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**IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 11 MM 2023

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

MICHAEL NOEL YARD,
Respondent

BRIEF OF AMICUS CURIAE
OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA
PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF THE COMMONWEALTH

Exercise of extraordinary jurisdiction pursuant to 42 Pa.C.S. § 726 concerning the January 25, 2023 order of the Common Pleas Court of Monroe County at CP-45-CR-0001222-2022 granting nominal bail.

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STATEMENT OF QUESTIONS PRESENTED

1. Does Article I, § 14 permit bail where the defendant is charged with an offense for which the maximum sentence is life imprisonment?

2. Does *Commonwealth v. Talley* control the above issue?

INTEREST OF AMICUS CURIAE

The Attorney General of Pennsylvania has a special interest in the ongoing development of the criminal law of the Commonwealth, including construction and application of constitutional and statutory law governing criminal offenses and prosecutions. The Attorney General is "the chief law enforcement officer of the Commonwealth," and is authorized "to investigate any criminal offense which he has the power to prosecute," as well as to "convene and conduct investigating grand juries." 71 Pa.C.S. § 732-206. In addition to directly investigating and prosecuting certain crimes, the Office of the Attorney General provides assistance and support to local District Attorneys upon request. Such assistance may include representation of the Commonwealth in any and all stages of criminal proceedings.

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of issues involving state constitutional interpretation and the availability of bail is of special interest to district attorneys throughout Pennsylvania.

Certification pursuant to Pa.R.A.P. 531(b)(2):

No person or entity other than the amici paid in whole or in part for the preparation of this brief, or authored this brief, in whole or in part.

SUMMARY OF ARGUMENT

The grammatical structure of Article I, § 14 is clear and unambiguous. Unlike in earlier provisions, the current Constitution creates three disjunctive categories, separated by "or," in which bail is unavailable. In the first two categories of offenses, capital cases and cases subject to life imprisonment, bail is absolutely unavailable. In the third category—cases in which "no condition or combination of conditions" are adequate to protect the public—the unavailability of bail is not absolute, but is subject to the "proof evident and presumption great" qualifying language. That language does not apply to the other two disjunctive constitutional categories.

Here, the second constitutional category, in which the prohibition of bail is unqualified, applies. The trial court's order granting nominal bail should therefore be reversed.

ARGUMENT

Bail is constitutionally unavailable for capital and life-sentence offenses.

The Court of Common Pleas erred in granting nominal bail where the defendant is charged with first degree murder. Where that offense is validly charged bail is constitutionally impermissible. That has been so since the Constitution was amended in 1998.

Previous versions of Article I, § 14 addressed bail as follows:

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

The meaning of that former language was plain. Bail was generally available, but not in one category of cases—"unless for capital offenses"—meaning that this general availability did not extend to capital offenses. But this prohibition was not absolute. Bail was not precluded in every capital case, but only in those where "proof [was] evident or presumption great."

In 1998, Article I, § 14 was changed. It now says:

> 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[.]

It is critical to note the different structure of this new language.

Article I, § 14 now presents not one, but three categories of cases in which bail is unavailable, each separated by "or." Under the current Constitution bail is again precluded for capital offenses, but now the previous "proof is evident or presumption great" qualifier is no longer connected with the capital cases category. Instead the provision proceeds to the next category, presaged by "or"—"or for offenses for which the maximum sentence is life imprisonment." Bail is unavailable for this second category as well. And, as with the first category, the "proof is evident or presumption great" qualifier is not part of, and does not modify, the second category. The new language omits the "proof evident" modifier from the first two categories.

Bail is therefore unequivocally unavailable in the first two categories: capital cases and life sentence cases.

Article I, § 14 then introduces a third category, preceded by "or unless"—"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." Notably, while the first two categories are separated only by "or," the third is separated by "or unless," indicating that the third category is treated differently from the first two. Thus, in its entirety the provision allows

bail "unless" the case is capital "or" subject to life; "or unless" the third, dangerousness category applies. Only in this last category is the withholding of bail from dangerous prisoners qualified by "when the proof is evident or presumption great."

Whereas previously the "proof evident" qualifying language modified "capital offenses," it no longer does. Nor does it modify "offenses for which the maximum sentence is life imprisonment." The "proof evident" language now modifies only the third, "dangerous prisoner" category.

In construing the Constitution, the word "or" is given its "normal disjunctive meaning." *Commonwealth ex rel. Specter v. Vignola*, 285 A.2d 869, 871 (Pa. 1971). Here, the word "or" clearly designates three disjunctive categories of cases in which bail is constitutionally unavailable: (1) capital cases; (2) life sentence cases; (3) cases in which "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." The "proof evident" language appears only within the third disjunctive category.

It is a "well-established cannon of construction" that "qualifying words or phrases" apply "to the words immediately preceding them," and "do not extend to or include other words, phrases, or clauses more remote, unless such extension or

inclusion is clearly required by the intent or meaning of the context or disclosed by an examination of the entire act." *Commonwealth v. Packer*, 798 A.2d 192, 198 (Pa. 2002). Here, use of the disjunctive "or" is in opposition to applying the "proof evident" language to all three non-bailable categories.

Because Article I, § 14 separates the non-bailable categories with the word "or" and includes the words "when the proof is evident or presumption great" only in the final category, only that final category is modified by that phrase. There is nothing in the provision to suggest that the "proof evident" language has any application outside the final disjunctive category. Had it not been the legislative intent to restrict that modifier to the last category, it would have been a simple matter to write a provision in which the phrase "when the proof is evident or presumption great" modified all of the categories. (For example, "unless, when the proof is evident or presumption great, for capital offenses, for offenses for which the maximum sentence is life imprisonment, and where no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community"). To treat the "proof evident" language as if it were present in the first two categories would impermissibly re-write Article I, §14 by inserting "language … that simply does not appear" in those categories. *Commonwealth v. Vasquez*, 753 A.2d 807, 809 (Pa. 2000).

Because the words of Article I, § 14 are clear and unambiguous, legislative history is immaterial. *Commonwealth v. Smith*, 221 A.3d 631, 636 (Pa. 2019) ("when the words of a statute have a plain and unambiguous meaning, it is this meaning which is the paramount indicator of legislative intent"); *Police v. State Employees' Retirement Board*, 180 A.3d 740, 752 n.10 (Pa. 2018) ("Because the language of the relevant provisions of the Retirement Code are unambiguous, we may not consider the arguments based upon legislative history"); *Commonwealth v. Lynn*, 114 A.3d 796, 827 (Pa. 2015) ("legislative history is not to be consulted where, as here, the statute is explicit"). It is not material that, for example, the "plain English statement" for public adoption of the amendment assumed that the "proof evident" qualifier applied to all non-bailable categories. *See Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005) (discussing text of statement). Given the law at the time, the statement was accurate in conveying that, under the amendment, bail would be categorically unavailable in capital and life sentence cases because in 1998 "proof evident" meant a prima facie case. *Commonwealth v. Farris*, 278 A.2d 906, 907 (Pa. 1971) (bail precluded given a prima facie case for first degree murder). Therefore any defendant held for court on a capital or life sentence charge was necessarily held without bail. Only after the meaning of "proof evident" was changed over two decades later by *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), was it necessary to reexamine the complete text. As

shown above, that examination reveals that the "proof evident" qualifier was not in fact applicable to the first two categories—a point that was not significant at the time the amendment was offered for adoption. Of course in 1998 the "plain English" statement could not have anticipated the ramifications of *Talley*. *See Grimaud* at 843 (ballot summary not required to be a "comprehensive recitation of all ramifications of a constitutional amendment").

Consequently, the constitution itself now precludes bail for capital and life-sentence cases, and it does so categorically. The prohibition is not contingent on any additional facts or any type or level of proof. It is necessary only that the prisoner be validly charged with a capital or life sentence offense. This does not mean an accused is without recourse; the validity of the charge may be disputed by, *inter alia*, a petition for writ of habeas corpus. But it does mean that, where either of these two constitutional categories applies, the constitution makes bail unavailable.

Commonwealth v. Talley, *id*., is not on point. That case construed only the third constitutional category defined by Article I, § 14. While certain language in that case assumes that the "proof evident" qualifier applies to all the categories, including the two that were not in issue in that case, *id*. 265 A.3d at 513, that language is dicta. It is also contradicted by the plain terms of the constitutional

provision itself, which unambiguously shows that the three categories are disjunctive and that only the third is modified by the "proof evident" qualifier.

CONCLUSION

For these reasons, the order of the trial court should be reversed.

Respectfully submitted,

/s/ Hugh Burns

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CERTIFICATE OF COMPLIANCE
WITH RULE 531

This amicus brief complies with Pa.R.App.P. 531(b)(3) (length of amicus briefs), as it contains fewer than 7,000 words. *See* Pa.R.A.P. 2135(b) ("the cover of the brief and pages containing the table of contents, tables of citations, proof of service and any addendum containing opinions, signature blocks or any other similar supplementary matter … shall not count against the word count limitations").

CERTIFICATE OF COMPLIANCE
WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*, which require that confidential information and documents be filed differently than non-confidential information and documents.

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