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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

M.M. 2023 NO. 11

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

MICHAEL NOEL YARD

BRIEF FOR AMICUS CURIAE OF THE DEFENDER ASSOCIATION OF PHILADELPHIA AND THE PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA IN SUPPORT OF MICHAEL YARD

Commonwealth Appeal From The January 25, 2023 Order Of The Common Pleas Court Of Monroe County, at No. 1222 Criminal 2022, Granting A Motion For Bail.

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September, 2023

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Defender Association of Philadelphia

The Defender Association of Philadelphia is a private, non-profit corporation which represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to ensure a high standard of representation and to prevent the abridgement of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

Public Defender Association Of Pennsylvania

The Public Defender Association of Pennsylvania (the "PDAP") is a Pennsylvania non-profit corporation whose membership is comprised of over a thousand public defenders employed full or part time in the sixty-seven county public defender offices of this Commonwealth. The PDAPA was incorporated in 1971.

PDAP is dedicated to securing a fair justice system and ensuring high quality legal representation for people facing loss of life, freedom or

family. PDAP's mission is to provide tools, strategies, mutual support, training and information to Public Defender Offices; to be the voice of public defense; and to promote best practices in the leadership, management, and administration of justice in Pennsylvania. The members of PDAP represent many people charged with criminal offenses who would be impacted by a decision of the Court in this case. The PDAP has previously participated in numerous cases before this Court.

ARGUMENT

1. For The Commonwealth To Be Entitled To A Preventive Detention Order For Someone Facing A Potential Life Sentence It Must Establish That The Proof Is Evident Or Presumption Great, With The Same Burden Of Proof As Held By This Court In *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021).

Before 1998, Article I, Section 14 provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great."

In 1998 the voters decided to ratify a proposed amendment, that now provides in pertinent part:

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

In *Talley*, this Court considered a case where the Commonwealth sought preventive detention before trial for the "safety of any person and the community" ("dangerous") provision. The issue before the Court was to construe the Commonwealth's burden of proof for the "proof is evident or presumption is great" requirement to hold a defendant without bail. The Commonwealth concedes, as it did in the lower court that a

defendant facing a potential life sentence offense is entitled to bail under the amended Article I, Section 14 provision. *See, e.g.,* Commonwealth Brief, 14-29 (arguing what evidence should be admissible at the bail hearing). However, it contends that this Court's holdings in *Talley* are irrelevant at the bail hearing for someone facing a potential life sentence because the "proof is evident or presumption is great" burden does not apply to someone facing a possible life sentence. Its claim is that the plain language of the amended bail provision, and legislative intent show that the proof is evident or presumption is great requirement only modifies the last part of the Amendment, the dangerous provision, not the life sentence provision before it. *See, e.g.,* Commonwealth Brief*,* 1-7.

The plain language argument, depending solely on a principle of grammar, is meritless. *See, e.g.,* Commonwealth Brief, 2-6. The language is not plain. That is apparent because the Attorney General who explained the Amendment to the voters, the voters who ratified it, and this Court all have viewed the Amendment differently, and contrary to the construction urged by the Commonwealth.

The Commonwealth relies on a general rule of grammar that is not controlling here. The grammar principle is that language of qualifying

words apply only to words immediately preceding them. The principle should not be woodenly applied when "the intent or meaning of the context or disclosed by an examination of the entire act" shows that grammar should not prevail. *Commonwealth v. Packer*, 798 A.2d 192, 198 (Pa. 2002), quoting *John Hancock Property & Casual Ins. Co. v. Commonwealth Ins. Dep't*, 554 A.2d 618, 622 (Pa. Cmwlth. 1989).

In determining the proper construction of a constitutional provision this Court has looked to "our constitutional history and case law." *Blum v. Merrell Dow Pharmaceuticals*, 626 A.2d 537, 538 (Pa. 1993). As this Court emphasized in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), in analyzing an Article I, Section 8 issue, prior case law and the values underlying previous decisions, provide guidance for how to interpret a Pennsylvania constitutional provision. *Id.* at 206-08. Most recently, and highly relevant, is *Talley*. Before deciding bail issues under Article I, Section 14, this Court looked to the "text and history, in addition to any relevant decisional law and policy considerations . . . ." *Talley,* 265 A.3d at 513.

In *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1976), over fifty years ago, this Court examined the pre-amended Article I, Section 14's

history and decisional law. *Truesdale* held that a person charged with a life sentence offense had the same right to bail as any other offense. The "proof is evident or presumption great" provision for limiting the right to bail applied only to capital offenses. *Id.* at 831-32, 834-35. In reaching this conclusion the Court examined the history of the right to bail in Pennsylvania and its strong reliance on the presumption of innocence, and the related general abhorrence for the notion of preventive detention without bail. *Id.* at 834-35.

In *Talley*, quoting *Truesdale,* this Court stated that Article I, Section 14's bail provision then, as now

> embodies three core tenets of our system of criminal justice: "(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to present his defense."

Talley, 265 A.3d at 499, quoting *Truesdale,* 296 A.2d 834-35.

The Commonwealth, in addition to relying on grammar to construe Article I, Section14, relies on an amended 42 Pa.C.S. § 5701, stating that "[t]his amendment makes clear the legislative intent in drafting the current iteration of Article I, Section14." Commonwealth Brief, 7 (footnote omitted). However, this statute that was amended in 2009 by a later

legislature does not reflect on any intent 11 years earlier in 1998 when the amended Article I, Section 14 was adopted by the voters. Further, because of separation of powers, the statute is irrelevant to this Court's construction of the amended Article I, Section14. The legislature "may not direct a statute to be construed in a certain way" by this Court. *Commonwealth v. Sutley*, 378 A.2d 780, 784 (Pa. 1977), quoting *Leahy v. Farrell*, 66 A.2d 577, 579 (Pa. 1949).

The Commonwealth's focus on legislative intentions is misplaced "because the emphasis in constitutional construction is upon the intent of the ratifying citizenry." *In Re Bruno*, 101 A.3d 635, 660 (Pa. 2014). "[C]constitutional provisions are not to be read in a strained or technical manner. Rather they must be given the ordinary, natural interpretation the ratifying voters would give them" *Commonwealth ex rel. Paulinsky v. Isaac*, 397 A.2d 760, 765 (Pa. 1979).

The natural interpretation for the ratifying voter would depend on the explanation of the proposed amendment by the Attorney General. The Attorney General is required to submit a plain English statement to the voters that indicates the purpose, limitations, and effects of the ballot question. 25 P.S. § 621.1. The Attorney General complied and released

the following "plain English statement" along with the proposed 1998 amendment of Article I, Section 14.

> The purpose of the ballot question is to amend the Pennsylvania Constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail. Presently, the Constitution allows any person accused of a crime to be released on bail unless the proof is evident or presumption great that the person committed a capital offense. A capital offense is an offense punishable by death. The Pennsylvania Supreme Court has ruled that a person accused of a crime that is not a capital offense may be denied bail only if no amount or condition of bail will assure the accused's presence at trial.
>
> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.
>
> The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or

> life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Commonwealth v. Grimaud, 865 A.2d 835, 842-43 (Pa. 2005) (quoting plain English statement).

In *Grimaud*, this Court rejected a challenge to this plain English statement, contending that it was misleading and insufficient. *Id.* at 843-44. "The Attorney General here provided a sufficient explanation of the purpose, limitations, and effects of the bail amendment and thus complied with statutory requirements." *Id.*

The plain English statement is clear and unambiguous. It explained to the voters more than once that the amendment would add two new categories of cases to the proof is evident or presumption is great standard for capital cases: (1) life imprisonment charges and; (2) where there is a showing of a need to protect any person or the community.[1]

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[1] The current Attorney General now disputes that explanation given to the voters by the Attorney General at the time of the proposed amendment. She contends that the grammatical structure dictates that the amendment was intended to make bail in life cases "absolutely unavailable." Attorney General Amicus Brief, 3. The party, the Commonwealth, has not raised this issue, therefore it is well settled that

In accordance with the Attorney General statement to the voters, and the understanding of the voters in ratifying the amendment, this Court in *Tally* concluded that the proof is evident provision now applies to those facing possible life imprisonment. After quoting the amended Article I, Section 14, this Court explained what the amended provision requires from the Commonwealth for pre-trial preventive detention without bail.

> The opening clause 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. *Truesdale*, 296 A.2d at 836.

Talley, 265 A.3d at 513.[2]

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amicus may not. *E.g., Banfield v. Cortes*, 110 A.3d 155, 172 n.14 (Pa.2015). In any event the issue is meritless.

[2] The Commonwealth asks this Court to ignore its interpretation of the amended Article I, Section 14 made just two years ago in *Talley*. It characterizes the analysis as mere "obiter dictum." Commonwealth Brief, 12-14. The Court should not consider this *Talley* ruling as dictum because the interpretation was integral to the decision of the case. In any event, it is not "obiter dicta" made "by the way," but rather judicial dictum entitled to respect. *Lewis v. Paine*, 56 A.2d 317, 319 (Pa. 1903). Although not binding, this Court has noted that a court should consider "very weighty judicial

Justice Mundy dissented, but with respect to what cases "proof is evident and presumption great" applied, interpreted the amended bail provision identically to the majority. "This amendment could have required a different standard to the two new categories of nonbailable prisoners; but it specifically did not." *Id.* at 540 (Mundy, J., dissenting).

The Court should reject the Commonwealth's contention that bail can be denied to those facing life sentences without evident proof or great presumption. Likewise, the Court should not accept its argument that there should be a lower burden of proof than required by *Talley*.

In *Tally*, this Court, after an extensive analysis, rejected a *prima facie* standard as inadequate for the Commonwealth's burden to establish that the proof is evident or presumption great to warrant preventive detention. *Id.*, 265 A.3d at 516-525. The Court held that the Commonwealth's evidence "must be such that it persuades the bail court that it is **substantially more likely than not** that the accused is nonbailable, which is just to say that the proof is evident or presumption great." *Id.* at 524-25 (footnote omitted).

"The Commonwealth recognizes that the Court in *Talley* rejected

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dictum" when deciding a case. *Lindenmuth v. Safe Harbour Water Power*, 163 A. 159, 161 (Pa. 1932).

the use of a *prima facie* standard." Commonwealth Brief, 16. Nevertheless it argues at length that there should be a *prima facie* standard when considering denying bail for those with charges carrying the potential for life imprisonment. Commonwealth Brief, 16-20. There is no supportable rationale for applying differing burdens to the three categories where bail may be denied. The Court explained in *Talley* that the "proof is evident" standard's purpose is to prevent the denial of bail in weak or marginal cases. *Id.* at 515. That concern applies to all three categories, leading this Court to conclude that the same burden should apply to all three categories.

> 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 can not be abated using any available bail conditions.

Id. at 525-26 (footnote omitted).

The Court should rule that its holdings in *Talley* apply where the Commonwealth seeks to deny bail when a defendant is accused of a crime with a potential life sentence.

2. As This Court Held In *Talley*, At A Bail Hearing A Court Should Consider Only Legally Competent Credible Admissible Non-Hearsay Evidence For The Material Factual Matters Necessary To Support A Commonwealth Claim For The Pre-Trial Denial Of Bail.

In essence, the Commonwealth asks this Court to ignore its decision in *Talley* and accept arguments that this Court already rejected two years ago. The Commonwealth urges that a bail hearing be treated the same as a preliminary hearing, with a *prima facie* standard of proof, and the same admissibility rules.[3] Further, if a preliminary hearing has already been held, it argues that the prior testimony there should be admissible at the bail hearing. In essence, the bail hearing would be a duplicative formality after a preliminary hearing. Commonwealth Brief, 14-20, 24-26. For several reasons articulated by this Court in *Talley,* the Court should again emphasize that the bail hearing must be meaningful "when the Commonwealth seeks to take the extreme step of denying the accused his or her state constitutional right to bail altogether." *Talley*, 265 A.3d at 525.

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[3] What kinds of hearsay evidence are admissible at a preliminary hearing is an open issue under Pa.R.Crim.P. 542. The Rule gives some examples, such as "damage to, or value of property" in establishing the elements of an offense (Rule 542(E)), but unanswered, and pending in this Court, is the issue of whether hearsay evidence may be utilized by the Commonwealth to establish identity, that the defendant committed the crime. *See Commonwealth v. Ronald Harris*, No. 31 EAP 2022.

At a preliminary hearing, the Commonwealth's burden is only to establish a *prima facie* case, and a judge may not consider the credibility of the Commonwealth's witnesses. Further, the judge must view the evidence in a light most favorable to the Commonwealth. If the individual is held for trial because the judge determines that the Commonwealth established a *prima facie* case the individual still has the right to seek his release on bail pending trial.

Talley definitively rejected this preliminary hearing legal model.

> Put simply, in scrutinizing whether the accused can be denied the right to bail, the Commonwealth bears a burden of both production and persuasion. Conversely, a *prima facie* standard, described as mandating that the evidence and the inferences drawn therefrom only supports each element of the offense, purely is a burden of production. In assessing the Commonwealth's case, preliminary hearing courts are precluded from evaluating the persuasiveness of its evidence. *See Commonwealth v. Perez,* 249 A.3d 1092, 1102 (Pa. 2021) ("The weight and credibility of the evidence are not factors at the preliminary hearing stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense.") Article I, Section 14 plainly requires the court to consider the quality of the evidence offered to support the denial of bail.

Talley, 265 A.3d at 517 (cleaned up).

Even before *Talley*, in *Commonwealth ex rel. Alberti v. Boyle*, 195 A.2d 97 (Pa. 1963), this Court held that at a hearing where the Commonwealth has to establish that the proof is evident or presumption great to deny bail, the Commonwealth may not rely on testimony presented at a prior hearing (there a coroner inquest). *Id.* at 98.[4] In *Talley*, this Court reiterated that the Commonwealth cannot rely "upon a cold record . . . ." *Talley*, 265 A.3d at 524.

In *Talley*, this Court emphasized that the bail denial hearing is adversarial. Credibility is at issue. And, the Commonwealth must rely on legally admissible "quality" evidence. "[T]he Commonwealth cannot sustain its burden at a bail hearing with hearsay or other legally incompetent evidence . . . ." *Id.* at 519. "[T]he evidence must be legally competent, meaning evidence that is facially admissible." *Id.* "[T]he combination of the evidence must be reasonable, credible, and of solid value." *Id.* at 525.

In the face of these *Talley* rulings the Commonwealth puts

[4] There is nothing reliable about prior testimony, which is hearsay. That is why it is not one of the hearsay exceptions where unavailability of the declarant is not required because the circumstances in which the statement was made are indicative of reliability. *See* Pa.R.Ev. 803. The prior testimony hearsay exception is a rule of necessity requiring a showing of unavailability of the declarant. The prior testimony is only admissible when it is fair because of a prior full and fair opportunity to cross-examine the witness. *See* Pa.R.Ev. 804; 804(b)(1) and Comment.

misplaced reliance on the following *Talley* footnote in urging this Court to treat the bail denial hearing like a preliminary hearing. Commonwealth Brief, 25-26.

> 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 524, n.35 (emphasis added).

In context, and by itself, this passage permits hearsay expert reports, and similar hearsay evidence not critical to the Commonwealth's burden. However, the Commonwealth must submit "admissible evidence" "in order to establish the material factual claims" when seeking the pre-trial denial of bail. *Id.* The Court demands no less when the result of a bail denial is to hold a presumptively innocent person in lengthy pre-

trial imprisonment.[5]

On the subsidiary issue of factual stipulations, the Commonwealth is correct that they may be admissible. However, it is the court that determines under the circumstances whether there has been a stipulation in effect for that proceeding, and if so, the weight it should be given. *See, e.g., David v. Commonwealth*, 598 A.2d 642, 645 (Pa. Cmwlth. 1991) ("A stipulation does not become evidence in a case unless it is offered and received into evidence in a proceeding to determine the facts of a controversy.")[6]

Mr. Yard can be held for trial without bail only if the Commonwealth presents competent admissible evidence in a potential life sentence case that is substantially more likely than not that he committed an offense that could result in a sentence of life imprisonment. *Talley*.

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[5] This Court has explained that the reason hearsay evidence is inadmissible under the Court's Rules (Pa.R.E. 802) is because a "hearsay statement lacks guarantees of trustworthiness fundamental to the Angelo-American system of jurisprudence." *Commonwealth v. Smith*, 681 A.2d 1288, 1290 (Pa. 1996).

[6] Because it is the court, not the parties that determine admissibility, a court can reject a stipulation to evidence that it finds to be inadmissible. For example, the results of a lie detector test.

CONCLUSION

This Court should hold that the Court's holdings in *Talley* regarding the Commonwealth's burden of proof and the admissibility of evidence at a bail denial hearing under Article I, Section 14 are the same here where the Commonwealth seeks pre-trial detention for a presumed innocent defendant who is accused of a crime with a possible life sentence.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 531

I do hereby certify on this 27th day of September, 2023, that the Brief For Amicus Curiae Of The Defender Association Of Philadelphia And The Public Defender Association Of Pennsylvania In Support Of Michael Yard filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 3,775 as counted by Microsoft Word.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

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

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October 6, 2023

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Re: Commonwealth. V. Michael Yard
No. 11 MM 2023
Trial Court Docket No: CP-45-CR-0001222-2022

Dear Ms. Dreibelbis:

This is a statement pursuant to Pa.R.A.P. 531 (b)(2), inadvertently omitted from our statement in our amicus brief.

The Defender Association of Philadelphia and the Public Defender Association of Pennsylvania are non-profit organizations. No other person or entity outside our organizations paid in whole or in part for the preparation of the amicus brief or authored in whole or any part the amicus brief.

Respectfully submitted,

/s/
Leonard Sosnov
Assistant Defender

LS:mj