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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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14 MAP 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

DANIEL GEORGE TALLEY,
Appellant

REPLY BRIEF FOR APPELLANT

Appeal from the Opinion and Order of the Superior Court issued July 17, 2020, indexed at Superior Court Docket Number 2627 EDA 2018, affirming the judgment of sentence imposed on August 24, 2018 by the Montgomery County Court of Common Pleas at CP-46-CR-0005241-2017.

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I. INTRODUCTION

In its brief, the Commonwealth advocates for this Court to interpret Article I, §14 in a way that is facially unconstitutional. According to the Commonwealth, a person presumed innocent, with no criminal record, can be stripped of his liberty indefinitely after a "hearing" with no presentation of evidence, upon the lowest burden of proof, and even though he is charged with a low-level crime. The Commonwealth then addresses Mr. Talley's arguments about the Best Evidence Rule by claiming that Appellant is really arguing about authentication—even though he has consistently, and explicitly contended he is not—in an effort to distract from the actual Rules of Evidence at issue, which plainly compel relief in this case.

II. ARGUMENT

A. Bail

1. *Alberti* and other cases on the burden of proof at a bail denial hearing are contradictory, and thus *stare decisis* does not apply.

The Commonwealth and its amicus heavily rely on the doctrine of *stare decisis* in their briefs. However, *stare decisis* does not apply when prior precedent is contradictory. *See Livingston's Ex'x v. Story*, 36 U.S. 351,

400 (1837) (Baldwin, J. dissenting) (when prior cases "are contradictory, the matter is open for future research").

Moreover, prior precedent, even if not contradictory, should not be followed if the prior decision was wrongly decided. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 653-57 (1999) ("an ironclad requirement of adherence to precedent in all cases would transform the doctrine of stare decisis into an 'imprisonment of reason,' requiring the perpetuation of an error in future cases for the sole reason that it was once enshrined as case law by the votes of five Justices.); (*quoting United States v. Internat'l Boxing Club*, 348 U.S. 236, 249 (1955) (Frankfuther, J., dissenting)) (citing *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring)).

The Commonwealth argues that *Commonwealth ex rel. Alberti v. Boyle*, 195 A.2d 97 (Pa. 1963) mandates that the burden of proof at bail denial hearings be a *prima facie* standard. First, if *Alberti* so holds, then it was wrongly decided for all of the reasons articulated in Appellant's and his Amici's briefs, and therefore it should not be followed by this Court.

But it is not clear that *Alberti* does articulate a *prima facie* standard. *See, e.g. Browne v. People of Virgin Islands*, 50 V.I. 241, 260 (2008)

(interpreting *Alberti* as an intermediate standard of proof). *Alberti* "condemned" the practice of making the bail decision on the basis of the transcript from the coroner's inquest (the functional equivalent of the preliminary hearing) and instead required a separate bail hearing with the presentation of live witnesses. *Id.* at 98. It is true that *Alberti* articulated the standard as evidence "sufficient in law to sustain a verdict of murder in the first degree," but if *prima facie* evidence was all that was required, why would there need to be a second hearing at which live witnesses would be presented? Live witnesses would allow for credibility determinations, whereas a cold transcript would not, but no credibility determination would be necessary if a *prima facie* standard was to be utilized. Similarly, if *prima facie* evidence were all that were required, the fact that the case was held for Court would mean that a *prima facie* case had been established, and thus law of the case would mandate the defendant be denied bail.

Moreover, *Alberti* approvingly cited to old lower court cases that required a burden of proof higher than *prima facie* evidence. *See, e.g. Commonwealth ex rel. Chauncey and Nixon v. Keeper of the Prison*, 2 Ashm. 227, 234 (Philadelphia County 1938) (articulating an intermediate standard). Such fact was acknowledged in *Commonwealth v. Truesdale*, 296 A.2d 829, 831-32 (1972) when this Court approvingly cited to *Alberti*—and

to the lower court cases cited in *Alberti*—and explained that bail could only be denied if "the evidence in support of [the offense] was strong." *Truesdale*, 296 A.2d at 832 n.6 (quoting *Commonwealth v. Lemley*, 10 P.L.J. 122 (Green County 1862)). A "strong evidence" standard negates the possibility of a *prima facie* standard, because a *prima facie* standard never assesses the strength of the evidence.

Thus, because prior precedent from this Commonwealth is contradictory or unclear regarding the burden of proof to be utilized, *stare decisis* does not apply and this Court should interpret the Constitution in accordance with its plain language and the cannons of statutory construction.

2. The Commonwealth confuses the *prima facie* and preponderance standards and otherwise cites inapposite cases.

In its brief, the Commonwealth states, "[w]hile most states reportedly employ some heightened standard, Pennsylvania is not alone in its use of prima facie standard." Com. Br. 33 (internal citations omitted). To support this proposition the Commonwealth then cites to cases utilizing a preponderance standard. *Id.* (citing *State v. Hill*, 444 S.E.2d 255, 257 (S.C. 1994); *Ayala v. State*, 425 S.E.2d 282, 285 (Ga. 1993); *Ex Parte Shires*, 508 S.W.3d 856 (Tex. 2016); *Weatherspoon v. Oldham*, 2018 WL 1053548 at *4 (W.D. Tenn. Feb. 26, 2018)). *Prima facie* evidence and the preponderance standard are not the same. The *prima facie* standard is established when "one

party produces 'enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.'" *McNeil v. Jordan*, 894 A.2d 1260, 1273 (Pa. 2006) (quoting *BLACK'S LAW DICTIONARY* 1209 (7th ed. 1999)). The preponderance standard, conversely, "is defined as the greater weight of the evidence." *Raker v. Raker*, 847 A.2d 720, 724 (Pa.Super. 2004). Thus, the preponderance standard assesses the weight of the evidence, while the *prima facie* standard only assesses whether there is legally sufficient evidence to prove a fact, a far lower standard.

Moreover, the cases cited by the Commonwealth are also not on point because not a single one of the states in those cases had a provision that required a "proof is evident or the presumption great" standard. The overwhelming majority of states that do have such a provision in their state law, conversely, require an intermediate burden of proof or higher. *See Browne v. People of Virgin Islands*, 50 V.I. 241, 260 (2008) (collecting cases).

3. A proffer does not meet the Commonwealth's burden of proof.

The Commonwealth admits that it proceeded entirely by proffer. Com. Br. 38 ("The affidavit laid out the Commonwealth's proffer").

In its brief, the Commonwealth's fundamental argument is that *Alberti* is the controlling precedent and therefore *stare decisis* requires this Court to

apply a *prima facie* standard[1], and yet, the Commonwealth asks this Court to ignore the express holding in *Alberti* that the Commonwealth may not proceed by proffer and instead must present live witnesses. *Alberti*, 195 A.2d at 98.

Because the bail decisionmaker must assess the weight of the evidence, it is improper for the Commonwealth to proceed by proffer when moving to deny a detainee bail, and thus, this alone violated Mr. Talley's rights under Article I, § 14.[2]

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[1] Which, of course, Appellant disputes. *See* Section II.A.1 *supra.*

[2] The Commonwealth argues that the defense attorney agreed to allow the trial court to consider the affidavit of probable cause. Com. Br. 37. However, just because Mr. Talley's attorney did not object to the trial judge considering the affidavit of probable cause, this does not mean that he agreed that there was sufficient evidence contained therein to deny bail. Indeed, Mr. Talley's attorney consistently maintained that Mr. Talley should be released, and the affidavit of probable cause did nothing to prove what conditions of release were available.

Moreover, Mr. Talley had the constitutional right under Article I, §14 to be bailed unless the Commonwealth could prove with evidence that he is a danger and that there were no conditions of release that could obviate that danger. To the extent the Commonwealth is arguing that Mr. Talley waived his right to an adversary hearing with the presentation of evidence regarding his constitutional right to bail, Mr. Talley himself was the only person who could waive that constitutional right. *See, e.g., Commonwealth v. Hill*, 422 A.2d 491 (Pa. 1980) (an individual can waive a constitutional right, but the record must clearly demonstrate an intentional relinquishment of a known right or privilege); *Commonwealth v. Monica*, 597 A.2d 600 (Pa. 1991) ("While an accused may waive his constitutional right, such a wavier must be the free and unconstrained choice of its maker, and also must be made knowingly and intelligent. To be a knowing and intelligent waiver defendant

4. The Commonwealth conceded that there was a lack of proof regarding the availability of electronic monitoring

The Commonwealth stated in a footnote, "[t]he trial court considered whether it could place defendant under house arrest and electronic monitoring, but the Commonwealth advised it that this was impossible pretrial. Defendant conceded he had not looked into it. The trial court proceeded with the understanding the[re] were not options." Com. Br. 40 n.22 (internal citations omitted). This footnote contains the entirety of the Commonwealth's argument regarding the propriety of the trial court's basis for denying release on electronic monitoring.

This concession of a lack of evidentiary basis for the conclusion that electronic monitoring was not available proves that the trial court committed error under any evidentiary standard.

In its brief, the Commonwealth acknowledges that it bore the burden of proof at the bail hearing. *Id.* at 27. Thus, it was the Commonwealth's burden to prove that electronic monitoring *was unavailable*—it was not the defendant's burden to prove that it *was available*. In its brief, the

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must be aware both of the right and of the risks of forfeiting that right. Furthermore, the presumption must always be against the waiver of a constitutional right.") (internal citations and quotation marks omitted). Mr. Talley was never asked whether he agreed to waive his constitutional right to a bail hearing, let alone colloquied to ensure that such waiver was knowing and voluntary, and thus no such waiver could have occurred.

Commonwealth does not contest that electronic monitoring was available because Montgomery County indisputably has the technology to do electronic monitoring and the probation department would have had to follow any order for electronic monitoring from the trial court.

Thus, the trial court should not have accepted the prosecutor's equivocal word that it was his understanding through hearsay that electronic monitoring was not available presentencing. 5/1/18 Tr. 18-20. Indeed, Mr. Talley's attorney asserted that it was his understanding that electronic monitoring *was* available. *Id.* ("My understanding is [electronic monitoring] is a possibility and can be ordered by the Court."). The trial court admitted in its Opinion that it relied on the prosecutor's equivocal, unsupported statement that electronic monitoring was unavailable when it denied bail. *See* Trial Opinion, p. 8 n. 3.

Thus, since the trial court denied bail on the basis of the unavailability of electronic monitoring after the presentation of no evidence by the Commonwealth on that issue, regardless of the burden of proof, the Commonwealth did not establish that there were no conditions of release that could assure the safety of the community and this alone violated Mr. Talley's rights under Article I, § 14.

5. The Commonwealth's interpretation of Article I, Section 14 is patently unconstitutional.

Mr. Talley argues that the constitutional avoidance doctrine mandates his interpretation of Article I, §14, including a clear and convincing evidentiary standard. Appellant's Brief, 29. The arguments forwarded by the Commonwealth and its amicus prove that Mr. Talley's interpretation should be adopted because the Commonwealth's interpretation causes Article I, §14 to be facially unconstitutional.

The Commonwealth argues that the protections in the Bail Reform Act were *sufficient* for it to pass constitutional muster, but each protection was not individually *necessary*. Com. Br. 35. Thus, the Commonwealth argues, an intermediate burden of proof is not required because that was only one of numerous factors that caused the *Salerno* Court to declare the Bail Reform Act Constitutional. However, the Commonwealth and its amicus go on to argue that Article I, Section 14 should be interpreted such that *none* of the protections found in the Bail Reform Act are required in Pennsylvania; this would plainly make the provision unconstitutional.[3]

[3] It is beyond the scope of this appeal to answer the question of whether there is any interpretation of Article I, §14 that can cause the provision to pass constitutional muster, but the Commonwealth's interpretation is plainly faulty and must not be adopted by this Court.

In *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), the Ninth Circuit considered whether Arizona's Proposition 100, which "mandates that Arizona state courts may not set bail '[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.'" *Id.* at 775 (quoting Ariz. Const. art. 2, § 22(A)(4)).

The Ninth Circuit held that the law did not comport with substantive due process because it was not narrowly tailored to achieve a compelling governmental interest. *Id.* at 777.

The court noted that the United States Supreme Court, in *Salerno*, applied heightened scrutiny. "[T]he Court concluded that the Bail Reform Act [in *Salerno*] satisfied heightened scrutiny because it both served a 'compelling' and 'overwhelming' governmental interest 'in preventing crime by arrestees' and was 'carefully limited' to achieve that purpose." *Id.* at 779 (quoting *United States v. Salerno*, 481 U.S. 739, 749-50, 755 (1987)).

> The Act was sufficiently tailored because it carefully delineated the circumstances under which detention will be permitted. It (1) narrowly focused on a particularly acute problem in which the Government interests are overwhelming, (2) operated only on individuals who have been arrested for a specific category of extremely serious offenses—individuals that Congress specifically found were far more likely to be responsible for dangerous acts in the community after arrest, and (3) afforded

> arrestees a full-blown adversary hearing at which the government was required to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. It satisfied heightened scrutiny because it was a carefully limited exception, not a scattershot attempt at preventing crime by arrestees.

Id. at 779-80 (quoting *Salerno*) (citations and quotation marks omitted).

Using the three-part test articulated above, the Commonwealth's interpretation of Article 1, §14 causes the provision to violate substantive due process. Under the Commonwealth's interpretation, *none* of the factors that caused The Bail Reform Act to be narrowly tailored are present.

First, under the Commonwealth's interpretation, Article I, §14 is not "narrowly focused on a particularly acute problem in which the Government interests are overwhelming." The Commonwealth and its amicus argue that bail can be denied for any crime, even misdemeanors, since the text of Article I, §14 does not say otherwise. *See, e.g.,* PA DA's Ass'n Br., 12-13. However, by grading a crime a misdemeanor, the legislature has signaled that the crime is not serious enough to indefinitely deny bail, given that the guidelines for misdemeanors may not involve jail time at all, let alone the year or more of incarceration that would flow from bail being denied pretrial. The *Salerno* Court noted that under the Bail Reform Act, detention without bail could only be ordered if the "case involves crimes of violence,

offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *United States v. Salerno*, 481 U.S. 739, 747 (1987). Under the Commonwealth's argument, bail can be denied for any offense, regardless of how long the arrestee could be punished for the underlying crime. Thus, under the Commonwealth's interpretation, the law does not narrowly focus on a particularly acute problem in which the Government interests are overwhelming.

Second, the Bail Reform Act was limited to "extremely serious" felonies that Congress explicitly found were far more likely to be result in dangerous acts in the community. There was no such finding by the legislature here, and as just explained, under the Commonwealth's interpretation, bail could be denied for any crime. Indeed, under the Commonwealth's interpretation, not only could bail be denied for misdemeanors but it could be denied for summary offenses as well since Article I, §14 does not expressly exclude them from its purview either. Thus, under the Commonwealth's interpretation, bail could be denied for a year or more until trial for a crime whose maximum penalty is 90 days incarceration. Indeed, in Mr. Talley's case, because he was charged with misdemeanors, bail was denied for longer than even the aggravated

guidelines range. This does not comport with fundamental fairness or substantive due process.

Third, under the Bail Reform Act, the arrestee is afforded "a full-blown adversary hearing at which the government was required to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. It satisfied heightened scrutiny because it was a carefully limited exception, not a scattershot attempt at preventing crime by arrestees." *Lopez-Valenzuela*, 770 F.3d at 779-80 (quoting *Salerno*, 481 U.S. at 750) (citations and quotation marks omitted). Under the Commonwealth's interpretation, there is no heightened standard of proof, and there need be no adversary hearing with the presentation of evidence. *See United States v. Munchel*, 991 F.3d 1273, 1282-83 (D.C. Cir. 2021) ("[t]he crux of the constitutional justification for preventive detention under the Bail Reform Act is" the clear and convincing standard). Indeed, the Commonwealth and its amicus argue that bail should be permitted to be denied for misdemeanor DUI. *See* PA DA's Ass'n Br., 12. This is precisely the sort of "scattershot attempt at

preventing crime by arrestees" that the *Salerno* Court stated would be unconstitutional.[4]

Thus, this Court should not adopt the Commonwealth's interpretation of Article I, §14 and instead should require a clear and convincing burden of proof, not permit bail denials in the case of misdemeanors, and should require that bail be denied only after an adversary hearing at which the Commonwealth bears the burden of production and persuasion regarding the detainee's alleged dangerousness and the conditions of release available.

B. Best Evidence Rule

1. Mr. Talley is not forwarding an authentication argument under Rule 901.

The Commonwealth spends ten pages of its brief explaining how the screenshots meet Pennsylvania Rule of Evidence 901 "Authenticating or Identifying Evidence." Com. Br., 42-52. Indeed, the Commonwealth claims that "Defendant's real objection is authentication." *Id.* at 42. This is simply not accurate. Mr. Talley's brief examines the text of the rules of evidence that comprise the Best Evidence Rule—Rules 1001-1004—and explains how the screenshots at issue do not comport with those rules. Appellant's

[4] Even though bail should not be *denied* for misdemeanants, that is not to say that appropriate bail conditions could not be ordered such as electronic monitoring, interlock devices, stay away orders, drug and alcohol counseling, etc. If any bail term were not complied with, the court could then use its contempt powers to incarcerate the defendant.

Br., 45-54. Indeed, Mr. Talley explicitly differentiated between the two rules and emphasized that the issue raised in this case is about the Best Evidence Rule, not Rule 901. Appellant's Br., 55 n.27 ("The Superior Court also spends a significant portion of its Opinion describing how the screenshots meet Rule 901 "Authenticating or identifying evidence"—a rule that Mr. Talley did not assert was violated—instead of focusing on Rules 1001-1004, the rules actually at issue in this case.").

Nonetheless, the Commonwealth claims that Mr. Talley's objection is really to authentication because, according to the Commonwealth and its amicus, the Best Evidence Rule only applies when the "terms or contents of a writing" are at issue, and supposedly the terms of the text messages are not at issue here. Com. Br., 42. However, the terms or contents of the text messages *are* at issue. Mr. Talley's entire claim is that portions of the text messages were cut off by the screenshots, hyperlinks were omitted, and other important data was omitted, including the status of the message (e.g. read), the date and time the message was sent, and from whom and to whom the message was sent (including name and telephone number). The cut-off portions of the messages are "terms or contents of a writing." Similarly, the omitted hyperlinks and other data are also contents of the electronic document.

It is undisputed that the content of the messages was material to Mr. Talley's conviction. Superior Court Opinion at 19 n. 9. Thus, it is difficult to understand what the Commonwealth means when it says that the terms or contents of the text messages were not at issue in this case.

The Commonwealth also suggests that trial counsel never objected on the basis of the Best Evidence Rule and only objected to a lack of authentication. Com. Br., 45. In fact, trial counsel objected on both bases, although only the Best Evidence Rule objection is being forwarded in this appeal.

Defense counsel expressly argued that the screenshots do not comport with the best evidence rule.

> MR. RIDEOUT: Well, they're screenshots. They're hearsay. They're not properly authenticated, and they can't be properly authenticated.
>
> **The best evidence would be something besides a screenshot.** The Court needs to rely on something better than a screenshot.

7/20/18 Tr. 11 (emphasis added).

Moreover, Mr. Rideout did not make one stray "best evidence" objection. He strenuously argued that the defense had never been provided with the original of the text messages.

> MR. RIDEOUT: I have not seen the original phone that the messages were received on. In fact, there was no effort by the Commonwealth to get that information and to provide that

> information in discovery. That's something that they could have done.

Id. at 11-13.

The Commonwealth has never before suggested that this issue was waived, and it does not do so in its current brief even though it claims (wrongly) that the defense never objected on the basis of the Best Evidence Rule at trial.

Moreover, the Commonwealth claims that the Superior Court concluded that defendant had only pursued an authentication claim. Com. Br., 46 (quoting *Commonwealth v. Talley*, 236 A.3d 42, 62 n.14 (Pa.Super. 2020)). The Superior Court, like the Commonwealth in its instant brief, did devote an undue amount of its Opinion to a discussion of Rule 901, a rule never invoked by Mr. Talley. Nonetheless, Appellant's Reply Brief before the Superior Court was abundantly clear that Mr. Talley was not invoking Rule 901 and was arguing exclusively about the Best Evidence Rule:

> The Commonwealth also spends a considerable amount of its brief arguing that the text messages were properly authenticated. *See* Appellee's brief pp. 14-16. This is curious because the appellant did not raise the issue of authentication in its brief.
>
> Rule 901 provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." This is *not* the Best

> Evidence Rule. This is a wholly separate requirement for the admissibility of evidence.
>
> Indeed, "dispensing with authentication does not necessarily dispense with production [of an original], just as dispensing with production [of an original] does not dispense with authentication." *State v. Brown*, 743 A.2d 262, 268 (Md.App. 1999) (citing 4 J. Wigmore, *Evidence* (Chadbourn rev. 1972) §§1187-88 p. 430).
>
> That is to say, it is entirely possible to authenticate a document pursuant to Rule 901 without meeting the requirements of the Best Evidence Rule, just as it is entirely possible to produce an original document but not properly authenticate it.

Appellant's Superior Court Reply Br., 6-7.

Contrary to the Commonwealth's assertion before this Court, while the Superior Court followed the Commonwealth's lead and discussed Rule 901 in its Opinion, the Superior Court never ruled that the Best Evidence Rule was not raised by Appellant. If the Superior Court had so held, it would have found waiver, but it did not do so, and, in any event, such a ruling would be erroneous given defense counsel's clear trial objections and the arguments made consistently during all stages of Mr. Talley's appeal.

The Commonwealth's argument appears to conflate authentication with authenticity. Rule 901 is concerned with authentication. The Best Evidence Rule is concerned with a related concern, authenticity. Indeed, Rule 1003 states: "A duplicate is admissible to the same extent as the

original unless a genuine question is raised about the original's **authenticity** or the circumstances make it unfair to admit the duplicate." Pa.R.E. 1003 (emphasis added). Thus, Mr. Talley does forward an alternative argument in his principal brief that even if this Court found the screenshots to be "duplicates," the original needed to be produced under Rule 1003 because there was a genuine question raised about the original's authenticity. Appellant's Br, 52-54. Not only is such an argument not about Rule 901, it is expressly an argument under Rule 1003, one of the four rules of evidence that codify the common law Best Evidence Rule.

The Pennsylvania District Attorney's Association, also misconstruing Appellant's argument and conflating it with authentication, argued that Mr. Talley's interpretation would mean that an anonymous note "would never be admissible, regardless of the accuracy of the writing itself." PA DA's Ass'n Br., 17. This is a misreading of Appellant's argument. Appellant has consistently maintained that what makes the screenshots inadmissible is that they are not printouts and they do not accurately reproduce the original digital file; not that they are anonymous. Under Appellant's argument, an anonymous note would be admissible under the Best Evidence Rule **if the Commonwealth produced the original of the anonymous note.** If, however, the Commonwealth took a picture of a note that it claimed was

anonymous, and the picture of that note cut off part of the body of the note, and the picture also cut off where a signature would be located, and the Commonwealth also refused to produce the original even though it had the original in its possession, that would not be permitted under Rules 1001-1004; that is the analogue of what happened here.

Thus, the Commonwealth is simply incorrect that Mr. Talley ever forwarded a 901 argument, and this Court should consider the argument actually forwarded by Mr. Talley in this appeal based upon Rules 1001-1004.

2. The screenshots are not a printout that accurately reflects the data in the original digital file; thus, they do not comport with the Best Evidence Rule.

The Commonwealth argues extensively over the definition of metadata and the difference between "primary" and "secondary" data. Com. Br., 49-52. However, none of these terms are found in the Rules of Evidence. Mr. Talley could quibble over the Commonwealth's definition of metadata, but it does not matter because Rule 1001 never mentions metadata or primary data; it defines an original of an electronic document as "any **printout**—or other output readable by sight—if it accurately reflects the information." Pa.R.E. 1001(d) (emphasis added). That is, pursuant to the plain text of the rule, a document is an original if two elements are present:

(1) the document is a "printout", and (2) that printout "accurately reflects the information." The screenshots at issue are neither a printout nor accurately reflect the information contained in the digital file. Thus, they were inadmissible.

a. The screenshots are not a printout.

The screenshots do not qualify as a "printout." A printout is what one gets when one asks an electronic device to reproduce all the information contained in the electronic document. *See* Merriam Webster Dictionary, "printout"[5] (printout is defined as "a printed record produced automatically (as by a computer)"). The screenshots are not printouts. They are pictures taken of various portions of the electronic document.

The Pennsylvania District Attorney's Association argues that requiring the introduction of a printout pursuant to the plain language of the Best Evidence Rule would require every litigant—criminal or civil—to "have a forensic analysis of their phone absent an agreement by the other party that the message is admissible." PA DA's Ass'n Br., 18-19. This is not the case.

[5]https://www.merriam-webster.com/dictionary/printout

Appellant argued that *the Commonwealth* was capable of providing a printout in the form of a forensic download because it had conducted a forensic download of Mr. Talley's phone. Appellant's Brief, 46. However, that does not mean that a forensic download is the only way to produce a printout of text messages that would conform with the rule. Indeed, if one Googles "how to print text messages for court," over 47 million results are produced, with links to *numerous* instructions for how to print out text messages. For instance:

> Keeping a backup of your text messages is simple enough, however you might have some text message conversations that you need to print out and keep on paper, and use this either as evidence in court, or simply in your personal archive.
>
> This article covers a couple of tools which will print messages from your iPhone or Android phone **with all the information about the messages at hand: sent messages, received messages, contact's name and number, dates and times, emojis and images.**

How to Print Out Text Messages for Court[6], Wide Angle Software, Last Updated April 28, 2021, retrieved July 19, 2021 (emphasis added). Thus, litigants far less sophisticated that the Commonwealth of Pennsylvania have numerous available tools to make an accurate printout of their text messages. The plain text of the Best Evidence Rule demands a printout of

[6] https://www.wideanglesoftware.com/blog/how-to-print-out-text-messages-for-court.php

digital files, and there is no technological impediment to any litigant either making a printout of the messages they seek to introduce or simply bringing their cellphone into court. Therefore, the Commonwealth and its amicus's policy arguments should be rejected and this Court should apply the plain language of Rule 1001 to this case.

b. The screenshots do not accurately reflect the information in the original.

The screenshots also do not accurately reflect the information in the original. The Commonwealth makes a distinction between primary data on the one hand and "metadata" or "secondary" data on the other. The Commonwealth attempts to do so because the screenshots omit nearly all of what Appellant has termed "metadata," namely the status of the message (e.g. read), the date and time the message was sent, from whom and to whom the message was sent (including the name and telephone number), etc. Since all of this information is indisputably omitted, the Commonwealth seeks to assert that this data is not controlled by Rules 1001-1004.

However, nothing in the text of these rules suggests any such distinction. The name of the sender of the message and the date and time the message was sent is part of the message's contents. Indeed, when one makes a printout of text messages (as just described), all such information is contained, just as the sender, recipient, and date and time is contained in any

printout of an email. According to the Commonwealth's argument, when introducing emails, a party could take a picture of an email and cut off the "To," "From," and "Date" fields and the non-offering party would not be entitled to see a printout of the email with this information contained.

Appellant is not arguing that he is entitled to the code underlying the text messaging program or anything remotely so extreme; he simply wants to see all of the information contained within the messages that the Commonwealth introduced at his trial, including who sent them and when.

And, at the risk of being repetitive, what Appellant terms the "metadata" was not the only data lost by utilizing these screenshots. All of the hyperlinks were eliminated **as was the substantive content of many of the messages.** Defense counsel objected twice during the trial to the fact that the messages' content was cut off. 7/23/18 Tr. 120 and 138. Therefore, even according to the Commonwealth's non-textually based distinction between primary and secondary data, these screenshots do not qualify as originals.

The cases cited by the Commonwealth from other jurisdictions actually support Appellant's position. In *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002), the Indiana Court of Appeals ruled that a conversation cut and pasted from an AOL chat room did not violate the Best Evidence Rule because "the printout document accurately reflected the

content of" the AOL conversations. Similarly, in *Commonwealth v. Gilman*, 54 N.E.3d 1120, 1128 (Mass. App. Ct. 2016), the Massachusetts Court of Appeals ruled that the Commonwealth was not required "'to bring in the computer [hard] drive itself' from which the messages were downloaded" and instead could introduce a "duplicate." Thus, since in both cases the printout accurately reflected the content of the original, there was no violation of the Best Evidence Rule. Here, the screenshots did *not* accurately reflect the content of the original, so their introduction does violate the Best Evidence Rule.

The Massachusetts Court noted that the way the messages at issue had been downloaded, some of the messages had been omitted, but the Court asserted that no relief was due because the defendant had made no objection to those missing portions and the messages were in the defendant's possession so he could have introduced any of the missing portions if he believed that the messages presented to the jury were taken out of context. *Id.* at 1128 n.9. Here, the defendant *did* object to the missing portions, and the original was not in his possession, so therefore that aspect of the court's rationale is not applicable.

In short, the plain text of Rule 1001 requires that the data in the printout "accurately reflect[] the information" in the digital file; the

screenshots did not do so, and therefore they were inadmissible. Mr. Talley is entitled to a new trial after the production of the original text messages at issue.

C. Harmless Error Analysis

The Commonwealth devotes half of its brief to describing the facts in the light most favorable to itself, in a seeming attempt to relitigate the case. However, if this Court finds error, either in the bail denial or in the introduction of the screenshots, the proper standard is whether the error was harmless beyond a reasonable doubt. *See Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978); *see also Chapman v. California*, 386 U.S. 18 (1967). This standard is assessed on the full record; not in the light most favorable to the Commonwealth. *United States v. Lane*, 474 U.S. 438, 476 n.20 (1986) (Stevens, J. concurring in part and dissenting in part) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. 'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.'"); *see also Story*, 383 A.2d at 166 n. 24 ("The determination whether an error is harmless because of overwhelming evidence is closely tied to the facts of a particular case, requiring an examination of the entire record.").

Many of the "facts" presented in the Commonwealth's Counter-Statement of the Case are not facts at all, but hotly disputed conclusions the prosecutor argued that the jury should draw from the evidence. For instance, the Commonwealth states that Mr. Talley "subjected his ex-girlfriend Christa Nesbitt to a torrent of sexually explicit—and, at times, racially charged—and threatening text messages." Com. Br., 2. This is, of course, what the Commonwealth has alleged, but Mr. Talley has consistently maintained that he did not send these despicable messages. Indeed, the Commonwealth never forensically connected any of the messages to Mr. Talley. Moreover, even though the messages themselves purported to come from Ms. Nesbitt's ex, Korey McClellan, or someone texting on his behalf, the police never conducted any forensic analysis of Mr. McClellan's computers or phones. 7/24/18 Tr. 363 (Detective Chiarlanza: "Q. And, again, some of the emails are clearly from a third party working for Korey, correct? A. Correct. Q. And you never followed up on that, correct? A. Correct. Q. So you really have no evidence of who sent the messages to Ms. Nesbitt? A. Correct.").

Similarly, the Commonwealth states that Mr. Talley "was seen driving by Nesbitt's home the night someone fired a bullet at her parked car." Com. Br., 2. In fact, the witness who claimed that she saw Mr. Talley's truck is

Ms. Nesbitt's best friend, Ashley-Lynn Donnelly, and Ms. Donnelly changed her story between the statement that she gave to the police and her testimony at trial; in her original statement she did not say that she recognized the truck as Mr. Talley's. 7/23/18 Tr. 216-217. Indeed, the jury hung on the count related to this shooting incident.

This is not a case in which there was overwhelming evidence. The jury deliberated for three days after a two-day trial. There was no direct evidence linking Mr. Talley to the messages, no forensic evidence linking him to the messages, and the case ultimately boiled down to a credibility battle between Mr. Talley and Ms. Nesbitt.

Nonetheless, the Commonwealth never even attempts to conduct a harmless error analysis, but instead seeks to smear Mr. Talley with a long and graphic recitation of the disgusting content of the very messages that Mr. Talley asserts he did not send and of which the Commonwealth will not fully produce.

The introduction of the screenshots was not harmless. Had the screenshots, or any of Ms. Nesbitt's supporting testimony about the contents of those messages, not been admitted, there would have been no evidence of harassment at all.

Moreover, the wrongful bail denial was equally not harmless for all of the reasons articulated in Appellant's principal brief.[7] *See* Appellant's Br., p. 39-45 (See Section VII.A.5 of Appellant's principal brief: "The revocation of Mr. Talley's bail without sufficient process impeded his ability to assist in his own defense and therefore made his trial fundamentally unfair.") It is the Commonwealth's burden to prove *beyond a reasonable doubt* that the bail denial had no impact on the outcome of Mr. Talley's trial, a burden that it cannot meet given all of the evidence of the bail denial's detrimental effect on this razor thin case.

III. CONCLUSION

Based upon the arguments raised herein as well as in Appellant's principal brief, Mr. Talley respectfully requests this Court reverse his conviction and remand for a new trial.

[7] Relatedly, because the bail denial impeded Mr. Talley's ability to assist in his own defense and because the bail denial was improperly leveraged against him during cross-examination, this issue is not moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains fewer than 7,000 words and thus complies with the length limitations in Pa.R.A.P. 2135(a)(1).

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