven." *See* 3.17 STIPULATIONS OF FACT, Pa. SSJI (Crim), §3.17. Indeed, the Supreme Court has sanctioned receipt of factual stipulations to sustain guilty verdicts in homicide proceedings. *See Commonwealth v. Tate*, 487 Pa. 556, 410 A.2d 751 (1980).

Withdrawal of such a stipulation should not be permitted within the same type of proceeding. As referenced above, "concessions made in stipulations are judicial admissions, and accordingly may not later in the proceeding be contradicted by the party who made them." *Tyler*, *supra.*; *Rothman*, *supra.* Additionally, to permit withdrawal of a previously agreed on and received stipulation of facts would be contrary to the longstanding "law of the case doctrine," standing for the proposition that previously resolved legal issues within a case should not be disturbed. *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (Pa. 1995). "The various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy...[but] also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." *Starr*, 664 A.2d at 1331. Enforcement of a factual stipulation is supported by multiple tenants of the law of the case doctrine, including protecting the settled expectations of the parties, maintaining consistency during the course of a case, effectuating the proper and streamlined administration of justice, and bringing litigation to an end.

The above-referenced precedent dictates consideration of the stipulation of facts received by the trial court at the May 24 Hearing in disposing of the bail

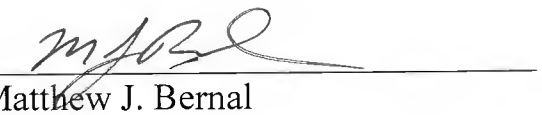
motion. This stipulation was made on the record, agreed on by the parties, and accepted and received by the Court. Though the Superior Court did vacate the May 27 Bail Order following application by the Commonwealth, the Superior Court's order in no way addressed the evidence presented or received at the May 24 Hearing. The vacating of the May 27 Bail Order does not have the effect of nullifying the existing record. To ignore the previously entered and received stipulation of facts would be to ignore true, uncontested facts of the case which would remove any need for the qualitative analysis required by *Talley*, if applicable.

In consideration of the above-referenced legal principles and reasoning, precedent dictates that due consideration and effect be given to the stipulation of facts in disposing of the pending bail motion, along with the audio and written transcription of the sworn preliminary hearing testimony, autopsy report, and 911 call.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court find the holding in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), applicable only to the Dangerousness Exception and further hold that evidence otherwise admissible during *prima facie* criminal proceedings as outlined in *Commonwealth v. McClelland*, 660 Pa. 81, 233 A.3d 717 (2020), legally competent for consideration by a bail court in determining the applicability of the life imprisonment bail exception under Article I Section 14.

Respectfully submitted,



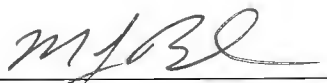
Matthew J. Bernal
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, a true and correct copy of the Commonwealth's Brief in the above-captioned matter was served upon the following individuals:

The Honorable Judge Jennifer Harlacher Sibum
Judge's Chambers
Monroe County Courthouse
7th & Monroe Streets
Stroudsburg, PA 18360

Jason LaBar, Esquire
Noelle Wilkinson, Esquire
Counsel for the Defendant
Monroe County Public Defender's Office
701 Main Street, Third Floor
Stroudsburg, PA 18360



Matthew J. Bernal, Esquire
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610 Monroe Street
Stroudsburg, PA 18360
Tel: (570) 517-3052
Attorney ID No. 313792

CERTIFICATE OF COMPLIANCE PURSUANT TO PA. R.A.P. 127

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

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CERTIFICATE OF COMPLIANCE PURSUANT TO PA. R.A.P. 2135

I certify that this filing complies with Pennsylvania Rule of Appellate Procedure 2135 in that it does not exceed 14,000 words.

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APPENDIX 'A'

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 57 EDM 2022
	:	(C.P. Monroe County
vs.	:	No. 45-MD-259-2022)
	:	
MICHAEL YARD,	:	
	:	
Defendant	:	

STATEMENT OF REASON PURSUANT TO SUPERIOR COURT ORDER FILED JUNE 6, 2022

The Commonwealth filed a Petition for Review Pursuant to Pa.R.A.P. 1610 and 1762 from our May 27, 2022 order granting bail with specific conditions. The Defendant in this case has been charged with an open count of criminal homicide as a result of the death of his 3 month old infant child. On May 10, 2022, Defendant filed a Motion to Set Bail. In his motion, Defendant concedes the Commonwealth has established a prima facie case for involuntary manslaughter but challenges any evidentiary finding of homicide.

We held a hearing on the motion on May 24, 2022, at which time the Commonwealth and Defendant agreed to submit the matter for consideration upon stipulated facts. We offered counsel the opportunity to present evidence and testimony, but counsel instead chose to submit Defendant's bail motion to the court on facts stipulated to by counsel. The stipulated facts, in turn, were based upon the testimony and evidence presented by the Commonwealth at Defendant's preliminary hearing.

Niether the Commonwealth nor Defendant called any witnesses to testify or offered any other evidence for our consideration at the May 24, 2022 hearing.

On May 27, 2022, we announced our decision on the record. We granted Defendant secured bail with specific non-monetary conditions. The Commonwealth made an oral motion for stay. We declined the Commonwealth's request to entertain an oral motion and directed the Commonwealth to file a written motion with this court. The Commonwealth thereafter filed its Petition for Review with the Superior Court. We issue this statement in response to the Superior Court's order of June 6, 2022 directing us to provide the reasons for our May 27, 2022 order granting bail.

To be succinct, we believe that we committed an error of law when we based our May 27, 2022 decision upon the facts stipulated to by the Commonwealth and Defendant. The Pennsylvania Supreme Court's decision in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), specifically prohibits courts, in cases where the Commonwealth is seeking the denial of bail, from deciding bail on a cold record. *Talley, at* 524. Therefore, it was error for counsel to request that the matter be submitted on stipulated facts, and it was also error for us to grant that request. Accordingly, we ask that the Superior Court vacate our May 27, 2022 order and remand the matter for hearing so that we may make the qualitative and quantitative analysis required by *Commonwealth v. Talley.*

In making the necessary qualitative and quantitative analysis, we acknowledge that the Pennsylvania Supreme Court specifically addressed the classifications of defendants that may be denied bail and the standard of proof required for such a denial in *Talley.* The *Talley Court* recognized that the opening

clause of Article I, Section 14 of the Pennsylvania Constitution establishes a right to bail for all prisoners, while the remainder of the text provides an exception to the right for three classes of defendants. To satisfy one of these exceptions, the Commonwealth must offer "evident" proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. If the Commonwealth fails to satisfy its burden of proof, the trial court cannot deny bail. *Talley,* at 513, *citing* Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829, 836 (1972).

In addressing the standard of proof necessary to deny bail to any of the three classes of defendants delineated above, the *Talley Court* specifically held:

> [W]e find that, under Article I, Section 14, "proof is evident or presumption great" constitutes its own unique standard, one that lies in the interstice between probable cause and proof beyond a reasonable doubt. Unlike the *prima facie* standard, it requires both a qualitative and quantitative assessment of the evidence adduced at the bail hearing. ..... "Proof is evident or presumption great" calls for a substantial quantity of legally competent evidence, meaning evidence that is admissible under either the evidentiary rules, or that is encompassed in the criminal rules addressing release criteria. *Citations omitted.* The Commonwealth's "feel[ings]" about evidence that it "may be able to introduce" are not relevant considerations. *Citations omitted.* And, because a court must be able to evaluate the quality of the evidence, it also cannot rely upon a cold record or untested assertions alone. *Cf. Com. ex rel. Alberti v. Boyle*, 412 Pa. 398, 195 A.2d 97, 98 (1963)(admonishing courts for deciding "this very important question on the basis of the testimony presented at" an earlier hearing).
>
> . . . . . .

> In sum, a trial court may deny bail under Article I, Section 14 when the Commonwealth's proffered evidence makes it substantially more likely than not that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. That determination requires a qualitative assessment of the Commonwealth's case. If the balance of the evidence is rife with uncertainty, legally is incompetent, requires excessive inferential leaps, or lacks any indicia of credibility, it simply is not evident proof, nor can it give rise to a great presumption, that the accused is not entitled to bail.

Com. v. Talley, at 522-526. In the event the Superior Court agrees with our request to vacate our May 27, 2022 as improvidently issued based upon a cold record, we will endeavor to adjudicate Defendant's Motion to Set Bail in conformity with the law set forth by the Supreme Court in *Talley*.

In the event the Superior Court does not vacate our order for the reasons stated above, we do not find, based upon the stipulated facts, that the Commonwealth has established by either evident proof or great presumption the premeditated, specific intent necessary for first degree murder, particularly where the death in this case is unexplained and the mechanism of injury is unknown. The stipulated facts may establish a prima facie case for first degree when all of the facts and inferences are considered in the light most favorable to the Commonwealth, but we do not find that the evidence meets the evident proof/great presumption standard required by *Talley* in order to deny Defendant bail. We acknowledge, however, that the Court's estimation of the Commonwealth's evidence may change after viewing and listening to witness testimony at hearing and making the required qualitative and quantitative assessment of that evidence prior to denying a defendant bail.

Finally, we are compelled to address the Commonwealth's assertion in paragraph 14 of their Petition for Review that we indicated that the crime at issue appeared to be a "blip on the radar" for Defendant. The Commonwealth's statement is not accurate and misrepresents the content and context of our statement. In addressing the fact that the Defendant has no prior criminal history, we stated that the current offense appears to be "the only blip on his criminal record." May 27, 2022 Notes of Testimony, page 2, lines 15-17. The statement – however in artful – was referring only to the Defendant's otherwise clean criminal history. To be clear, the court's statement in no way referred to, diminished, or made light of the gravity and seriousness of the minor victim's tragic death in this case.

By the Court,

Date: June 23, 2022

Jennifer Harlacher Sibum, Judge

cc: District Attorney (MB)
Public Defender (JL)

APPENDIX 'B'

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 1222 CR 2022**
vs.	:	
MICHAEL YARD,	:	
Defendant	:	

OPINION

This case is before us on Defendant's Motions to Set Bail and for Nominal Bail Pursuant to Rule 600 filed May 10, 2022 and October 20, 2022, respectively. We begin our analysis of the Defendant's Motions with a review of the relevant factual and procedural history of this case.

Factual and Procedural History

The Commonwealth filed a criminal complaint on or about April 8, 2022 charging Defendant with an open count of criminal homicide as a result of the death of his 3-month-old infant child. On May 10, 2022, Defendant filed a Motion to Set Bail. In his motion, Defendant conceded that the Commonwealth had established a prima facie case for involuntary manslaughter but challenged any evidentiary finding of homicide.

We held a hearing on the motion on May 24, 2022, at which time the Commonwealth and Defendant agreed to submit the matter for consideration upon stipulated facts. We offered counsel the opportunity to present evidence and testimony, but counsel instead chose to submit Defendant's bail motion to the court on facts stipulated to by counsel. The stipulated facts, in turn, were based upon the testimony and evidence presented by the Commonwealth at Defendant's preliminary hearing.

Neither the Commonwealth nor Defendant called any witnesses to testify or offered any other evidence for our consideration at the May 24, 2022 hearing.

On May 27, 2022, we announced our decision on the record. We granted Defendant secured bail with specific non-monetary conditions. The Commonwealth made an oral motion for stay. We declined to entertain the Commonwealth's oral motion and directed the Commonwealth to file a written motion with this court. Instead of filing a written motion with this Court, the Commonwealth filed a Petition for Review with the Superior Court. The Superior Court thereafter directed this court to file a statement of our reasons for our May 27, 2022 decision.

We complied with the Superior Court's order and filed our statement on June 23, 2022. In our statement, we advised the Superior Court that we believe that we committed an error of law when we based our May 27, 2022 decision upon the facts stipulated to by the Commonwealth and Defendant. The Pennsylvania Supreme Court's decision in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), specifically prohibits courts, in cases where the Commonwealth is seeking the denial of bail, from deciding bail on a cold record. *Talley, at 524*. There, the Supreme Court stated, in relevant part, as follows:

> because a court must be able to evaluate the quality of the evidence, it also cannot rely upon a cold record or untested assertions alone. *Cf. Com. ex rel. Alberti v. Boyle*, 412 Pa. 398, 195 A.2d 97, 98 (1963) (admonishing courts for deciding "this very important question on the basis of the testimony presented at" an earlier hearing).

Id. Accordingly, we asked the Superior Court to vacate our May 27, 2022 order and remand the matter so that we could hold a hearing, take live testimony, and make the qualitative and quantitative analysis required by *Commonwealth v. Talley.* We

incorporate our June 23, 2022 Statement of Reasons in its totality herein. By order dated July 14, 2022, the Superior Court granted our request, vacated our May 27th bail order, and remanded the matter for further hearing.

Once the case was remanded back to us, we issued an order on August 15, 2022 scheduling a hearing on Defendant's Motion to Set Bail for October 25, 2022. On October 20, 2022, Defendant filed a Motion for Nominal Bail Pursuant to Rule 600. We scheduled hearing on Defendant's nominal bail motion for October 31, 2022.

The hearing on Defendant's Motion to Set Bail proceeded to occur as scheduled. The Commonwealth did not present any witnesses or testimony at the hearing. Instead, the Commonwealth sought only to admit the transcript and audio recording of the Defendant's preliminary hearing, the victim's autopsy report, and the criminal complaint. We took the matter under advisement.

On October 31, 2022, we held hearing on Defendant's Motion for Nominal Bail Pursuant to Rule 600. The parties agreed that if we found that the Commonwealth has failed to establish by either evident proof or great presumption the premeditated, specific intent necessary for first degree murder, the Defendant was entitled to nominal bail. We took Defendant's nominal bail motion under advisement.

Discussion

The Pennsylvania Supreme Court's decision in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), specifically prohibits courts, in cases where the Commonwealth is seeking the denial of bail, from deciding bail on a cold record.

*Talley, a*t 524. In making the necessary qualitative and quantitative analysis, the Pennsylvania Supreme Court specifically addressed the classifications of defendants that may be denied bail and the standard of proof required for such a denial in *Talley.* The *Talley* Court recognized that the opening clause of Article I, Section 14 of the Pennsylvania Constitution establishes a right to bail for all prisoners, while the remainder of the text provides an exception to the right for three classes of defendants. To satisfy one of these exceptions, the Commonwealth must offer "evident" proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. If the Commonwealth fails to satisfy its burden of proof, the trial court cannot deny bail. *Talley,* at 513, *citing Com. v. Truesdale*, 449 Pa. 325, 296 A.2d 829, 836 (1972).

In addressing the standard of proof necessary to deny bail to any of the three classes of defendants delineated above, the *Talley Court* specifically held:

> [W]e find that, under Article I, Section 14, "proof is evident or presumption great" constitutes its own unique standard, one that lies in the interstice between probable cause and proof beyond a reasonable doubt. Unlike the *prima facie* standard, it requires both a qualitative and quantitative assessment of the evidence adduced at the bail hearing. ..... "Proof is evident or presumption great" calls for a substantial quantity of legally competent evidence, meaning evidence that is admissible under either the evidentiary rules, or that is encompassed in the criminal rules addressing release criteria. *Citations omitted.* The Commonwealth's "feel[ings]" about evidence that it "may be able to introduce" are not relevant considerations. *Citations omitted.* **And, because a court must be able to evaluate the quality of**

> **the evidence, it also cannot rely upon a cold record or untested assertions alone. *Cf. Com. ex rel. Alberti v. Boyle*, 412 Pa. 398, 195 A.2d 97, 98 (1963) (admonishing courts for deciding "this very important question on the basis of the testimony presented at" an earlier hearing).** [Emphasis added]
>
> . . . . . .
>
> In sum, a trial court may deny bail under Article I, Section 14 when the Commonwealth's proffered evidence makes it substantially more likely than not that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. That determination requires a qualitative assessment of the Commonwealth's case. If the balance of the evidence is rife with uncertainty, legally is incompetent, requires excessive inferential leaps, or lacks any indicia of credibility, it simply is not evident proof, nor can it give rise to a great presumption, that the accused is not entitled to bail.

Com. v. Talley, at 522-526.

Despite our findings as set forth in our June 23rd Statement of Reasons in which we specifically 1) cited to *Talley* and its prohibition against denying bail based upon a cold record, 2) requested that the Superior Court vacate our May 27th bail order as improvidently granted based upon a cold record, 3) requested the Superior Court remand the matter for hearing so that we may make the qualitative and quantitative analysis required by *Commonwealth v. Talley,* and, perhaps most importantly 4) we unequivocally stated in our June 23rd Statement of Reason filed that in deciding Defendant's Motion to Set Bail, we must view and listen to live witness testimony at the hearing, the Commonwealth did not present any witnesses or testimony at the hearing. Instead, the Commonwealth sought only to admit the

transcript and audio recording of the Defendant's preliminary hearing, the victim's autopsy report, and the criminal complaint. The Commonwealth having presented only a cold record for the court's consideration with respect to Defendant's Motion to Set Bail, we find that under *Talley*, the Commonwealth has failed to present "evident" proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. *Talley,* at 513, *citing Truesdale*, 296 A.2d at 836. Because the Commonwealth has failed to satisfy its burden of proof, we cannot deny bail. *Id.* Accordingly, we enter the following order.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 1222 CR 2022**
	:	
vs.	:	
	:	**MOTION TO SET BAIL**
MICHAEL YARD,	:	
	:	**MOTION FOR NOMINAL BAIL**
Defendant	:	

ORDER

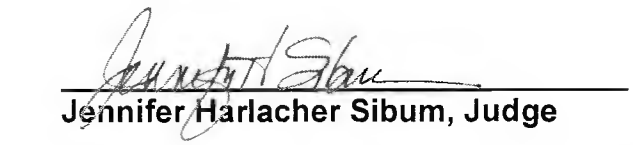
AND NOW, this 25th day of January, 2023, after hearing on Defendant's Motion to Set Bail and Motion for Nominal Bail Pursuant to Rule 600, and for the reasons set forth in the attached Opinion, it is **ORDERED** that the Motions are **GRANTED**.

Defendant's bail is set at One Dollar ($1.00). As special conditions of Defendant's bail, he shall:

1. Be placed on Pre-Trial Services and shall contact Pre-Trial Services immediately upon his release at 570-807-0427.
2. Have no contact with minor children, with the exception of his child(ren), pursuant to the conditions set forth below.
3. Have no unsupervised contact with his child(ren).
4. Shall be permitted to have supervised contact with his children at JusticeWorks, at such times and such days as may be arranged through JusticeWorks. Defendant shall pay all associated costs.
5. Shall not reside in the marital home or in a home where minor children reside.

6. Defendant's residence shall be pre-approved by Pre-Trial Services, and shall not be in a hotel or motel without kitchen facilities.
7. Shall be prohibited from leaving his residence without prior approval of Pre-Trial Services.
8. Shall wear a GPS ankle monitor, and pay the associated costs.
9. Shall not possess or reside in a home where firearms are located.
10. Shall be prohibited from utilizing any drugs or alcohol, except for those medications prescribed to the Defendant by a treating physician.
11. Shall be subject to random drug testing by Pre-Trial Services.
12. Shall undergo a mental health evaluation and comply with all treatment recommendations, including those for the taking of prescribed medications.
13. Shall remain in Monroe County, Pennsylvania.
14. Shall sign any and all releases requested by Pre-Trial Services.
15. Shall surrender any passport that may be issued in his name and/or to him.

By the Court,



Jennifer Harlacher Sibum, Judge

Filed
01/25/2023 4:47PM
Court of Common Pleas

cc: District Attorney (MB)
Public Defender (JL)