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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAP 2021 NO. 14

COMMONWEALTH OF PENNSYLVANIA

VS.

DANIEL GEORGE TALLEY,
Appellant

BRIEF OF AMICUS CURIAE DEFENDER ASSOCIATION OF PHILADELPHIA ON BEHALF OF APPELLANT DANIEL GEORGE TALLEY

Appeal From The July 17, 2020 Judgment Of The Superior Court Of Pennsylvania At No. 2627 EDA 2018, Affirming The Order Of The Court Of Common Pleas, Montgomery County, Criminal Division, Entered On August 24, 2018, At No. CP-46-CR-0005241-2017.

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INTEREST OF THE AMICUS CURIAE

The Defender Association of Philadelphia is an independent, not-for-profit corporation which represents a substantial percentage of the criminal defendants in Philadelphia at trial, at probation and parole revocation proceedings, and on appeal. The Defender Association also has a significant *amicus curiae* presence within the Commonwealth, and specifically in cases before this Court. In this latter role, the Defender Association attempts to present a high standard of legal analysis so as to aid this Court in its disposition of difficult and complex legal questions that define the constitutional and/or other legal rights or persons in Pennsylvania.

The Defender Association of Philadelphia is not aware of any person or entity other than the Defender Association who (i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part the *amicus curiae* brief.

SUMMARY OF ARGUMENT

Article I Section 14 of the Pennsylvania Constitution establishes a presumption that most people are bailable, and authorizes pre-trial detention only in a few specifically enumerated circumstances (relating to the magnitude of the criminal offense or public safety) "when the proof is evident or presumption great." This standard of proof, in modern terminology, equates to clear and convincing evidence. Clear and convincing evidence is the proper standard under the plain meaning of the words in the constitutional text, and is consistent with how many other states have interpreted "proof is evident or presumption great" in their own state constitutional provisions relating to nonbailability.

Clear and convincing evidence is also the appropriate standard – especially so in the "public safety" context at issue here – due to the magnitude of a defendant's interest in pretrial liberty for what can be a considerable period of time, and that detention is premised on a future crime (or future anti-social conduct) that has not yet been and may never be committed, and that the ultimate determination is based on inherently speculative future predictions. This is fertile ground for erroneous determinations. To mitigate this very real risk of error, the Commonwealth should bear the burden of demonstrating nonbailability by a strong showing.

Finally, if this Court concludes that the text of Article 1, Section 14 does not plainly require proof by clear and convincing evidence, or that its meaning is

ambiguous, it should apply the canon of constitutional avoidance. Interpreting Article 1, Section 14 to require a clear and convincing burden of proof avoids the significant federal constitutional tension that would be created by a holding that a lesser burden of proof applies. The United States Supreme Court, as well as this Court, has repeatedly held that whenever the state seeks a significant deprivation, more than mere loss of money, the federal Due Process Clause requires proof by clear and convincing evidence.

ARGUMENT

1. NONBAILABILITY UNDER ARTICLE I SECTION 14 OF THE PENNSYLVANIA CONSTITUTION MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

A.

This Court granted allocatur on the following question:

> Is the Commonwealth required under Art. 1 [S]ection 14 of the Pennsylvania Constitution to produce clear and convincing evidence at a bail revocation hearing in order to meet its burden of proof that there is "no condition or combination of conditions other than imprisonment that will reasonably assure the safety of any person and the community when proof is evidence or presumption great"?

As far back as 1776 (and adjusting for purely technical spelling and punctuation changes), the Pennsylvania Constitution provided that:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great…

Pennsylvania Constitution, Article I Section 14 (pre-1998 amendment version). In 1998, Section 14 was amended to add two new classes of nonbailable prisoners. It now reads:

> 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 evidence or presumption great; . . . .

Pa. Const., Art. I Sec. 14 (current post-amendment version).

Although the 1998 amendment added two additional classes of nonbailable prisoners, the evidentiary standard required for nonbailability remained unaltered: "the proof is evident or presumption great."

Where the same evidentiary standard (i.e. "proof is evident or presumption great") modifies three categories of nonbailability, this standard should have the same meaning for each of the three categories.[1]

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[1] Amicus notes that consistent with the aforementioned self-evident recognition, the Attorney General's "plain English statement" submitted to the electorate for the 1998 constitutional amendment explained as follows:

> 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.

Grimaud v. Commonwealth, 865 A.2d 835, 843 (Pa. 2005) (emphasis supplied).

This Court referenced, in In re Bruno, 101 A.3d 635, n. 13 (Pa. 2014), academic commentary by then Justice Saylor, who wrote that

> [T]here is some degree of consensus [among courts interpreting state constitutions] that the overarching task is to determine the intent of voters who ratified the constitution."

[Footnote Continued on next page]

B.

This Court's prior analysis of the meaning of Article I Section 14's language ("proof is evident or presumption great") has been, respectfully, quite cursory.

In Commonwealth ex rel. Alberti v. Boyle, 195 A.2d 97 (Pa. 1963), after acknowledging that there were no appellate decisions construing this provision, this Court stated (without any studied analysis) that

> [T]he words in Section 14 'when proof is evident or presumption great' mean that if the Commonwealth's evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused. It follows that in the absence of such evidence, the prisoner is entitled to bail.

Id. at 98. But the waters are muddied in Alberti because the actual holding of the case does not relate to the standard for determining nonbailability, but rather to the source of the testimony used to make that determination – and this Court condemned the practice of using the testimony presented at the coroner's inquest as the factual basis for the Article 1 Section 14 determination.

And in Commonwealth v. Farris, 278 A.2d 906 (Pa. 1971), this Court simply concluded, without any analysis or citation to authority, that the trial court did not

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The Attorney General's "plain English statement" is unparalleled for the insight that it gives into the ratifying voters intent in relation to symmetry in burdens of proof for each of the three categories of nonbailable prisoners.

err in refusing bail "[s]ince evidence offered at the preliminary hearing . . . established a prima facie case of murder in the first degree . . . ." Id. at 907.

The meaning of the phrase "proof is evident or presumption is great" has never received the analysis that it deserves. And it is problematic to equate this phrase with the quantum of evidence necessary at a preliminary hearing to bind a case over for trial. To this extent (at least in the post-preliminary hearing context of capital and life imprisonment cases) it is effectively surplusage because a *prima facie* case is independently necessary before a case may proceed to trial. Construing textual language in a manner that creates surplusage is disfavored. 1 Pa.C.S. 1922(2). And in the context of "public safety" nonbailability, it is hard to fathom exactly how to assess this concern in terms of binding a case over for trial. That is because the precipitating event is not a previously committed crime but rather only a predicted but not yet consummated crime (or anti-social act), and the absence of bail conditions believed to effectively guard against this. In short, the "public safety" concern ill fits a preliminary hearing *prima facie* analysis.

And neither Alberti nor Farris address what is most important and most revealing – the plain meaning of the language in Article I Section 14. The phrase "proof is evident or presumption great" includes significant linguistic clues as to its meaning by its choice of the descriptors: "evident" and "great." "Evident" means "plain or obvious; clearly seen or understood." Oxford English Dictionary (May 12,

2021); https://www.lexico.com/en/definition/evident. "Great" means "of an extent, amount, or intensity considerably above the normal or average." Oxford English Dictionary (May 12, 2021); https://www.lexico.com/en/definition/great. So with these words alone, the Section 14 standard of proof must be plain, obvious, and clearly seen or understood, and to the extent that any presumption is implicated, it must have a force considerably above what would be normal or average. This aligns closely to the clear and convincing evidence standard, which this Court has defined thusly:

> The standard of clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Matter of Sylvester, 555 A.2d 1202, 1203-4 (Pa. 1989).

C.

Fortunately, like in Pennsylvania, many state constitutions (or a state constitutional analogue in the case of the Virgin Islands) have long used the precise language of "proof is evident or presumption great" as their standard for determining nonbailablity. And many of these states have analyzed these provisions and equated them with a clear and convincing evidence standard. Consideration of how other states have interpreted this language is informative.[2]

[2] Many of our sister state constitutional provisions addressing the meaning of "proof is evident or presumption great" so as to authorize nonbailability, do so in provisions focused on the nature

[Footnote Continued on next page]

Two reported decisions have undertaken a survey as to how other states have interpreted "proof is evident or presumption great."

In Browne v. People, 50 V.I. 241 (Virgin Islands 2008), the Virgin Islands Supreme Court interpreted Section 3 of the Revised Organic Act (which was enacted by the United States Congress) and is roughly the equivalent of a state constitution for the territory. The Court held that the ROA places the burden on the Government to prove nonbailability by clear and convincing evidence. Id. at 263. In coming to this conclusion, it noted:

> Those jurisdictions which have defined the phrase "proof is evident or the presumption is great" have given it various meanings. See generally Simpson, 85 P.3d [478, 487 (Ariz. Ct. Appl. 2004)] ("The history of the phrase alone suggests that it is unique and that it establishes its own standard since there is no comparison for recourse."). A survey of case law demonstrates that there are three general approaches to defining the evident proof standard. On the whole, states have defined the standard as requiring either probable cause, something akin to clear and convincing evidence, or evidence beyond a reasonable doubt.
>
> Although articulating the standard in various ways, the overwhelming majority of states require evidence that is greater than probable cause but less than beyond a reasonable doubt. See supra n. 22 (noting that at least seventeen states have adopted a middle standard). Of these states, four explicitly adopt a "clear and convincing" standard and four adopt a very similar standard. See Simpson 85 P.3d at

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of the underlying offense. But as indicated, supra, the phrase "proof is evident or presumption great" should convey the same necessary degree of confidence by the fact-finder in the correctness of the determination – regardless of what it is that must be determined.

492 (“plain and clear ... [t]he proof must be substantial [in Arizona]”); In re Nordin, 143 Cal.App.3d 538, 192 Cal.Rptr. 38, 40 (Cal.Ct.App.1983) (“clear and convincing” evidence); Application of Haynes, 290 Or. 75, 619 P.2d 632, 636 (Or.1980) (“the evidence should at least be clear and convincing”); Nevada v. Teeter. 65 Nev. 584, 200 P.2d 657, 667-68 (Nev.1948) (“clear and obvious” evidence); Brill v. Gurich, 965 P.2d 404, 408 (Okla.Crim.App.1998) (clear and convincing evidence) [. . .]; Nguyen v. Texas, 982 S.W.2d 945, 947 (Tex.Crim.App.1998) (“clear and strong evidence” required in Texas). Such a position is consistent with the fact that “[t]he word ‘evident’ is construed to mean manifest, plain, clear, obvious, apparent, and notorious, and unless it plainly, clearly, and obviously appears by the proof that the accused is guilty of a capital crime, bail should be allowed.” 8A Am. Jur.2d Bail and Recognizance § 48 (2008).

Additionally, a clear and convincing standard is appropriate because, if the term “proof is evident or the presumption is great” is interpreted to require mere probable cause to believe that the defendant is guilty of first degree murder, “the guarantee would add nothing to the accused’s rights, since a suspect may not be held without a showing of probable cause in any instance." Fontaine v. Mullen, 117 R.I. 262, 366 A.2d 1138, 1141 (R.I.1976); see also 5 V.I.C. § 3562. A probable cause interpretation, adopted only by Maine, gives inadequate weight to a defendant's fundamental right to liberty and to the vital presumption of innocence. See Vermont v. Buff, 151 Vt. 433, 563 A.2d 258, 263 (Vt.1989); see also [United States v. Salerno, 481 U.S. [739, 755 (1981)] (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). On the other hand, requiring proof beyond a reasonable doubt at the pretrial bail stage of a criminal proceeding would also be imprudent. As the Rhode Island Supreme Court succinctly explained:

> Not only is it highly improbable that the framers intended the bail hearing to determine the precise question to be answered at the trial itself, but such duplication obviously wastes judicial resources and might prejudice a defendant's opportunity for a fair trial. If it becomes common practice to deny bail only after a judge has determined that the evidence produced at the bail hearing demonstrates guilt beyond a reasonable doubt, and the jury learns that a defendant has been denied bail, they may be highly predisposed to convict.
>
> Fontaine, 366 A.2d at 1142.

Browne, 50 V.I. at 260-262 (footnotes omitted).

Simpson v. Owens, 85 P.3d 478 (Ariz. Ct. App. 2004) likewise surveyed the landscape, and placed Arizona within the category of states "requiring some variation of clear and convincing or clear and strong evidence that the accused committed the crime" Id. at 488. The Court specified that:

> We conclude that the phrase "proof is evident or presumption great" provides its own standard: the State's burden is met if all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated…

Id. at 491.

There are many other notable examples of States that apply strong burdens to their similarly worded constitutional exceptions to bailability when "proof is evident

or presumption great." See State vs. Kauffman, 108 N.W. 246 (S.D. 1906) ("plain and palpable"); Ex Parte Dawson, 190 S.W. 2d 465 (Mo. Ct. App. 1945) ("evidence is clear and strong, leaving a well-guarded and dispassionate judgment to the conclusion…"); Washington v. State, 133 So. 2d 392 (Ala. Ct. App. 1961) ("evidence is clear and strong and would lead to a well-guarded and dispassionate judgment reasonably compelling the conclusion…"); Ford v. Dilley, 156 N.W. 513 (Ia. 1916) ("Putting it concretely, proof of capital guilt is evident only when the evidence, on its face and unexplained, excludes any other reasonable conclusion. The presumption of such guilt is great when the circumstances testified to are such that inference of guilt naturally to be drawn therefrom is strong, clear, and convincing to the unbiased judgment, and is such as to exclude all reasonable probability of any other conclusion." Id. at 532).

It is fair to say that state constitutions guaranteeing bailability unless, as to some consideration, "proof is evident or presumption great," have to an appreciable degree interpreted this phrase to mean what is contemporarily referred to as clear and convincing evidence.

D.

A ruling that Article I Section 14 textually articulates a clear and convincing evidentiary standard is all the more appropriate considering that even in the absence

of the "proof is evident or presumption great" language, a clear and convincing standard would nevertheless be the proper one for this Court to announce.

Article I Section14, and in particular the "public safety" provision at issue here, is noteworthy in several regards.

First, it allows for a total loss of liberty pending trial, and this pretrial detention can be of considerable duration.[3]

Second, a "public safety" detainee in some real sense is not being held in custody just for committing the actual crime that is the basis for the upcoming trial. Rather, detention is for protection against a future crime (or perhaps a future anti-social act) that has not yet been, nor may ever be, committed.

Third, detention is based on **predictions** of future criminal (or perhaps future anti-social) conduct and **predictions** as to inadequate bail conditions to mitigate this concern.

Selection of the appropriate burden of proof serves to ameliorate the above thorny concerns. This Court in Commonwealth v. Truesdale[4], 296 A.2d 829 (Pa.

[3] Pa.R.Crim.P. 600 (Prompt Trial) permits pretrial delay of 365 days excepting only delays caused by the Commonwealth while failing to exercise due diligence. Pa.R.Crim.P. 600 (A). This rule normally limits pretrial detention to 180 days, but this 180 day limitation is wholly inoperative if the detainee is nonbailable under Article 1, Section 14. Pa.R.Crim.P. 600 (B). See Commonwealth v. Jones, 899 A.2d 353 (Pa. 2006).

[4] Amicus recognizes that Truesdale was decided prior to the 1998 amendment of Article I Section 14, which amendment authorized a "public safety" exception which did not previously exist. But the 1998 amendment does not extinguish or eliminate those policy considerations that disfavor

[Footnote Continued on next page]

1972) recognized the basic principles of criminal law undergirding our strong preference for allowance of pretrial bail: "(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense" Id. at 834-835. Accord, Stack v. Boyle, 342 U.S. 1 (1951).

The paradigm for determining the appropriate standard or burden of proof in a given context is illustrated in Addington v. Texas, 441 U.S. 418 (1979), in which the United States Supreme Court considered the constitutionality (albeit under the federal constitution) of the burden of proof in a state civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period of time.

Addington teaches that the function of a standard or burden of proof is to instruct the fact-finder concerning the degree of confidence our society thinks it should have in the correctness of its conclusion. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. Id. at 423.

The Addington Court adopted an "intermediate standard" (somewhere between the standard in a typical civil case – preponderance of the evidence – and the standard in a criminal case – proof beyond a reasonable doubt) because the

pretrial detention. The amendment simply recalibrates their weight and significance in the "public safety" context.

concern involved particularly important interests in the civil context. The Court described this "intermediate standard" using descriptors such as "clear", "cogent", "unequivocal", and "convincing".

The Addington Court had to balance the same two basic considerations that this Court will have to balance in its Article I Section 14 analysis – the significant deprivation of liberty occasioned by civil commitment of the individual, and the state's interest to provide care for persons who are unable to care for themselves and "protect the community from the dangerous tendencies of some who are mentally ill." Id. at 425-26.

The Court concluded that this "intermediate standard" struck the fair and appropriate balance between the rights of the individual and the legitimate concerns of the state. Id. at 431.

Pennsylvania Supreme Court decisions have utilized an Addington-type analysis in addressing burden of proof questions. See Commonwealth v. Maldonado, 838 A.2d 710 (Pa. 2003); Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017).

Here, an Article I Section14 nonbailability determination results in loss of liberty for a potentially extended period of time, diminishes the detainee's opportunity to prepare the best defense at trial, and is based on a number of necessarily speculative **predictions** as to yet unconsummated crimes (or anti-social acts) and efficacy of yet to be imposed conditions of bail. The accused's interests

are substantial and the risk of error is real. In such circumstances, Addington analysis supports the view that the Commonwealth should bear the risk of error by laboring under a clear and convincing evidentiary standard.

Indeed, in line with this recognition, a number of state constitutions explicitly require "clear and convincing evidence" to establish their own "public safety" exceptions to bailability. See, e.g., California Constitution Article I Section 12; Utah Constitution Article I Section 8.

F.

For all of the above reasons, and in reliance on the plain meaning of the constitutional text, and the supporting policy considerations, this Court should hold that "proof is evident or presumption great" equates, in modern vernacular, to the clear and convincing evidentiary standard.

2. ARTICLE I, SECTION 14 SHOULD BE INTERPRETED TO HAVE THE REASONABLE CONSTRUCTION OF A CLEAR AND CONVINCING EVIDENCE REQUIREMENT TO AVOID FEDERAL CONSTITUTIONAL DIFFICULTIES.

For federal constitutional purposes, all state rules, statutes and constitutional provisions are treated the same as state law. Therefore, a provision like Article I Section 14 of the Pennsylvania Constitution may not violate the federal constitution.

See, e.g., Romer v. Evans, 517 U.S. 620, 623 (1996) (amendment to the Colorado constitution held to be unconstitutional because it violated the federal Equal Protection Clause).

If this Court concludes that it is not clear that we are correct that Article I, Section 14 requires Commonwealth proof by clear and convincing evidence, it should apply the doctrine of constitutional avoidance. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them.*" Clark v. Martinez, 543 U.S. 371, 385 (U.S. 2005) (applying canon of constitutional avoidance in deciding only issue, one of statutory construction). "In other words when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." Id. at 380.

This Court has explained what that choice should be when the avoidance doctrine is applicable. "Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties, and the other of which would not, we adopt the latter construction." Commonwealth v. Herman, 161 A.3d 194, 212 (Pa. 2017). See, e.g.,

Commonwealth v. McClelland, 233 A.3d 717, 735 (Pa. 2020) (doctrine applied for construing rule of criminal procedure).[5]

In this case our reasonable interpretation of Article I, Section 14 should be adopted because a ruling that clear and convincing evidence is not the requisite burden of proof creates significant constitutional tension with federal due process rights. See, e.g., Fagan v. Smith, 41 A.3d 816, 820 (Pa. 2012) ("We think that the statute, . . ., may be, and properly should be construed in a narrower sense that avoids the obvious constitutional tension.").

Counsel for Mr. Talley discusses United States v. Salerno, 481 U.S. 739, 747 (1987), that upheld the constitutionality of a federal pre-trial detention statute only because it provided significant procedural protections, including a government burden of proof by clear and convincing evidence. Id. at 750.[6]

Salerno is fully supported by other United States Supreme Court decisions that squarely hold that the Due Process Clause requires proof by clear and convincing evidence whenever the state seeks a significant deprivation. Santoskey v. Kramer, 455 U.S. 745 (1982) (holding that proof by clear and convincing evidence

[5] Sometimes, the doctrine is applied to avoid deciding a constitutional issue that is raised in the case, as in Commonwealth v. Herman, supra. Other times, where, as here, there is no federal constitutional issue raised, the doctrine is applied solely as a statutory construction aid. See, e.g., Clark v. Martinez, supra; Commonwealth v. McClelland, supra.

[6] Well before Salerno, this Court recognized that any "system of preventive detention . . . [is] one that is fraught with constitutional problems in terms of due process." Commonwealth v. Truesdale, 296 A.2d 829, 836 (Pa. 1972).

of unfitness is required for termination of parental rights); Addington v. Texas, 441 U.S. 418, 429-30 (1979) (holding that proof by clear and convincing evidence is required to justify involuntary civil commitment to a mental hospital).

In Commonwealth v. Maldonado, 838 A.2d 710 (Pa. 2003), this Court thoroughly discussed and analyzed these cases and others addressing the requisite constitutional burden of proof. Id. at 714-18. The Court concluded that a clear and convincing evidence standard is required when "the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." Id. at 715. Accord, e.g., German Santos v. Warden Pike County, 965 F.3d 203, 213 (3rd Cir. 2020); Velasco Lopez v. Decker, 978 F.3d 842, 855-57 (2nd Cir. 2020) (same) (holding that where detention of non-citizen for removal proceedings is lengthy, statute requires proof by clear and convincing evidence that further detention is necessary because of a risk of flight or dangerousness).

The application of Article I, Section 14, results in imprisonment, the most significant liberty interest there is. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004). This Court should acknowledge the potential constitutional tension that would arise if Article I, Section 14 is construed to require only a finding by a preponderance of the evidence for pre-trial detention without bail, and reasonably

construe this constitutional provision to have a clear and convincing standard of proof.[7]

3. ARTICLE I, SECTION 14 SHOULD REQUIRE PROOF BY CLEAR AND CONVINCING EVIDENCE OF DANGEROUSNESS TO ENSURE FAIRNESS WHEN BAIL RELIEF RIGHTS ARE ASSERTED.

When a defendant is arrested and bail is set, there has been a determination that preventive detention under Article I Section 14 is unnecessary. If the defendant secures sufficient funds he will be able to post bail and secure his liberty from imprisonment pre-trial. When the prosecutor fears such an outcome and believes that the defendant is too dangerous for release under any conditions, he may move for detention under Article I, Section 14. See, e.g., Pa.R.Crim.P. 529 (bail modification motions). In the absence of such action, the defendant has the potential to be freed.

Where the defendant has been financially unable to post bail, he may move for his release under Rule 600 (B) after 180 days in custody if he has not been the cause of the delay. Under Rule 600 (B), the judge may attach any non-monetary conditions to a release order that she deems necessary to help insure the defendant's

[7] The discussion here is truncated because the avoidance canon of statutory construction "is not a method of adjudicating constitutional questions by other means." Clark v. Martinez, supra, 543 U.S. at 381.

appearance for trial and the safety of the community in addition to those mandatory conditions under Pa.R.Crim.Pa. 526. Commonwealth v. Sloan, 907 A.2d 460, 467 (Pa. 2006); Pa.R.Crim.P. 527. If there are no set of conditions that can assure the safety of the community or the defendant's appearance at trial then a judge may order the detention of the individual pursuant to Article I Section 14. Sloan, 907 A.2d 467-68.

Frequently, as in this case prosecutors invoke Article I Section 14 in response to a defense Rule 600 release motion. For some prosecutors it is a knee jerk automatic response. A sufficient burden of proof, clear and convincing evidence, is necessary to prevent the erosion of a defendant's rights.

When a defendant who is financially unable to post bail files a meritorious motion for his release under Rule 600 (B), the opposite result occurs if he is ordered detained without bail under Article I, Section 14. He has lost the possibility he had before of perhaps raising enough money to post bail before his trial. The trial, with appropriate delays caused by the Commonwealth, or the courts, or extraordinary circumstances like the Covid virus, may delay a trial for years. See, e.g., Commonwealth v. Smith, 569 A.2d 337, 338-41 (Pa. 1990) (citing cases with no speedy trial violation found after years of delay, and holding that 555 days of judicial delay did not violate Pennsylvania speedy trial rule or constitutional rights).

Further, where the prosecutor had never before challenged the order setting bail, but now, in response to a defendant's motion for release under Rule 600, moves successfully for detention without bail under Article I, Section 14, there is the appearance of vindictiveness. See, e.g., Blackledge v. Perry, 417 U.S. 21 (1974) (where prosecutor brought more serious charges after defendant exercised his right to a trial de novo there was due process violation); Commonwealth v. Johnson, 860 A.2d 146 (Pa. Super. 2004) (where new sentencing hearing was ordered on appeal, increase in sentence on remand without any new objective information previously unavailable was barred by Due Process Clause); Commonwealth v. Lal, 627 A.2d 281 (Pa. Cmwlth. 1993) (judge could not, consistent with due process protections, increase the defendant's sentence after granting a hearing on his motion to modify sentence).

A prosecutor opposing a Rule 600 release motion with an Article I Section 14 detention request, should be required to prove by clear and convincing evidence that no conditions on release would be adequate. See, e.g., German Santos v. Warden Pike County, supra (to prolong lengthy detention of non-citizen detained for removal proceedings, statute requires government to establish by clear and convincing evidence that further detention is necessary because of a risk of dangerousness or flight); Velasco Lopez v. Decker, 978 F.3d 842, 855-57 (2nd Cir. 2020) (same).

In this case, in affirming the denial of the motion for Rule 600 (B) pre-trial release, and the granting of pre-trial detention under Article I Section 14, the Superior Court held that "[w]e conclude that the record contained sufficient evidence . . . ." Commonwealth v. Talley, 236 A.3d 42, 51 (Pa. Super. 2020). The court did not evaluate the evidence against any burden of proof. This Court should hold that the prosecution must show by clear and convincing evidence that pre-trial detention without bail is necessary because there are no possible conditions on release that are sufficient.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to hold that under Article I, Section 14 the burden of proof is on the Commonwealth to prove by clear and convincing evidence that pre-trial detention is necessary.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 531

I do hereby certify on this 19th day of May, 2021, that the Brief Of Amicus Curiae 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 5,244 as counted by Microsoft Word.

Respectfully submitted,

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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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