Case No. 20220636-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellant,

v.

KOLBY RYAN BARNETT,
Defendant/Appellee.

Reply Brief of Appellant

Interlocutory appeal from the denial of a pretrial detention motion in the Second Judicial District, Davis County, the Honorable Rita Cornish presiding.

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ARGUMENT

This Court gave clear direction last year about how to interpret Article I, Subsection 8(1) of the Utah Constitution. *Randolph v. State*, 2022 UT 34, ¶¶ 53-69, 515 P.3d 444, 459-62. While "interesting policy arguments about what interpretation . . . would best serve the people of Utah," *id.* at ¶ 69, and "what courts in other jurisdictions have said," *id.* at ¶ 68, were presented, the Court reiterated that "those cases do not speak to the meaning of the Utah Constitution or what the Utah voters had in mind when they amended article I, section 8," *id.* "But when we interpret our constitution, we are not simply shopping for interpretations that we might like. We start our analysis by trying to understand what the language meant to those who voted on it, and we go from there." *Id.* at ¶ 69; *accord State v. Kastanis*, 848 P.2d 673, 675 (Utah 1993) (per curiam) (applying this method to part of Section 8's 1988 amendment).

Just as the Court directed, the State's opening Brief demonstrates that in November of 1972, when each voting Utahn from St. George to Garden City went to vote on the amendment to Section 8 that added the double felony rule, their ballots explained that the language "shall be bailable except" means "that persons *shall not be bailable* when accused of a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, where the proof is evident or the presumption strong." Clyde L. Miller, *Proposed Changes in Utah's Const.*, Deseret News, Nov. 2, 1972, at 14A (emphasis added).

Utahns voted in favor of this amendment. Utah Const. art. I, § 8 (1973). There is no evidence more compelling of what they "had in mind when they amended article I, section

8" or what "'meaning the public would have ascribed to the amended language when it entered the constitution'" than this. *Randolph*, 2022 UT 34, ¶¶ 68-69.

As the State's initial Brief further shows, to accomplish this, as archaic as it may now sound, Utahns used the same term of art ("shall be bailable except") they had used in all of Utah's prior constitutions. Appellant's Br. at 15-31. Their intent was to have double felonies treated like capital offenses. *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976) (plurality). Their understanding of this "peculiar" language was the same as it had been originally understood by the very Commonwealth (Pennsylvania) from whence it was derived and first copied. *Com. ex rel. Chauncey & Nixon v. Keeper of the Prison*, 2 Ash. 227, 232-33 (Penn. Com. Pl. 1838) (explaining that the original purpose of this language "was to limit, not to enlarge, the judicial discretion on questions of bail").

Barnett dismissively discounts all of this, saying we "need not delve into history." Appellee's Br. at 29. He lobbies instead for a repeal of this language in favor of the "district court's interpretation," which, he advocates, "creates better policy." Appellee's Br. at 43. In other words, he advances a present-day, policy-driven theory he calls plain language analysis, but which is an attempt to reconstruct rather than construe, legislate rather than interpret Subsection 8(1)'s actual text. He essentially proposes an exception to the exception: "All persons shall be entitled to bail as a matter of right except double felony defendants, except that in the discretion of a court they may still be granted bail."

In support thereof, Barnett argues that the district court was merely doing what the Preconviction Bail statute directs. Appellee's Br. at 8-13. He asserts that a court's finding of discretion to grant bail is consistent with the federal approach to bail and case law in this

and other states. Appellee's Br. at 13-18, 29-35. He defends the district court by arguing that Section 26 only applies to "shall be bailable" and not the exceptions. Appellee's Br. at 18-24. And, warning of the danger of prosecutorial discretion, he discusses why his interpretation makes "better policy." Appellee's Br. at 43-51.

Barnett's argument fails: (I) He misstates the issue and wrongly conflates two separate procedures under the Preconviction Bail statute. (II) He selectively cites cases from Utah and other states, removing words or phrases from them to assert propositions they do not support. (III) He makes unhelpful comparisons of unlikes to try and bolster his plain language analysis. (IV) He propounds an unsupported parade-of-horribles argument about prosecutorial discretion. (V) And he posits a policy argument better suited for the Legislature.

I. BARNETT MISSTATES THE ISSUE AND WRONGLY CONFLATES TWO PROVISIONS FROM UTAH'S PRECONVICTION BAIL STATUTE.

Barnett begins by attempting to reframe the issue, arguing that the district court merely "complied" with the Preconviction Bail statute,[1] which, by the use of the verb "may," conferred discretion on it to choose not to enforce the double felony rule. Appellee's Br. at 8-13, 44-45. But that is not the issue. Neither the meaning nor the operation of Utah's Preconviction Bail statute was argued to the district court. *See* R.108-35, 211; Stip. Mot. to Reconst. That court made no findings to that effect. *Id.* Instead, it employed what it called a "plain language" construction of Subsection 8(1)(b)'s text,

[1] *See* Utah Code. Ann. §§ 77-20-201 *et seq.*

inferring therefrom that it "could grant or deny bail as a matter of judicial discretion." *Id.* at 2, 4-5. That is the issue before this Court and the basis for the district court's decision. Besides, Barnett "'erroneously conflates provisions that apply in two different contexts,'" *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1159 (10th Cir. 2014), and misapprehends the Legislature's use of the modal verb "may."

When a person is arrested, after a probable cause determination, a court determines whether the person is "eligible" for bail. Utah R. Crim. P. 9(a)(4). Statutorily, Utah's Preconviction Bail statute prescribes two separate procedures for this. *Compare* § 77-20-206(1)(a) ("eligible for detention"), *with* § 77-20-205(3) ("determination about pretrial release").

"If the criminal charges filed against an individual include one or more offenses eligible for detention under Subsection 77-20-201(1) or Utah Constitution, Article I, Section 8" and if the prosecution moves for detention, the court proceeds under Section 77-20-206. § 77-20-206(1).

If, however, the prosecutor makes no motion or fails to meet her burden, a court proceeds under Section 77-20-205, conducting a "pretrial release analysis" to determine what the "conditions of release" should be. § 77-20-205(3) (restricting a court's release analysis to four bailability considerations). While Barnett later suggests that these conditions guide a court in deciding whether to release, Appellee's Br. at 44-45, they do not. They are conditions "of" and not "if" to release.

By the statute's repeated plain language, prosecutors are allowed to bring detention motions "under [either] Section 77-20-201(1) or Utah Constitution, Article I, Section 8."

§§ 206(1)(a), (5)(a), (5)(b). When so framed, all they must prove—and the only findings a court makes—is what is found under "Section 8." § 77-20-206(5). A court is limited to finding "whether certain facts fulfill a legal standard" that otherwise "has a single 'right' answer in terms of the trajectory of the law." *Murray v. Utah Lab. Comm'n*, 2013 UT 38, ¶ 33, 308 P.3d 461, 472. And "the trial court does not have discretion to reach anything other than the 'right' answer," *id.*, deference being shown only to its substantial evidence determination, *Randolph*, 2022 UT 34, ¶ 76.

Deliberately absent[2] from Subsection 77-20-206(5), which concerns "pretrial detention," is any reference to Subsection 77-20-205(3)'s "conditions of release," which concern "pretrial release." When prosecutors bring detention motions under the Constitution, courts do not engage in a pretrial release analysis. § 77-20-206(5). Barnett mistakenly conflates a release analysis with a detention analysis. *See also* Appellant's Br. at 44-46 (discussing the interpretative problem this creates).

Nonetheless, Barnett asserts that Subsection 77-20-206(5)'s use of "may" "gives courts discretion to grant bail." Appellee's Br. at 12, 44-45; Utah Code Ann. § 77-20-206(5) ("After hearing evidence on a motion for pretrial detention, and based on the totality

[2] *2 Ton Plumbing, L.L.C. v. Thorgaard*, 2015 UT 29, ¶ 31, 345 P.3d 675, 682 (courts "'presume that the legislature was deliberate in its choice of words and used each term advisedly and in accordance with its ordinary meaning.'"); *State v. Sanders*, 2019 UT 25, ¶ 32, 445 P.3d 453, 458 (courts "presume . . . that 'the expression of one [term] should be interpreted as the exclusion of another,' and will not 'infer substantive terms into the text that are not already there.'"); *Riggs v. Georgia-Pac. LLC*, 2015 UT 17, ¶ 10, 345 P.3d 1219, 1222 (courts "'seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.'").

of the circumstances, a judge may order detention if:" the requirements of "Article I, Section 8" are shown.).

While "must" would have been clearer than "may,"[3] not every use of the modal auxiliary verb "may" means performative discretion has been conferred. "Modal auxiliary verbs cannot be understood or defined in isolation, but rather obtain meaning from their context." *Ring Energy v. Trey Res., Inc.*, 546 S.W.3d 199, 208 (Tex. App. 2017). The modality of "may" can be epistemic (descriptive or indicative) or deontic (imperative or performative).

When used epistemically in the "indicative mood," "may" states a fact, describes a situation, or delineates a process in which a proposition has the "possibility"[4] of becoming true if all circumstances materialize. Merriam-Webster Dict. Online, "may" (2023); Writers Inc: A Student Handbook for Writing & Learning 729 (1996). So used, it makes a "constative" rather than a "performative" "utterance," one describing an event, process, or potential state-of-affairs "capable of being judged true or false" and not one that "serves to effect . . the performance of the specified act." *Compare* Merriam-Webster Dict. Online, "constative" (2023), *with* Merriam-Webster Dict. Online, "performative" (2023). As the modal verb "may" often does, it can simply mean "is authorized to." Garner, § 11.2 at 189.

[3] "Most of us blatantly misuse" the verb "may," often by interchanging it with "can." Bryan A. Garner et al., The Redbook: A Manual on Legal Style § 12.3 at 22 (2d ed. 2006). Depending on context, even "may" can mean "mandatory." *Bd. of Educ. of Granite Sch. Dist. v. Salt Lake Cnty.*, 659 P.2d 1030, 1035 (Utah 1983).

[4] It can simply mean that something "'[h]as a possibility' to do something." *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶ 25, 48 P.3d 895, 903.

Here, the statute's contextual use of the verb "may" simply means "can" happen or "is authorized to." *Id.* It is a constative utterance: merely indicative of a process and its potential true outcome contingent upon the "if" being satisfied. It is not phrased as a performative utterance conferring discretion on a judge to not detain even when the judge has found proven the conditions of the "if." Rather, this statute's words and structure limit what a court can consider to a legal standard and "whether certain facts fulfill" that standard. *Murray*, 2013 UT 38, ¶ 33. If they do, there is "a single 'right' answer in terms of the trajectory of the law." *Id.* Detain. What follows the "if" does not permit for other considerations or confer discretion.[5] Barnett's argument fails.

II. BARNETT TAKES WORDS AND PHRASES FROM CASES OUT OF CONTEXT TO REACH PROPOSITIONS THEY DO NOT SUPPORT.

Selecting a few cases out of Utah and picking certain phrases from them, Barnett posits that his interpretation of Subsection 8(1) "harmonizes with this Court's precedent." Appellee's Br. at 13-18. But a party "may not cherry-pick a definition and call it a plain language analysis," *Matter of Adoption of B.B.*, 2017 UT 59, ¶ 41, 417 P.3d 1, 15, and courts do not read "provisions in isolation," *Anadarko Petroleum Corp. v. Utah State Tax Comm'n*, 2015 UT 25, ¶ 11, 345 P.3d 648, 651.

While he quotes some of *State v. Alvillar* wherein that court observed that a double felony defendant "was simply not entitled to bail as a matter of right, totally aside from the

[5] Because this statute would be construed to comply with, *Vega v. Jordan Valley Medical Cent.*, 2019 UT 35, ¶ 12, 449 P.3d 31, 35, and in "avoidance" of constitutional conflict, *State v. Jordan*, 2021 UT 37, ¶¶ 45-46, 493 P.3d 683, 692, the argument that it plainly "gives courts discretion to grant bail," Appellee's Br. at 12, must be rejected.

state of his personal finances," Appellee's Br. at 16, 18, Barnett omits the rest of what the court said: the "defendant was *precluded* by statute and *by the Utah Constitution*—not by his economic circumstances—from having the *opportunity* to post bail." 748 P.2d 207, 210 (Utah Ct. App. 1988) (emphasis added).

"Preclusion" is a prohibitory term rendering something "impossible," Appellant's Br. at 39, leaving no discretion, foreclosing the very chance for bail. That is why *Alvillar* did not analyze the issue under the abuse of discretion standard. If the decision were discretionary, the "opportunity" to post bail would not have been precluded.[6]

Similarly, Barnett takes *Roll v. Larson*'s use of the modal verb "may," Appellee's Br. at 15; 516 P.2d 1392, 1392 (1973), out of context to argue that the Court held "that the decision to deny bail was discretionary." Appellee's Br. at 15. That was not the holding in *Roll*. The issue was not one of discretion but whether Roll was still a capital offender under Utah's "fundamental law" considering the then-existing moratorium on the death penalty. *Id.* at 1393.

Roll argued that he had the "right to bail" because he was no longer a capital offender, not because of judicial discretion. *Id.* at 1392. The State rejoined "that first-degree murder is not a bailable offense where the state's evidence shows that the proof is evident or the presumption strong." *Id.* Quoting Section 8 verbatim, the Court then explained:

> This provision refers to a specific, distinct category identified as 'capital offenses' for which bail may be denied under certain circumstances. The legislature has classified offenses by their gravity both for the purpose of

[6] Insofar as this language was dicta, it was "judicial dicta," which the district court was "obliged" to follow. *Ortega v. Ridgewood Ests. LLC*, 2016 UT App 131, ¶ 14 n.4, 379 P.3d 18, 23.

> fixing bail before trial and for imposing punishment after conviction. The legislative classification of a crime as a 'capital offense' remains constant, although under *Furman v. Georgia*, it seems doubtful that punishment by death can be constitutionally exacted.

Id.

The remainder of this decision is discussed in the State's opening Brief. Appellant's Br. at 38. In context, the Court did not use "may" because it was construing Section 8 to be a performative utterance conferring discretion on district courts. Rather, it used it to simply make a constative utterance.[7]

Turning to cases outside of Utah, Barnett asserts that they have defined "bailable" to mean "fundamental right to bail" and historically "held that they had discretion to grant bail even in capital cases." Appellee's Br. at 30, 35-40. But Barnett again takes the language they used out of context and detached from the holdings.

The issue in these cases was whether a jury's indictment for a constitutionally excepted offense was, alone, conclusive to establish the evidentiary proof required to deny bail. *In re Goans*, 12 S.W. 635, 635-36 (Mo. 1889); *In re Losasso*, 24 P. 1080, 1082 (Colo. 1890); *California v. Tinder*, 19 Cal. 539, 542 (Cal. 1862). The "discretion" discussed was whether a court could probe into the indictment or receive other evidence in determining if the constitutional standard had been met or if the presumption an indictment created had been overcome. *In re Goans*, 12 S.W. at 636; *In re Losasso*, 24 P. at 1082 (clarifying that

[7] It is akin to "obiter dicta": "'a remark or expression of opinion that a court uttered as an aside,' such as a 'statement made by a court for use in argument, illustration, analogy or suggestion.'" *Ortega*, 2016 UT App 131, ¶ 14 n.4 (citation omitted).

"release upon bail should not be permitted, unless the court feels clear that the constitutional exception does not apply");[8] *Tinder*, 19 Cal. at 542, 543-50 (actually finding a statute that attempted to confer "discretion" "conflicts with the fundamental law" and discussing the "special and extraordinary circumstances" to look beyond the indictment that otherwise provides "a presumption of guilt . . . too great to entitle him to bail as a matter of right under the Constitution, or as a matter of discretion under the legislation of the State").[9]

These cases were not interpreting the meaning of "shall be bailable except."[10] Even if any dicta in *Tinder* could be stretched to lend a modicum of support to Barnett's argument, near the time of Utah's Convention, California reaffirmed the original understanding of "shall be bailable except" when it cited the Pennsylvania *Keeper of the Prison* case in *In re Troia,* 28 P. 231, 232 (Cal. 1883) (per curiam) to justify its refusal to grant bail.

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[8] Insofar as any dicta might be read as Barnett suggests, the Colorado Supreme Court rejected it around the same time Utahns voted on the double felony amendment. *Colorado v. District Court*, 529 P.2d 1335 (Colo. 1974).

[9] Barnett also misstates the holding in *Iowa v. Klingman,* 14 Iowa 404, 408 (Iowa 1862) (observing only that a person was bailable when the constitutional standard was not satisfied: "if the proof is slight, or that which was offered tended to show that it was an offense committed under mitigating circumstances, and would not be punishable with death"). His reliance on *North Carolina v. Herndon* is inapposite because that court was construing a "statute" that conferred power to grant bail "in all cases," expressly noting that its "former constitution" was no longer the law. 12 S.E. 268, 269 (N.C. 1890).

[10] Similarly, Barnett relies on *Rigdon v. Florida,* 26 So. 711 (Fla. 1899) to define "bailable." Appellee's Br. at 37. But the issue in that case like in the others cited was the burden on the accused to overcome the presumption created by an indictment. It was not the meaning of "bailable" or "bailable except." After all, that same court earlier explained that "shall be bailable except" means "not bailable." *Benjamin v. Florida,* 6 So. 433, 436 (Fla. 1889).

This Pennsylvania case is important. As discussed in the State's opening Brief, Pennsylvania and its use of this phrase was the model for the Northwest Ordinance and the state constitutions. *United States v. Edwards*, 430 A.2d 1321, 1328 (D.C. 1981); Appellant's Br. at 14-16. It was the "'soil'" from whence this language grew and was then "'transplanted.'" *Maxfield v. Gary Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647, 655.

In this definitive case, the Pennsylvania Court of Common Pleas discussed the original understanding of this "peculiar" language and the "principle" it "introduced," explaining that its "object," in stark contrast from the "common law" and the discretionary power of the "King's Bench," "was to limit, not to enlarge, the judicial discretion on questions of bail." *Keeper of the Prison*, 2 Ash. at 232. "If any faith is to be placed on human language, in expressing the intentions of the lawgiver, nothing can be clearer than that" this "peremptory" term of art "intended to guaranty" both a right and an exception, "nothing left to judicial discretion." *Id.*

> While on the one hand, it was deemed inconsistent with civil liberty to leave the right of bail, in minor offences, dependent on mere judicial discretion, it was, on the other hand, esteemed inconsistent with the certainty of punishment due to atrocious offenders, to allow the exercise of such a discretion, on capital accusations of an urgent character. The resulting rule, therefore, is this: where the crime charged is short of a felony, the judges are bound to admit to bail; but, where a capital felony is charged, and the proof is evident, or the presumption great, *no power exists anywhere to allow it*.

Id. at 232-33 (emphasis added).[11]

[11] Just a few years before Utah added the double felony exception, Pennsylvania reaffirmed this decision in *Com. ex rel. Alberti v. Boyle*, 195 A.2d 97, 98 (Penn. 1963).

Barnett's reliance on cases like *Tinder* to show that courts have historically held that they have discretion to grant bail for a nonbailable offense is misplaced. Indeed, *Tinder* cited "authorities" that actually reject this notion. *E.g.*, *North Carolina v. Mills*, 13 N.C. 420, 422 (1830). ("This presumption is so strong, that in the case of a capital felony, the party cannot be let to bail."); *Territory v. Benoit*, 1 Mart. 142, 142 (La. Super. 1810) (applying this term of art under territorial law: "It cannot be done. Bail is never allowed in offences punishable by death, when the proof is evident or the presumption great."); *State ex rel. Hunter v. Brewster*, 35 La. Ann. 605, 607, 609 (1883) (reaffirming this, noting that "[t]his constitutional provision is not peculiar to us" and "has long existed here and elsewhere, and its meaning is settled beyond controversy").

Contrary to Barnett's claim, most nineteenth century state courts, when their decisions are read in their entirety, shared in the original understanding of "shall be bailable except" as explained by the *Keeper of the Prison* case. *E.g.*, *Ex parte Colter*, 35 Ind. 109, 110 (Ind. 1871) (finding that a constitutionally excepted offense "is not bailable" "where the proof is evident or the presumption strong"); *Ex parte McCrary*, 22 Ala. 65, 72 (Ala. 1853) (same).

A complete reading of the 1895 *Wyoming v. Crocker*, 40 P. 681, 686 (Wyo. 1895) case Barnett cites only in part reinforces this. Appellee's Br. at 36-37 (asserting that *Crocker* defines "bailable" as "a right to bail"). The State does not dispute that when "bailable" is isolated, part of its meaning is "right to bail." But that is not all it means. Wyoming's Section 14, like Utah's Section 8, did not simply use the word "bailable." It,

too, said "shall be bailable" coupled to "except" and "when." *Crocker*, 40 P. at 685. "At common law," *Crocker* correctly explained,

> it was within the discretion of the magistrate, judge, or court to *allow* or deny bail in all cases, and was usually denied in cases of felony punishable by death. *This has been so changed by the state constitutions in this country generally*, as well as by our own, so as to give bail as a matter of right *in those cases where it is allowable*.

Id. at 686 (emphasis added).

Crocker, like *Keeper of the Prison*, recognized that Americans sought to limit judicial discretion in questions of bailability. *Id.*; Appellant's Br. at 13-15. And *Crocker* recognized that the right to bail was circumscribed to "those cases where it was allowable." *Crocker*, 40 P. at 686. The adjective "bailable" did not just mean "right to bail;" it was also understood to mean "allowable." *Id.*[12] No wonder *Crocker* instructed that "the best rule in ultimately determining whether the prisoner should be admitted to bail or not is that bail should be refused in all cases where a judge would sustain a conviction for" the excepted offense charged. *Crocker*, 40 P. at 688.

While Barnett wants the word "bailable" to only mean a "right to bail," Utah's history and this Court, like its sister courts, have understood it to also mean what is "admissible," Appellant's Br. at 19-22, 34-35, or "allowable." In *Kastanis*, reaffirmed last year, this Court stated:

> Section 8, however, denie[s] the right to bail in capital cases and certain other categories of offenses and by inference guarantee[s] bail to all others as a

[12] "The term 'bailable' means 'capable of being bailed' or 'entitled to bail.'" *Westerman v. Cary*, 892 P.2d 1067, 1078 (Wash. 1994) (*en banc*).

> matter of right. Even in capital cases, bail [i]s not to be denied unless the proof [i]s evident or the presumption strong.

Kastanis, 848 P.2d at 675; *Randolph*, 2022 UT 34, ¶ 15. The phrase "shall be bailable," *Kastanis* clarified, creates "a general presumption in favor of *allowing release on bail* prior to conviction of a crime," *Kastanis*, 848 P.2d at 675 (emphasis added), not just a "right to bail." The adjective "bailable," like in *Crocker*, means "allowing release on bail." *Id.* Section 8 both "guaranteed" and "denied" that allowability. *Id.*

The authorities Barnett cites, when read in their entirety, do not stand for the propositions asserted, their reasoning having been taken out of the context of the issue they were addressing. The question for this Court is unlike the one in those cases: it is not the quantum or quality of proof required to deny bail or the meaning of "shall be bailable." It is the meaning of "shall be bailable except [double felony defendants] when" substantial evidence is shown. Barnett's myopic focus undermines his argument and conclusion.

III. BARNETT USES COMPARISONS OF UNLIKES TO SUPPORT HIS INCORRECT HISTORICAL AND PLAIN LANGUAGE ANALYSES.

While Barnett discards consideration of Utah's history (except for his reference to Brigham Young's federal indictment), he focuses on the history of a federal bail statute and compares it to Utah's Constitution to argue that it better reflects the intentions of Utahns when they ratified their Constitution, shows that the right to bail is fundamental, and illustrates that courts have historically believed they had discretion to grant bail for nonbailable offenses. Appellee's Br. at 29-35. Barnett's argument fails because it asks for

"a comparison of unlikes, of apples and oranges," *Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1088 (Utah 1998) (Stewart, J., concurring and dissenting in part).

As in England, "a fundamental right to bail was not universal among the colonies or among the early states; several states made the right to bail a statutory rather than a constitutional right." *Edwards*, 430 A.2d at 1327. But some of the colonies "deviated sharply from the English tradition by granting an affirmative, though limited, right to bail. Excluded were capital crimes, contempts of court, and other cases to be expressly designated by the legislature." *Id.* Pennsylvania was one and "was widely copied in 19th century state constitutions." *Id.* at 1328.

But when the United States Congress took up the question of a federal Bill of Rights, aware of the very different approach that many of the States had taken, it nonetheless chose to adhere to the English model of leaving "the definition of bailable offenses" to Congress and instead "drafted and passed the Judiciary Act of 1789." *Id.* at 1329.

This Act, as dissenting Justice Stephen Breyer acknowledged in the federal non-criminal case Barnett relies upon, only applied to "federal criminal cases." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863-64 (2018) (Breyer, J., dissenting). This Act did not then and does not now apply to state criminal cases. It does not reflect the divergent approach taken by the states as expressly noted by the cases cited herein. To analogize to a federal statute as Barnett suggests is to compare apples to oranges.

Similarly, while Barnett mentions Brigham Young's indictment, brought by a "U.S. district attorney," under federal law, and in one of "'the United States courts" to attempt to show how Utahns would have understood their state Constitution, Appellee's Br. at 34,

saying it provides the right analytical "backdrop," Appellee's Br. at 30, this comparison is unhelpful because, as noted, the federal approach to bail was and is very different from the approach Utah and most of the states took. Moreover, the State has already shown why a comparison to how bail was handled with Joseph Smith is more informative. Appellant's Br. at 17-18. Besides, neither the Judiciary Act nor Brigham Young was mentioned in Utah's Convention when Section 8 was discussed.

The State has additionally already demonstrated how Barnett's plain language analysis of Subsection 8(1) is incorrect, especially when Section 26's interpretative rules are applied, and how the contextual use of "except" is a prohibitory exclusion. Appellant's Br. at 33-42. To challenge this, Barnett uses a few inapt comparisons to argue that Section 26 only applies to the phrase "shall be bailable" and the word "except" is not prohibitory but, in accordance with Section 26, an express statement granting a court discretion. Appellee's Br. at 19-29.

Barnett compares a Montana dissenting opinion applying its version of Utah's Section 26 to the phrase "'Unless otherwise provided by law, that salary of the justices shall be four thousand dollars per annum each,'" *State ex rel. Niewoehner v. Bottomly*, 148 P.2d 545, 555–56 (Mont. 1944) (Morris, J., dissenting), to Subsection 8(1)'s use of "except" to show it is not prohibitory. Appellant's Br. at 26.

But the Montana salary provision the *Bottomly* dissent interpreted does not mirror the language of Subsection 8(1)'s first two bailability exceptions. They are very different. Unlike the salary provision, these exceptions do not use the phrase "unless otherwise

provided by law." Rather, they define their exceptions without any delegation of authority to redefine or implement them.

By contrast, Utah's third risk-of-flight-or-danger exception does (although not as broadly) delegate authority to the Legislature, like the Montana provision, excepting bailability from "persons charged with any other crime, designated by statute as one for which bail may be denied." Utah Const. art. I, § 8(1)(c). Montana's salary provision is more analogous to this than to Utah's first two exceptions where such express delegation was omitted. Appellant's Br. at 41-42. A comparison to *Bottomly* is simply unhelpful.

Likewise, Barnett's comparing Utah's "No Imprisonment for Debt" Clause (Section 16) to its "Offenses Bailable" Clause (Section 8) to discredit the State's argument is a comparison of unlikes. Appellee's Br. at 26-27. Section 16 provides: "There shall be no imprisonment for debt except in cases of absconding debtors." Subsection 8(1) states: "All persons charged with a crime shall be bailable except" double felony persons "when there is substantial evidence to support the new felony charge."

The operative terms of these two Sections—"shall be no imprisonment for debt except" and "shall be bailable except"—do not mirror each other. Section 16 is a proscription. Subsection 8(1) is a prescription. Section 16 does not concern something's being "available," *State v. M.L.C.*, 933 P.2d 380, 383 n.5 (Utah 1997);[13] "allowable," *Crocker*, 40 P. at 686; *Kastanis*, 848 P.2d at 675; "eligible," *Parker v. Roth*, 278 N.W.2d

[13] While Barnett says this decision is "irrelevant," Appellee's Br. at 15, 17-18, the meaning and application of Subsection 8(1)'s phrase "'persons charged with a crime'" was at issue. *Id.* at 382-84. As such, while dicta, it has persuasive value.

106, 117 (Neb. 1979); "authorized," *Ex parte Springer*, 1 Utah 214, 214 (1875);[14] "admissible," Appellant's Br. at 19-22, 34-35, or what "may be," Noah Webster, Amer. Dict. of the English Lang. Online, "bailable" (1828). Section 8 does.

Section 16's sole exception is open-ended. Because it follows a negative proscription that does not define the standards of enforcement, it only leaves open a possibility that requires implementing legislation to give it effect. Section 8's first two exceptions, by contrast, are not open-ended. They follow a positive grant whose exceptions circumscribe the standards by which they are enforced. Section 16's exception is not self-executing. Section 8's are. Barnett's comparison is one of unlikes and thus unsupportive.

A far more analogous comparison is between Subsection 8(1) and Section 4071 of Utah's first criminal code. Appellant's Brief at 25. Like Subsection 8(1)'s "All persons charged with a crime shall be bailable except," it stated that "All persons are capable of committing crimes except." Both declared a general rule using positive imperative wording to one class. Both spoke to what was "-able." Both then carved out the exceptions, designating what classes were excluded from bailability or liability. Contextually, the

[14] While Barnett argues that *Springer* does not support the State's argument because a "statute" was being applied, the "statute" referenced was Chapter XXXII of Utah's territorial laws found under the Acts, Resol., & Memo., Passed at the Sev. Legis. Sess. of the Legis. Assm. of the Terr. of Utah (1866). Section 1 provided that a magistrate determines if an offense "be bailable" or "not bailable" and, if not, "the prisoner shall be committed for trial." *Id.* at 67. Bailability was designated by Article II of the Northwest Ordinance: "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great." *Id.* at 11. *Springer* was referencing the same language adopted into the Utah Constitution; *Springer* cannot be so easily dismissed as unhelpful. Appellee's Br. at 16-17.

exceptions were prohibitory. And that is how Utahns understood them. Appellant's Br. at 26-30, 34-35.

While Barnett argues that because Subsection 8(1) does not say "shall not," it cannot be prohibitory, Appellee's Br. at 25-29, a provision does not have to use explicitly mandatory and prohibitory language to be both. *E.g.*, Utah Const. art. I, § 26 (conjoining "mandatory and prohibitory"); *Intermtn Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 15, 103 P.3d 716, 720 (Section 24 "is presumptively 'mandatory and prohibitory' under article I, section 26 of the Utah Constitution and there is nothing in the text that indicates otherwise."); *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, ¶ 14, 16 P.3d 533, 536 (same for Section 7 and Article X, Section 1); *Weaver v. Kimball*, 59 Utah 72, 202 P. 9, 9 (1921) (same for Section 12); *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985) (same for Section 11).[15]

Besides, even if Subsection 8(1) were read to be only "mandatory," it would not render its exceptions discretionary. The "shall" prescribes that capital and double felony persons "be" excepted from bailability. *E.g.*, *Colorado*, 529 P.2d at 1336 (holding "[a]ll persons shall be bailable . . . except" in the Colorado Constitution "to mean and say that . . . denial of bail is mandatory"); *Arizona v. Garrett*, 493 P.2d 1232, 1234 (Ariz. Ct. App. 1972) (holding that the Arizona Constitution's double felony exception was mandatory and not discretionary).

[15] Even the *Bottomly* dissent agreed that by "[e]liminating the words 'Unless otherwise provided by law,' the language is mandatory and prohibitory," *Bottomly*, 148 P.2d at 556, even when the Montana salary provision used no expressly prohibitory words.

While Barnett argues otherwise, Appellee's Br. at 25, Subsection 8(1)'s contextual use of "except" does not constitute "express words that declare[]" a person charged with an excepted offense to be "otherwise" subject only to a court's discretion. Utah Const. art. I, § 26. Section 26 contemplates "express words" like those in *Bottomly* or under Subsection 8(1)(c) ("designated by statute)," or Subsection 8(2) ("only as prescribed by law"). *Accord* Utah Const. art. I, § 6 ("but nothing herein shall prevent the Legislature from defining"); *id.* § 12 ("as defined by statute or rule"); *id.* § 13 ("as prescribed by the Legislature"); *id.* § 17 ("under regulations to be prescribed by law"); *id.* § 20 ("except in a manner to be prescribed by law").[16]

Subsection 8(1)(b), unlike these other provisions, does not use any express words to confer performative discretion on a court to grant bail to an otherwise nonbailable person. Appellant's Br. at 41. It defines its parameters and by operation of Section 26 limits a court in what it can consider and do. Section 26 "not only commands that [Subsection 8(1)'s] provisions shall be obeyed, but that disobedience of them is prohibited." *State Bd. of Ed. v. Levit*, 343 P.2d 8, 19 (Cal. 1959); *see* Appellant's Br. at 41 n.18 (discussing the origin of Section 26).

Section 26's purpose, as the *Levit* case explained, was to correct past and prevent future courts from reading constitutional provisions as "directory": discretionary suggestions or advisory options. *Levit*, 343 P.2d at 19. Section 26 does not permit a court

[16] Utah Const. art. VIII, § 16 ("as may be provided by statute"); *id.* § 2 ("may be changed by statute," "may resign," "by rule may sit and render"); *id.* § 4 ("[t]he Legislature may amend the Rules," "by rule may authorize"); Utah Const. art. VII, § 5(4) ("may appoint").

to read discretion into the Constitution where there are no express words granting discretion. Subsection 8(1)(b) has no express words, which is why the district court had to infer its purported discretion. Stip. Mot. to Reconst. at 2, 4-5. The requirement of "express words" rejects the concept of inferred discretion. Barnett's argument is mistakenly built upon comparisons of unlikes.

IV. BARNETT'S CONCERNS ABOUT PROSECUTORIAL DISCRETION ARE UNFOUNDED.

Barnett makes a "parade-of-horribles argument" about prosecutorial discretion, *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 932 (Utah 1993), hyperbolizing by words like "overbroad," "decimate," "curtail," "eviscertates," and "stand in the way" of a "fundamental" right to pretrial "redemption" that, "based solely on the prosecutor's discretion," "courts would be obligated to hold individuals without bail whenever a prosecutor asked." Appellee's Br. at 45-46, 48-50.

Prosecutors have discretion in choosing to move for pretrial detention, Utah Code Ann. § 77-20-206(1)(a), just like they choose what crime to charge, *State v. Martinez*, 2013 UT 23, ¶ 17, 304 P.3d 54, 58 (discussing "'traditional prosecutor discretion'"). But their discretion is not unfettered or unchecked. It is circumscribed by law. Utah Code Ann. § 77-20-206(5)(b) (stating what the prosecutor must demonstrate). The law, applied by the Judiciary, acts as a check on them.

Indeed, it is their discretion, after discharging their other obligations like victim consultation, Utah Code Ann. § 77-38-3, that permits them to consent to a person's participation in a specialty court, Utah Code Ann. § 78A-5-201(1). Prosecutors, similar to

courts, are to be "disinterested," *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987), and see "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935). They are servants of the law. *State v. Saunders*, 1999 UT 59, ¶ 31, 992 P.2d 951, 961.

Barnett's parade of horribles is unfounded. Prosecutors cannot, by their charging decision alone, unilaterally and on-demand have a person held without bail. They must first show in a hearing where evidence is presented and the defense is permitted to challenge that evidence that the supporting evidence is substantial and that detention is authorized by law. *See* § 77-20-206.

V. BARNETT'S POLICY DISCUSSION IS AIMED AT THE WRONG BRANCH OF GOVERNMENT.

Finally, Barnett argues that modern policy favors his interpretation because it permits what are otherwise courts of law to become rehabilitative problem solvers, reflecting "what the people of Utah stand for: redemption is fundamental and is available." Appellee's Br. at 48-50.

"'As a general rule, making social policy is a job for the Legislature, not the courts.'" *Jones v. Barlow*, 2007 UT 20, ¶ 34, 154 P.3d 808, 817 (citation omitted). The Legislature "'is to define crimes, prescribe penalties, and establish guidelines for prosecutors, judges, and juries for enforcing the law.'" *State v. Drej*, 2010 UT 35, ¶ 23, 233 P.3d 476, 483 (citation omitted) . "Courts are ill-suited for such ventures." *Barlow*, 2007 UT 20, ¶ 35.

Instead, the Judiciary's "province and duty [is] to say what the law is," *McDonald v. Fid. & Deposit Co. of Maryland*, 2020 UT 11, ¶ 33, 462 P.3d 343, 349, not what the law

"should" be, *Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 23, 61 P.3d 989, 998 ("We need not 'agree with the legislature as a matter of public policy. What the legislature should do is not the question.'") (cleaned up); *Tesla Motors UT, Inc. v. Utah Tax Comm'n*, 2017 UT 18, ¶ 57, 398 P.3d 55, 66 ("The legislature may draw lines that the judiciary views as curious or even unwise. But unless those lines are utterly lacking in a rational basis, we judges have no say in the matter; we leave the second-guessing to the political branches of government."). To do otherwise "invade[s] the purview of the legislature." *Barlow*, 2007 UT 20, ¶ 35.

The same is true *a fortiori* of the Utah Constitution. *Volker-Scowcroft Lumber Co. v. Vance*, 88 P. 896, 899 (Utah 1907); *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶¶ 12-14, 140 P.3d 1235 ("Judicial officers may not substitute their own wisdom for that of the people of Utah."). "Policy arguments are relevant only to the extent they bear upon the discernment of [the People's] intent." *Id.* at ¶ 12 n.3.

Unlike Barnett, the State has not argued modern policy. Appellee's Br. at 43-50. The Judiciary is not the proper place for such an argument. The State's policy discussion was to demonstrate a rational basis for the People to disqualify repeated offenders from bailability and to show the intent of those who voted on the amendment—what animated them to act.

While Barnett wishes for this Court to discriminate among felonies and select what ones qualify for the exception, implying that only violent felonies should be considered, Appellee's Br. at 47, the People made no such distinction. Their aim was "the repeated

offender." Appellant's Br. at 9. Subsection 8(1)(c) was instead created to address "any other crime" like violent ones.

Regardless of how "interesting" or progressive Barnett's policy argument is, it is not for the Judiciary to second-guess and override the prevailing policy the People constitutionalized. *Randolph*, 2022 UT 34 ¶ 69. It is not for the Judiciary to second-guess the People's prevailing legislative enactments designating certain acts as crimes and classifying them as felonies. And it is not for the Judiciary to say they are not "of comparable gravity" to a capital offense when the "intention" was otherwise. *Scott*, 548 P.2d at 236.

Barnett's argument fails because policy "is an argument better made to the legislature." *Gables at Sterling Vill. Homeowners Ass'n, Inc. v. Castlewood-Sterling Vill. I, LLC*, 2018 UT 04, ¶ 43, 417 P.3d 95, 108.

CONCLUSION

This Court should instruct the district court that as a matter of Utah constitutional law a double felony defendant "shall not be bailable," Miller, at 14A, when, as it was in this case, substantial evidence is shown to support a new felony charge.

Respectfully Submitted on March 30, 2023.

/s/ Jeffrey G. Thomson
Deputy Davis County Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(g) of the Utah Rules of Appellate Procedure, this Reply contains 6,996 words, exclusive of the items set forth under Rule 24(g), and therefore complies with the word limits set forth at Rule 24(g). I relied on the word count function in Microsoft Word to perform this calculation.

This Reply complies with the Addendum requirements of Rule 24(a)(12) because it contains a copy of historical information of central importance cited in the Reply.

This Reply, including its Addenda, also complies with Rule 21(h) because it does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

/s/ Jeffrey G. Thomson
Deputy Davis County Attorney

ADDENDUM

NOVEMBER 8, 1838.

COMMONWEALTH ex relatione CHAUNCEY and NIXON *against* KEEPER of the PRISON.

When a female is with child, and a potion is administered to her for the purpose of destroying the child, which produces the death of the mother, it is a murder in the second degree; unless there existed in the perpetrator of the mischief, an intent to take away the life of the mother, as well as destroy her offspring; in which case, it would be murder in the first degree.

It is the nature of the intention with which the criminal act is committed, that constitutes the great distinguishing feature between murder as it exists at the common law, and murder as it is understood and defined by the act of assembly of 1794.

Where the illegal act, which produces death, is malicious, and purpetrated with an intent to take life, the offence becomes murder of the first degree; bnt, where no such intent is apparent, the crime is reduced to murder of the second degree.

Where a crime is charged, which is short of a capital felony, the judges are bound to admit the prisoner to bail; but, where a capital felony is charged, and the proof of it is evident, or the presumption great, no power exists anywhere to admit to bail.

A safe rule, where a malicious homicide is charged, is to refuse bail in all cases where a judge would sustain a capital conviction if, pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and, in instances where the evidence for the commonwealth is of less efficacy, to admit to bail. Hence, where a judge is satisfied, that the offence at most is only murder in the second degree, the prisoner is entitled to be liberated on bail.

Neither the recorder of the city of Philadelphia, nor a justice of the peace, can admit to bail in cases of felonious homicide, whether of murder or manslaughter; nor in cases of robbery, burglary, rape, arson or horse stealing.

The presidents of the courts of common pleas throughout the commonwealth, possess the same authority and jurisdiction to admit to bail, as do the judges of the Supreme Court.

THIS was a writ of *habeas corpus ad subjiciendum*, allowed by the President of the Court of Common Pleas, and issued on the relation of Henery Chauncey and William Nixon, and directed to the keeper of the prison of the county of Philadelphia. To the writ, the keeper of the prison returned, that he detained the relators in pursuance of certain commitments, issued by the recorder of the city of Philadelphia; of which copies were annexed to his return. From them, it appeared, that the relator, Henry Chauncey, was charged with the

murder of Eliza Sowers, and the relator, William Nixon, with being accessory, before the fact, to the murder. As the object of the writ of *habeas corpus* was to enable the defendants to offer bail for their appearance at the next Court of Oyer and Terminer, to answer for the offences charged, the depositions taken by Samuel Rush, Esq., recorder of the city of Philadelphia, were, by consent, read to the court, on the hearing of the case, which took place on the 5th of November, 1838. As the testimony given before the recorder was voluminous in its nature, and not material to the proper understanding of the decision of the court, it is omitted in this report. It did, however, appear, that Eliza Sowers, an unmarried female, in the employ of William Nixon, being pregnant, applied to Henry Chauncey, (said to be a practising physician,) for the purpose of obtaning his aid in accomplishing a criminal abortion. That Chauncey consented, an effected the object; but, did it in such manner, that peritoneal inflammation ensued, and Eliza Sowers, a few days afterwards, died at his house, in great agony; her death being the consequence of the abortion which was produced. There was also evidence showing, that Nixon had knowledge of, and was accessary to, all that Chauncey had done.

The question discussed was, the authority of the president of a court of Common Pleas to admit to bail, prisoners who were charged with the commission of murder.

Hart, *I. Norris* and *D. P. Brown*, for the relators argued.

1st. The court has the power to take bail. By the act of April 30, 1832, the president judges of the courts of Common Pleas can take bail, as amply as the judges of the Supreme Court can. This act supplies the acts of 21st March, 1806, (4 Smith, 334,) and of 1790, (2 Smith, 531,) and the act of 1780, relative to horse stealing. The question, then, is, what is the jurisdiction of the judges of the Supreme Court? In the cases of robbery, burglary, &c., and horse stealing, they are expressly allowed to admit to bail; and, by the act of 1722, (1 Smith, 139,) they have the same jurisdiction and powers as the King's Bench. This jurisdiction is continued by the act of 16th of June 1836, sec. 1. The King's Bench has power to admit to bail in all cases whatever. All felonies were bailable by the common law, till murder was accepted by stat. 6 Edw. 1, c. 9, (4 Black. 298; 1 Chit. Crim. Law, 76,) which is not in force here. The statute of West. 1, c. 15, declares what persons are not replevisable by writ *de homine replegiando*; the first of which, are those who are taken for the death of a man, yet, the King's Bench is not restrained by this statute, although they regard its rules. 2 Hawk. Ch. 15, tit. Bail, sec. 33. 47. 80. 1 Chit Crim. Law, 80. 4 Black. 299. 1 Wilson's Bacon, 353. King v. Rudd.

Lord Castlemain was bailed for treason, (4 State Trials, 398,)

and Lord Mohun for murder; cited in 2 Strange, 911. Lisle's case, (Kel. p. 89.)

Having the right, the court will exercise their discretion according to circumstances. In capital cases, the court will exercise it where there is any circumstance to induce the court to suppose the party may be innocent. The rule is, that in all criminal cases, in which it seems doubtful, whether the accused is guilty or not, bail is to be allowed. 1 Wilson's Bacon, tit. bail, in Crim. Cases, p. 348. In many cases, the offence amounts to a certainty; but, where there is reasonable doubt of guilt, bail should be allowed. Barney's case, (5 Mod. 323.) Lord Baltimore's case, (4 Burr. 2179; S. C. 1 Black. 648.) Sir W. Wyndham's case, (1 Strange, 5.) And this, where the doubt is of law or fact. King v. Marks, (3 East, 165,) per Le Blanc, J. It makes no difference what the commitment is for. King v. Dalton, (2 Strange, 911.) It would be oppressive to detain the party in many cases, without bail. It is true, there is no trace, in our reports, that this power to bail has ever been mooted in capital cases; but the practice has been universal to admit to bail, subject to the restrictions prescribed by the King's Bench. In Short's case, the Chief Justice discharged him. 10 Serg. & Rawle, 125. If he had the power to discharge, he would have had the power to admit to bail. The Supreme Court, in New York, exercise the power to bail in all cases. Tayloe's case, (5 Cowan, 39.)

2d. The constitution of Pennsylvania has guaranteed the right. Art. IX. sec. 14; "All prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or presumption strong." The charge is founded on suspicion, and circumstantial evidence. The girl was a patient of Dr. Chauncey's. He was exercising his best skill to cure her. In England, some of the most eminent of the profession have been charged with murder, on account of the unsuccessfulness of their skill. Rex v. Van Butchell, (14 Eng. Com. Law, 493.) Rex. v. Long. (19 Ib. 440.) Rex. v. Williamson, (19 Ib. 697.) The case of Rex v. Senior, (1 Moody Crim. Cas. 346,) cited in Chitty's Medical Jurisprudence, 421, is a case of gross ignorance. Besides, to constitute murder in the first degree, there must be a clear intent to take life. Com. v. Green, (1 Ashm. 299.) There is no evidence of any intention to kill, which is the essence of the crime. Even if the killing was unlawful, the law will not presume it murder in the first degree. Com. v. Lewis, (Addis. 282.) There must be evidence of an express intent to kill. Nixon it only charged as an accessory before the fact; and all accessories to a felony, even of homicide, are bailable. 2 Hawk. ch. 16, sec. 53, p. 159. 1 Hawk. 121.

W. B. Reed, (Attorney General,) Emlen and Clarkson, for the commonwealth, cited, 1 Burn's Justice, 180, 1 Hawk, Pleas of Crown, 95. 105. 1 Bacon's Abr. 352, "Bail." Statute of 1 & 2 Ph. & M. c.

13. United States v. Johns, (4 Dallas, 413.) Rex v. Marks, (3 East, 163.) Ex parte Tayloe, (5 Cowen, 39.) 1 Hale's Pleas of Crown, 430. 1 Chitty's Crim. Law, 263. Roscoe on Criminal Evidence, 191. Acts of Assembly of 1790, 1794, and Laws agreed on in England, (1682,) page 28; act of 1705, (1 Smith's Laws, 56.) Act of 1722, (1 Smith's Laws, 140.) Constitution of 1776, ch. 2, sec. 28. Act of 10th March. 1780, (Purdon 380.) Act of 1785, (Habeas Corpus Act.) Act of 5th April, 1790, (Purdon, 699.) Constitution of 1790. Act of 1836, (Purdon, 703.) Act of 1832. Jacobs v. Commonwealth, (5 Serg. & Rawle, 317.) Commonwealth v. Wilson, (Oyer and Terminer, Philadelphia county.)

The opinion of the court was delivered by

KING, *President.*—The defendants have sued out this writ, in order to offer bail for their appearance at the next Court of Oyer and Terminer, to answer the accusation for which they stand committed. From the return, it appears, that the relator, Henry Chauncey, is charged with the murder of Eliza Sowers, and the relator, William Nixon, with being an accessory before the fact, to the murder. The depositions taken before his honor, the recorder of the city, have been exhibited to us, and contain a full and accurate statement of the facts, proved before that officer, on which he committed the defendants to the custody from which they now seek to be relieved. It is not necessary to the understanding of the principles on which the decision now about to be pronounced is based, to enter into the voluminous and painful details of this record of cruelty and crime; but, simply to refer to some of the results induced by their consideration, on our judgments. Sufficient probable cause has been shown, that Eliza Sowers, a young, unmarried female, in the employ of the relator Nixon, being pregnant with the offspring of illegitimacy, applied to the relator Chauncey, (said to be a practising physician of this city,) with the view of obtaining his aid in accomplishing a criminal abortion: that Chauncey acquiesced in her wishes, and effected the object; but, in such a manner, that peritoneal inflammation ensued, and, in a few days, the unfortunate victim of seduction and malpractice, died in excruciating tortures, in the house of Chauncey; her death being the consequence of the abortion. There is also sufficient probable cause shown, that the relator Nixon was conusant of, and accessory to, this terrible act of turpitude. I say, there is sufficient probable cause shown, of the existence of thse facts; because, the proceedings being *ex parte*, the accused not having exhibited their defence, the evidence can only now be so regarded. For the honor of humanity, it is to be presumed, that when the defence is presented to the appropriate forum, this apparently dark and fearful imputation will

be explained in such a way, as to comport with the innocence of those on whom it now so heavily rests.

On the motion to admit the relators to bail, three subjects of inquiry present themselves. First, what is the legal character of the offence of which they stand charged? Second, whether such a charge, properly supported by evidence, is a bailable offence by the common law, or by the peculiar institutions of Pennsylvania? And, thirdly, whether we, or either of us, are clothed with the necessary authority to admit the relators to bail, if it should appear that they are entitled to that important franchise?

Of the legal character of the offence, if proved as charged, no doubt can be entertained. One of the most learned and humane sages of the common law, Sir MATTHEW HALE, gives the following as doctrine ruled by him at Bury Assizes in 1670: "If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it and it works so strongly that it kills her, this is murder: for it was not to cure her of a disease, but unlawfully to destroy her child within her: and therefore, he that gives a potion to this end must take the hazard, and if it kills the mother, it is murder." 1 Hale's Pleas of the Crown, 429--30. In more recent times, the same doctrine has been held. Tinkler's case, (1 East P. C. ch. 5, sec, 16.) In cases of this character, although death was not intended, yet, the acts are of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they are practised; and, consequently, those who perpetrate them are answerable for their results.

Although, by the common law, such a crime would have therefore been murder, yet, in Pennsylvania, it can hardly be regarded as exceeding that crime in the second degree, unless there existed in the perpetrator of the mischief an intent as well to take away the life of the mother as to destroy her offspring. It is the nature of the intention with which the criminal act is committed, that constitutes the great distinguishing feature between murder as it stands at the common law, and murder as it is understood in the penal code of this commonwealth. Where the illegal act, which produces death, is malicious, and perpetrated with an intent to take life, the offence becomes murder of the first degree, and punishable with death; where no such intent is apparent, the crime is reduced to murder of the second degree, and punished by penal imprisonment. For one of these degrees of murder, is the defendant Chauncey clearly liable to answer; and the defendant Nixon as accessory before the fact is equally obnoxious to criminal investigation now, and punishment subsequently, if proved guilty.

This brings us to the second head of inquiry, viz., whether by law, the defendants are entitled to be released on bail, before trial, or, whether they are to be held in custody to abide that issue. If this question were to be determined by the common law, as adminis-

tered in an English court, or in any state tribunal, proceeding according to the course of the common law, bail would not necessarily be allowed. Murder, or criminal homicide, where the party charged is clearly the slayer, is not bailable by any subordinate tribunal; (1 Chitty's Crim. Law, 78;) nor would the court of King's Bench bail, any case, which is expressly declared to be irrepleviseable by the inferior magistrate, without some peculiar circumstances being shown to exist in the prisoner's favor. Bacon's Abr. Bail D. Tayloe's case, (5 Cowan. 39.) No special circumstances have been exhibited in this case, adequate to favor an exception to this general rule; and if nothing peculiar existed in the institutions of Pennsylvania, in reference to the subject, this application would be refused. But, the law of bail, in criminal cases, has ever been with us a peculiar system. By the provincial statute of 1705, (1 Smith, 56,) it was among other things, provided, "that all prisoners shall be bailable by one or more sufficient sureties, to be taken by one or more of the justices having cognizance of the fact, unless for such offences as are or shall be made, felonies of death by the laws of this province; and this statute is still in full force and operation. In the original constitution of the state, this principle was introduced, and it was there declared, that "all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great." In the present constitution, the same provision, in the same words, is found in the "*Declaration of Rights.*" If any faith is to be placed on human language, in expressing the intentions of a lawgiver, nothing can be clearer than that these provisions of the act of 1705, and of the constitution of 1776 and of 1790, intended to guaranty the right to the citizens of the state, that for all offences charged, bail by sufficient sureties should be received, except for capital offences, or, as they are more precisely defined by the act of 1705, "felonies of death." The language is peremptory: "All persons shall be bailable." In the class of cases not within the exception, nothing is left to judicial discretion, except the ascertainment of the "sufficiency of the sureties;" which, of course, is to be regulated as well by the condition of the accused, as the nature and urgency of the crime charged against him. The practical construction of the act of 1705, and of the constitution, has always agreed with this doctrine; for, at no time in our judicial history, has it been held, that a party charged with a crime inferior in grade to a felony of death, was not, before bill found, or conviction on trial, bailable by "sufficient sureties." The object of the act of 1705, and of the constitions of 1776 and 1790, was to limit, not to enlarge, the judicial discretion on questions of bail, which at common law existed without stint in the higher tribunals, such as the King's Bench. While on the one hand, it was deemed inconsistent with civil liberty to leave the right of bail, in minor offences, dependent on mere judicial discretion, it was, on the other hand, esteemed incon-

sistent with the certainty of punishment due to atrocious offenders, to allow the exercise of such a discretion, on capital accusations of an urgent character. The resulting rule, therefore, is this: where the crime charged is short of a felony, the judges are bound to admit to bail; but, where a capital felony is charged, and the proof is evident, or the presumption great, no power exists anywhere to allow it.

The Attorney General seems to suppose, that a crime capital at the adoption of the constitution, still continues so to be considered, so far as respects the question of bail; and that, therefore, inasmuch as the crime of which the relators stand charged, was then a felony of death, it is not now bailable, although the punishment may have since been modified. This construction cannot be sound as respects the act of 1705, for that act excepts from the right of bail such crimes as "are" or "shall be made" capital felonies. If the operation of this law would, as it clearly does, extend the exception to the right of bail to future felonies of death, it would seem to follow, that when the lawgiver ceased to regard an offence as deserving that high penalty, the general right to bail, on an accusation of such a crime, necessarily arose. But, if the constitutional, was the sole provision on the subject, I should regard the construction urged on us as too narrow. "All prisoners shall be bailable, unless for capital felonies where the proof is evident, or the presumption great," is the language of the constitution. In the employment of such language, in the formation of an organic law, it must have been intended to apply it to all future details of criminal legislation; otherwise, continued modifications of the constitution would have been necessary, to meet the changes in the criminal code, adopted from time to time by the legislative power. These would seem to have been the views of the legislature, which, aided by the highest professional skill of the times, passed, on the 5th of April, 1790, the "act to reform the penal laws of this commonwealth," which noble statute forms the basis of our improved system of criminal jurisprudence: for, in the same section of that act, in which various crimes formerly felonies of death, are made penitentiary offences, the authority to bail such offenders is confined, not given, to the judges of the Supreme Court. Now, if it is true, that felonies of death at the adoption of the constitution, still are to be so regarded with reference to bail, then, was this act an infraction of the constitution of 1776, which, it will be remembered, contained the same clause as to bail in criminal accusations, found in the existing constitution; for the legislature could not authorise any tribunal to admit an offender to bail, charged with an offence declared by the constitution not to be bailable. But, the act of 1790 is obnoxious to no such exception. When that law declared the offences alluded to should be no longer regarded as felonies of death, the constitutional right of a prisoner charged with any of them, to be admitted to bail, *ipso facto* arose;

and the provision restricting the authority to receive such bail, to the judges of the Supreme Court, was but to prevent abuses in admitting such high offenders to bail by inferior tribunals.

There is more force in the argument of the Attorney General, in which he insisted, that assuming murder in the second degree to be a bailable offence, yet, that the power to discriminate and decide upon the degrees of murder, pertains to the jury which tries the offender, and is not properly exerciseable by the judge, on a question of admitting to bail. In a given case, in which a malicious homicide should be clearly shown, and in which the presumption was reasonably strong, that the malicious killing was done with an intent to take away life, I should pause before I undertook to decide as to what degree of murder the perpetrator was guilty of, in such an inquiry as that before me. It is difficult to lay down any precise rule for judicial government, in such a case; but, it would seem a safe one, to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction, pronounced by a jury, on evidence of guilt, such as that exhibited on the application to bail; and to allow bail, where the prosecutor's evidence was of less efficacy. This appears to afford a practical test, by which the question of admitting to, or refusing bail, in malicious homicide, may be readily solved. Applying this rule to the case before us, we cannot discover such a state of the evidence as would induce us to consider a capital conviction as authorized by it. A well settled series of decisions, flowing in one current, since the act of 1794, by which murder was discriminated and divided into degrees, have established, that to constitute the capital offence, the homicide must not only have been malicious, but that it must have been perpetrated with an intent to take life, except where the murder was "committed in the perpetration or in the attempt to perpetrate any arson, rape, robbery or burglary." We have most carefully examined the testimony, and, in no part of it, can we find any ground for a fair and reasonable presumption, that the defendant Chauncey ever intended to take away the life of Eliza Sowers. On the contrary, criminal as he possibly may be, we are irresistibly led to the conclusion, from the whole case, that such a tragical result was the farthest thing from his wishes and intentions. The case, therefore, does not present itself as one of equivocal character as to the intent with which the homicide was committed, but one in which an intent to kill Eliza Sowers would be a most strained and forced presumption. At common law, the death of the mother following criminal abortion, is murder, not because the agent accomplishing the act intended to kill the female, but, because, the act being unlawful in itself, he is held responsible for all its results. In Pennsylvania, that murder only is a felony of death, (except in the cases previously referred to,) where the act producing the homicide is not only unlawful, but perpetrated with an intent to kill the victim of the crime. The

common law murder arising from death following criminal abortion, is the exact kind of crime which the legislature intended by the act of 1794, to reduce to the grade of murder of the second degree; being a homicide, arising from an unlawful act, unaccompanied with any intent to take away life.

It is said, however, that Eliza Sowers came to her death by poison, and that such a killing is, according to the act of 1794, a murder of the first degree. There is evidence, showing that some emmenagogue was administered to the deceased; but, the inference deducible from the whole proof rather seems to be, that the abortion was the product of instrumental violence. But, be this as it may, murder by poison must, to constitute that crime in the first degree, be a "willful" killing. "All murder," says the act, "which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree." Murder by "poison, or lying in wait," are given as instances of willful, deliberate and premeditated killing; not as cases which, under all conceivable circumstances, are to be regarded as such. When, however, a malicious homicide accompanies the perpetration, or attempt to perpetrate, arson, rape, robbery or burglary, the common law is left to its full operation, and the incendiary, ravisher, robber or burglar, if he takes life in the prosecution of his crime, is answerable capitally for its consequences, whether he did or did not intend to kill. Suppose, for instance, a quack should administer a poisonous drug, not with intent to kill, but under the honest, but mistaken, idea of relieving his patient; but where, from the magnitude of the dose, or the peculiar condition or habits of the patient, death ensues: here would be a case of killing by poison, but not one of murder by poison; for, who could regard such a case as one of willful, premeditated and deliberate killing? In the case before us, if savin or ergot was administered to the deceased, it was not done with an intent to destroy or permanently injure her; and it is for her murder, not the unlawful destruction of her offspring, that the defendants are charged. How can we regard an act as the result of a "willful, deliberate and premeditated" intent to kill Eliza Sowers, in which the mind finds nothing to rest upon, to satisfy it that such an intent existed; and, where the reasonable inference is, that the deleterious drug, if any was administered, was exhibited without any intent to injure the recipient, but to produce a different, though an unlawful result? Considering the case with regard to the testimony before us, we cannot view it as a case of killing by poisoning, within the true intent and meaning of the act of 1794. It may be, that hereafter the commonwealth may present the case in a more urgent form. Our opinions are expressed on the case as it is now presented, and we desire it to be so understood. On the whole,

we are of opinion, that the commonwealth has not shown to us, that the present is the case of a "capital offence, where the proof is evident, or the presumption great," and that, according to the constitution and laws of the state, we are bound to admit the defendants to bail; having by them no discretion vested in us to refuse them the benefit of this great chartered right.

The remaining question for decision is, whether we, or either of us, are clothed with the necessary authority to accept the bail tendered; or whether that power exclusively pertains to the judges of the Supreme Court. For the better understanding of this question, it becomes requisite to examine into the relative powers of our magistracy, subordinate and superior, in reference to bail, in criminal accusations.

By the 4th section of the provincial act of the 22d of May, 1722, (1 Smith's Laws, 137,) the justices of the peace of the province had, among other things imparted to them, "full power and authority, in and out of sessions, to take all manner of recognizances and obligations as any justices of the peace of Great Britain may, can or usually do." Although some parts of this section are virtually repealed by the existing constitution, this provision, in my opinion, is in full force, and forms the basis of all the authority exercised by justices of the peace in receiving bail in criminal cases. The authority of a justice of the peace, then, in criminal bail, is analogous to that possessed by similar officers in Great Britain, at the time of the passage of this law, unless when modified or extended by subsequent legislation. The limitations under which English justices of the peace exercised this important power in 1722, are found in the statute of Westminster 1, 3 Edward 1, chapter 15, and of 1 & 2 Philip and Mary, chapter 13. The 2d, 3d, 4th, and 5th sections of 1 & 2 Philip and Mary are declared by the judges of the Supreme Court to be in force in Pennsylvania; and, as the second section of 1 & 2 Philip and Mary, re-enacts the statute of 3 Edward 1, ch. 15, the latter is consequently in operation. It is not necessary to enumerate all the offences declared by these statutes, and the decisions under them, not to be bailable by a justice of the peace; but, it is quite clear, that in all cases of felonious homicide, whether of murder or manslaughter; of robbery, burglary, rape, arson or horse-stealing, a justice of the peace cannot admit to bail. In refusing, therefore, after final hearing, to bail these defendants, the recorder acted with perfect propriety; for, assuredly, he did not possess the authority invoked.

From the operation of these statutes, the Court of King's Bench has ever been held to be exempted, and the judges of that court, and each of them, in the plenitude of that power they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed for crimes in which inferior jurisdictions would not venture to interfere. 1 *Chit. Crim. Law*, 80. 1 *Bacon's*

Abr. tit. Bail. By the act of 22d of May, 1772, (1 Smith, 159, "for establishing courts of judicature in this province," the Supreme Court of the state is clothed with the amplest powers, and directed to "minister justice to all persons, and exercise their jurisdiction as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminister, or any of them, may or can do." The Supreme Court, under this broad grant of power, have, like the Court of King's Bench, authority to admit to bail in all cases; subject, however, to one constitutional limitation, which interdicts bail in cases clearly capital. By the act of the 30th of April, 1832, (Pamphlet Laws, 388,) "the president judges of the courts of Common Pleas are empowered to admit to bail any person accused of felony, or other criminal offence, as amply and effectually as any judge of the Supreme Court may or can." If, then, at common law, the Court of King's Bench, or any of the justices thereof, can admit to bail any offender, then it would seem to follow, that the justices of the Supreme Court possess the same authority, with the single limitation referred to it; and that, consequently, the president of this district, possessing the same jurisdiction in the premises as a judge of the Supreme Court, can and ought to accept bail, in a case like that before us. The attorney General, in his ingenious argument, tried to avoid this necessary conclusion, by assuming the novel ground, that a single judge of the Supreme Court did no possess the same power, in this respect, as a single justice of the King's Bench; and that, as my authority was only co-extensive with that of a "judge of the Supreme Court," I could not admit the relators to bail. If the premises of the argument of the learned attorney General were sound, the conclusion would be certain. But, I cannot so regard them. By the act of 1722, the Supreme Court was directed to be composed of three judges; and the jurisdiction given to the court is to be exercised by the said "judges, or any two of them." The effect of this direction was only to make a majority of the judges necessary to constitute a court, which would have been necessary if the law had been silent on the subject. At present, the Supreme Court is composed of five judges; and no one, I presume, would venture to argue, that because, by the act of 1722, two judges composed a quorum of the Supreme Court, the same number would be adequate under its existing organization. The act of 1722, in stating what should be a quorum of the court, never meant to limit the authority given to its judges in the general grant of power. Such an idea never has heretofore been started. Every chief and associate justice of the Supreme Court since the act of 1722, has issued writs of *habeas corpus*, and admitted prisoners to bail, where the inferior tribunals were deemed inadequate for the purpose; and to none of the distinguished lawyers who have adorned that bench, has such a doubt presented itself. Constant practice has settled

this question too firmly to be now disturbed. If it was true, that none but the Supreme Court could bail in such a case, how inconvenient would be the consequences. At present, that court sits in several counties of the state. In all the other counties, prisoners situate like these defendants, nay, parties charged with simple manslaughter, would be denied the benefit of the constitutional right of bail before trial. This would hardly be the ministration of justice, "without denial or delay." Although long practice, under one rule, and the inconvenience of adopting another, do not make law, yet, they are strong evidences of what is the law. On the point of my authority to take this bail, I have no doubt. Although by law it would seem, that the bail is to be taken by me, yet, in this judgment, as well as in the amount of bail, which will be required, *Judge* RANDALL (who sat with me on the hearing) fully unites. In fixing the amount of bail, we have had full regard to all the circumstances of the case; but, we forbear commenting on them, lest we might unwillingly prejudice the defendant's case on the trial. Let the defendant Henry Chauncey enter bail in the sum of $8000; and the defendant William Nixon, in the sum of $5000, to answer at the next Court of Oyer and Terminer to be holden for Philadelphia county.

CERTIFICATE OF SERVICE

I certify that on March 30, 2023, the Reply Brief of Appellant was filed with the Court in a searchable PDF attachment to an email and served upon Appellee's Counsel by email at:

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I further certify that the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and Counsel within 7 days.

/s/ Jeffrey G. Thomson
Deputy Davis County Attorney