[J-56-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 14 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 2627 EDA
	:	2018 dated July 17, 2020,
v.	:	reconsideration denied September
	:	23, 2020, Affirming the Judgment of
	:	Sentence of the Montgomery County
DANIEL GEORGE TALLEY,	:	Court of Common Pleas, Criminal
	:	Division, dated August 24, 2018 at
Appellant	:	No. CP-46-CR-0005241-2017.
	:	
	:	ARGUED: September 22, 2021

OPINION

JUSTICE WECHT **DECIDED: December 22, 2021**

We granted review of this matter to resolve two distinct legal issues, one of longstanding import to the criminal law, and the other of contemporary significance. The first addresses the Commonwealth's burden of proof when it seeks to deprive the accused of his or her state constitutional right to bail—a right that has existed in Pennsylvania law since the Commonwealth's founding by William Penn in 1682. That right, now reposed in Article I, Section 14 of the Pennsylvania Constitution, embodies three core tenets of our system of criminal justice: "(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense." *Commonwealth v. Truesdale*, 296 A.2d 829, 834-35 (Pa. 1972).

For more than three centuries, the right-to-bail clause invariably has provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." But in the 1998 general election, a majority of Pennsylvania's voters approved an amendment that added new language to Article I, Section 14, the relevant portion of which now provides:

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

PA. CONST. art. I, § 14. While the amendment expanded the class of nonbailable prisoners, the requisite proof needed to deny them bail did not change. Since 1682, one's right to bail could not be denied unless "the proof was evident or presumption great." In this case, we must determine the meaning of that colonial-era phrase as it relates to an assertion that the accused should be denied bail because "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community."

The second issue, in contrast, concerns the interplay between twenty-first century cellphone technology and the rules governing the admissibility of evidence. More specifically, we must determine whether the best-evidence rule allows a party to introduce printed photographs of text messages as they appeared on a cellphone's interface—*i.e.*, "screenshots." Ordinarily, the best-evidence rule requires the production of an "original" writing when a document is central to a case. Under certain conditions, however, a party may offer a "duplicate" of the original writing. Here, we assess whether the best-evidence rule applies to the text messages at issue, and, if so, whether the printed screenshots of the messages were admissible as either originals or duplicates.

I. Background

In March 2016, Christa Nesbitt was working as a server at the Whistle Stop diner in Oreland, Pennsylvania, when she first met Daniel Talley. As time passed, Talley began visiting Nesbitt regularly at the diner. Over the next several months, their friendly chats led to mutual affection, which then evolved into an intimate and physical relationship. In September 2016, Talley asked Nesbitt and her minor daughter, R.N., to move into his home. Nesbitt agreed. She and R.N. lived with Talley until the spring of 2017.

On May 27, 2017, Nesbitt and R.N. moved out of Talley's house. The next day, Nesbitt began receiving threatening and harassing messages on her mobile phone from unfamiliar email addresses, including from "maxkillin@gmx.com," "mkkilonton@outlook," "c6103317009@outlook,"and "Christa.Nesbitt@tush." Notes of Testimony ("N.T."), Trial, 7/23/2018, at 98, 164-65, 171. The messages referred to Nesbitt using vulgar names. For example, one message contained the following rhyme:

> Twinkle, twinkle little whore.
> Close your legs. They're not a door.
> You're gonna get an STD.
> They only like you cuz you're [free].

Id. at 141. Other messages contained threats, one of which stated, "I was up da stret from your house. My gun was loaded, and I was going to end everything. We cld die togetter." *Id*. at 139. Some referenced R.N.—*e.g.*, "Where my kid now, slut" and "GIMME BACK [R.N.]." *Id*. at 103, 165.

On June 2, 2017, while dining at a Friendly's restaurant, Nesbitt received a text message stating that the sender was watching her eat. Nesbitt reported this incident to Detective Robert Chiarlanza of the Springfield Township Police Department. Detective Chiarlanza examined Nesbitt's cellphone and determined that one of the applications installed on it automatically and in real-time was sharing her device's location with a

corresponding application that was installed on Talley's cellphone, which would allow Talley to track Nesbitt's movements when she possessed her phone. At that time, Detective Chiarlanza instructed Nesbitt to document the harassing messages. Nesbitt began taking screenshots of the messages.

On June 19, 2017, Nesbitt received a message with the subject "Tick tock," which read, in part, "It gonna happen, slut. You gonna pay. Comin' soon mybe on Fox stret. You seem to like it der." *Id*. at 140. Around 11:30 p.m. that night, Nesbitt's friend and neighbor, Ashley Donnelly, was sitting outside when she noticed a pickup truck that she believed resembled Talley's 2003 Chevrolet Silverado parked near Nesbitt's home. After watching the truck drive in the direction of Nesbitt's home, Donnelly heard a loud bang. She immediately texted Nesbitt that Talley was driving near Nesbitt's house.

The following day, Nesbitt noticed a puncture hole on the outside of her vehicle. Believing that someone may have shot her car, Nesbitt reported the incident to Detective Chiarlanza, who went to her home with several other police officers. There, Detective Chiarlanza observed "[a] round hole resembling that of a bullet hole . . . at the driver's side rear sail" of Nesbitt's vehicle. Crim. Compl. Aff. of Probable Cause, 8/7/2017, at 1 (hereinafter, "Affidavit"). Investigators also spoke with Donnelly, who recounted what she had seen and heard the night before.

That same day, June 20, 2017, Detective Chiarlanza obtained a warrant to search Talley's home and his belongings, and a separate warrant for Talley's arrest. When police officers arrived at his home, Talley was standing in his driveway armed with a Kel-Tec .380 semiautomatic pistol. The officers arrested Talley and proceeded to search his home. His computer and cellphone were seized and forensically examined. The Commonwealth charged Talley with "aggravated assault, stalking, harassment and

related offenses," and he "was remanded to Montgomery County Correctional Facility in lieu of $75,000 cash bail," which he posted on June 22. Affidavit at 1.[1]

Following Talley's arrest, Nesbitt stopped receiving the anonymous messages. On June 22, 2017, Talley was released on bail. Within an hour of his release, Nesbitt began receiving more harassing messages from unfamiliar email addresses. Additionally, Nesbitt received several notifications from Facebook that someone had attempted to reset her password, as well as a message that a new Facebook account was created on her behalf. On July 18, 2017, law enforcement officials, after obtaining a second arrest warrant, took Talley back into custody. His bail was set at $250,000.

On August 7, 2017, the Commonwealth filed a criminal complaint formally charging Talley with the offenses specified above, as well as criminal use of a communication facility, terroristic threats, recklessly endangering another person, and simple assault.[2] An affidavit of probable cause substantiating the remaining charges was attached to the complaint. *See supra* n.1. In addition to much of the foregoing factual account, the affiant set forth the following allegations. Investigators believed that the messages received by Nesbitt "were sent from an anonymous email" account and that many "of the originating I.P. addresses were from other countries, with [*sic*] is common with the use of a TOR browser." Crim. Compl. Aff. at 2. The affiant explained that "TOR" is an acronym for "The

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[1] The information regarding these June 2017 charges and Talley's first bail award was derived from the affidavit of probable cause attached to the criminal complaint that was filed on August 7, 2017. After a thorough review of the record and available government databases, we were unable to locate any records confirming that the initial set of charges were filed, how they were disposed of, or any bail orders related to Talley's initial arrest. A lone document in the record entitled "Bail Release Conditions" specifies a "Date of Charges" of June 22, 2017; however, that document was signed several weeks later, on August 7. *See* Bail Release Conditions (Docket No. MJ-38110-CR-0000146-2017), 8/7/2017 (specifying, as conditions of his release, that Talley was not to have any contact with Nesbitt and not to possess any firearms or other weapons).

[2] The Commonwealth withdrew the aggravated assault charge later that day. *See* Crim. Compl., 8/7/2017, at 2 ("W/D . . . 8/7/17").

Onion Router," which "enable[s] anonymous communication," by concealing "a user's location and usage from anyone conducting network surveillance or traffic analysis." *Id*.

The affidavit also detailed the information recovered from the search of Talley's home computer and cellphone. According to the affiant, a forensic analysis of the computer revealed that the owner installed "TOR software" and searched the phrase, "When text emails become harassment." *Id.* An extraction of Talley's cellphone data allegedly showed that Talley had deleted a text message to his friend David Wolf, in which Talley asked, "Is there a way to spam am [*sic*] with so many texts and calls it just totally fucks it up?" *Id*. Wolf suggested "finding an online script that sends message[s] anonymously," and that will "accept input from an anonymized browser." *Id*. The affiant continued: "According to a witness, a truck known to the witness was seen in the area" near Nesbitt's home; "the witness heard a loud bang"; and "the truck is known to belong to" Talley. The affiant stated that, the next day, "[a] round hole resembling that of a bullet hole was observed" on Nesbitt's vehicle. Based upon these allegations, the affiant believed "that Talley has, and is continuing to stalk, threaten and harass Nesbitt[.]" *Id*. (capitalization normalized).

On January 8, 2018, Talley filed a motion for release on nominal bail. Talley argued that he was entitled to relief pursuant to Pennsylvania Rule of Criminal Procedure 600, which permits an individual who has been incarcerated in excess of 180 days from the date that the criminal complaint was filed to move for release on nominal bail, subject to any nonmonetary condition(s) imposed by the court and permitted by law. *See* Pa.R.Crim.P. 600(B) and (D)(2). But that individual is not entitled to be released under Rule 600 if, *inter alia*, "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when

the proof is evident or presumption great." *Id*. Cmt., *Remedies* (quoting PA. CONST. art. I, § 14).

The trial court heard argument on the motion almost four months later, on May 1, 2018. At that hearing, the Commonwealth conceded that Talley had been incarcerated for more than 180 days since the filing of the criminal complaint. N.T., Nominal Bail Hr'g, 5/1/2018, at 4. However, the Commonwealth maintained that no condition of bail could protect the community in general, or Nesbitt in particular, from Talley and, thus, asked that he remain incarcerated. To that end, the Commonwealth initially asserted that the fact that Talley's bail was set at $250,000 demonstrated that he was such a danger. The court rejected this argument, stating that the Commonwealth had "to start from a blank slate." *Id*. at 8.

In response, the Commonwealth attempted to prove that Talley was a danger by relying upon the facts undergirding the criminal charges that it sought to establish at trial. Defense counsel objected to this maneuver. *Id*. at 9-10. The court concluded that it would be untenable to preclude the Commonwealth categorically from using the trial allegations, but opined that it would be equally problematic to allow prosecutors to rely upon those allegations alone. Specifically, the court stated that "it can't be fully correct that unproven allegations or yet-to-be-proven allegations, while there still is a presumption of innocence, also could be sufficient." *Id*. at 10.

Talley's counsel conceded that, in deciding the motion, the court could consider the information alleged in the affidavit of probable cause. *Id*. at 11 ("I suppose the affidavit is fine."). But, in accordance with the trial court's view of the requisite proof, the defense argued that, while the allegations in the affidavit of probable cause can be a relevant consideration, they are insufficient, without more, to prove that nominal bail should be

denied.[3] At no point did the defense concede that the allegations alone established that Talley presented a danger to either Nesbitt or to the community, or that there existed no condition or combination of conditions that could mitigate or prevent that purported danger.

The Commonwealth resumed its argument that what it was "going to be alleging" at trial—"that Talley was reaching out in a masked identity to the victim in this case, to stalk and harass her and put her in fear"—sufficiently demonstrated that he presented a non-mitigatable danger to Nesbitt and to the community. *Id* at 8, 12. Notably, in the Commonwealth's view, the harassing messages ceased temporarily following Talley's June 2017 arrest, but then resumed almost immediately after he posted bail. The Commonwealth clarified that, while it was "not trying to argue that there was a particular instance of face-to-face physical aggression or direct contact," it still believed that Talley presented a danger because in cases "with stalking/harassment, when a person shows such dedication that they would go through incarceration and within 24 hours just continue doing it once again, that paints a person as being a high risk to the victim and community." *Id*. at 13.

The court found the Commonwealth's argument to be unavailing, stating that it was "not sure [the Commonwealth had] made out [its] case." *Id*. at 14. The Commonwealth responded that it also was in possession of hundreds of text messages, which it characterized as going "into [Nesbitt's] behavior with other men, calling her every name imaginable, talking about body parts, talking about smells, [and] talking about the child that they at least lived with together." *Id* at 15-16. The Commonwealth stated (incorrectly)

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[3] *See* N.T., Nominal Bail Hr'g, 5/1/2018, at 9 ("[T]here is no evidence to support that [the texts] came from my client."); *id*. at 10 ("[Y]ou can use [the allegations] as a factor in weighing . . ."); *id.* at 19 ("There are many combinations of conditions that can ensure the safety of the alleged victim here and the community.").

that the messages referenced a "young child, who is [Talley's] biological son."[4] The court asked, "Are there threats to her? What makes you think [Nesbitt] would be in danger if he gets nominal bail?" *Id*. at 16. The Commonwealth replied that, "in the text messages," the author wrote, "[i]t is coming" several times, and "[y]ou better watch out at least four or five times." *Id*. Additionally, the Commonwealth expressed its intent to "present evidence at trial that [Talley] fired a gun into [Nesbitt's] vehicle." *Id*.

Talley's counsel retorted by emphasizing that "[t]here is absolutely no computer forensic evidence that can tie any of those texts to my client. There is also absolutely zero ballistic evidence to tie that shot to my client." *Id*. at 17. Counsel highlighted the fact that Talley had "absolutely no prior record" and that the Commonwealth offered mere "allegations that have not been proven." *Id.* at 18. The defense noted that, immediately before the commencement of the nominal bail hearing, the Commonwealth made "an offer to resolve this case for a time-served sentence." *Id*. Counsel also suggested several conditions that could protect Nesbitt and the community from any potential harm that Talley allegedly might pose.

After the defense rested, the trial court suggested that Talley "be released on nominal bail, on GPS and be under house arrest and be confined to his home until the trial." *Id*. at 19. The attorney for the Commonwealth replied, "I have learned directly from those above me in my office that we cannot provide electronic monitoring for the defendant before he is sentenced." *Id*. at 19-20. The court requested clarification as to why electronic monitoring was unavailable, but the Commonwealth was unable to offer an explanation. The Commonwealth did not submit any exhibits, testimony, or other evidence during the hearing. The court took the matter under advisement. On May 9,

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[4] The messages referenced R.N., who is the child of Nesbitt and Korey McClellan, Nesbitt's former boyfriend.

2018, in a one-sentence order, the court denied Talley's motion for release on nominal bail. The court did not provide any reasons for denying the motion at that time.

On May 11, 2018, Talley moved for reconsideration of the denial of his nominal bail motion. On June 27 and 28, 2018, the trial court held a hearing on several pretrial motions, including on Talley's reconsideration motion.[5] During the hearing, the court described the Commonwealth's allegation that the threatening text messages resumed on June 22, 2017—the date that Talley was released from pretrial incarceration—as "the most important fact in denying" nominal bail. N.T., Mot. Hr'g, 6/27/2018, at 49; *see id.* at 29-49. On July 11, 2018, the trial court denied Talley's motion for reconsideration.

Beginning on July 20, 2018, Talley was tried before a jury over the course of five days. At trial, the Commonwealth sought to introduce printed versions of hundreds of screenshots that Nesbitt took of the messaging application installed on her phone that depicted the threatening and harassing text messages she had received. Because the exhibits were photographs of the messaging application, rather than the digital files themselves, they did not display certain metadata,[6] such as the names of the participants in the message, the source of the message, the number of attachments, and timestamps. Rather, the screenshots displayed only what purported to be the messages' substantive

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[5] During this two-day hearing, the court also heard argument on a petition for writ of *habeas corpus*, a motion *in limine*, and a suppression motion. *See* N.T., Mot. Hr'g, 6/27/2018, at 3. In connection with Talley's *habeas* petition, the Commonwealth called Detective Chiarlanza, who explained and elaborated upon the allegations in the affidavit of probable cause. The trial court noted that "all of the testimony thus far[,]" including Detective Chiarlanza's testimony, "can be incorporated and cross-referenced and applied to all of the motions[.]" N.T., Mot. Hr'g, 6/28/2018, at 61.

[6] Metadata is "[s]econdary data that organize, manage, and facilitate the use and understanding of primary data." *Metadata*, BLACK'S LAW DICTIONARY (11th ed. 2019). Stated differently, a computer uses metadata to describe and present primary data. The primary data is the substantive content that is displayed in the body of a document. Unlike primary data, metadata is not viewable in the document's body.

content. Talley objected, asserting that the admission of the screenshots would violate the best-evidence rule. The court overruled his objection.

During the Commonwealth's case-in-chief, Nesbitt testified that the screenshots accurately portrayed the messages that she received. She explained that the anonymous messages began once she broke up with Talley. Nesbitt described many of the messages as referencing sexual acts between her and Talley and as containing peculiar phrases that he used throughout the relationship. The Commonwealth also introduced the text messages between Talley and Wolf, wherein Talley inquired about sending text messages anonymously. Further, the Commonwealth presented testimony describing the software discovered on Talley's computer and how it could be used to send anonymous text messages.

The defense's theory, in turn, was that Korey McClellan, the father of Nesbitt's child, authored the messages and that Nesbitt only claimed otherwise because she was upset with Talley. Talley testified that McClellan had been sending Nesbitt threatening messages months before Talley and Nesbitt ended their relationship and that McClellan continued to do so after the relationship ended. In addition, Talley testified that it was his decision to end the relationship with Nesbitt, not hers, and that she wanted to retaliate against him for kicking her out of his home. Talley claimed that Nesbitt manipulated her statements to law enforcement and her trial testimony in an effort to falsely paint Talley as the source of the offensive messages.

Ultimately, the jury found Talley guilty of two counts of stalking and one count each of terroristic threats and harassment. The jury deadlocked on the charges of recklessly endangering another person and simple assault. On August 24, 2018, the trial court sentenced Talley to time served (twenty-three months' incarceration), followed by five years' probation. Talley appealed.

In a unanimous opinion, the Superior Court affirmed Talley's judgment of sentence. *Commonwealth v. Talley*, 236 A.3d 42 (Pa. Super. 2020). Talley raised two claims that are relevant here.[7] First, he maintained that the Commonwealth failed to meet the requisite burden of proof to deny bail under Article I, Section 14 of the Pennsylvania Constitution. Second, he asserted that the trial court violated the best-evidence rule by allowing the Commonwealth to introduce screenshots of the text messages as they appeared in the messaging application on Nesbitt's cellphone. The Superior Court rejected both claims.[8]

Concerning his right-to-bail claim, Talley specifically asserted that the Commonwealth was required to offer evidence or testimony to establish that no condition or combination of conditions of bail could protect the community from him. He maintained that the Commonwealth could not satisfy its burden solely by relying upon the allegations in the affidavit of probable cause attached to the criminal complaint. The Superior Court disagreed, concluding that "the record contained sufficient evidence to show that no condition or combination of conditions could reasonably assure the safety of the victim or the community." *Id.* at 51.

In arriving at that conclusion, the Superior Court addressed neither the burden of proof that Article I, Section 14 imposes upon the Commonwealth at a bail hearing nor

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[7] Talley also claimed that Article I, Section 14 of the Pennsylvania Constitution violated his federal right to due process. The Superior Court determined that Talley waived that argument because he raised it for the first time in his Pa.R.A.P. 1925(b) statement. In his petition for allowance of appeal, Talley did not challenge that determination. Further, Talley alleged that his sentence was illegal because the court imposed concurrent sentences for what he claimed was the same statutorily proscribed conduct. The Superior Court rejected Talley's illegal sentencing claim on the merits, and he does not challenge that holding presently.

[8] The Superior Court found that Talley's argument relating to the denial of nominal bail was not moot because he claimed "that the wrongful denial of nominal bail deprived him of a meaningful opportunity to assist in his own defense and, as such, contributed to his conviction." *Talley*, 236 A.3d at 49 n.2.

whether the allegations supporting the charges filed against a defendant suffice. Instead, the appellate panel highlighted defense counsel's statement at the bail hearing that the affidavit of probable cause was a relevant consideration in deciding the motion, construing it as a "conce[ssion] that the Commonwealth could rely on the factual averments in the affidavit of probable cause to oppose [Talley's] motion." *Id.* at 52. The court found that the averments in the affidavit were enough to support the decision to deny Talley bail because they linked him to "numerous harassing text messages and violent threats issued to Ms. Nesbitt and set forth compelling proof that [Talley] used a firearm to damage Ms. Nesbitt's vehicle." *Id*. The court also underscored that "the trial court learned that house arrest with electronic monitoring was not available prior to sentencing," circumstances that also supported the decision to deny bail. *Id*.

The panel then turned to Talley's claim that the trial court's decision to admit the screenshots of the text messages violated the best-evidence rule, as codified at Pennsylvania Rules of Evidence 1001, 1002, 1003, and 1004. Talley argued that the screenshots were inadmissible because they did not meet the criteria of original writings or duplicates. In his view, important identifying information was missing from the messages. Specifically, he noted that screenshots lack metadata and that the messaging application's screen truncated portions of the messages as they originally would have appeared. According to Talley, these omissions compelled the conclusion that the screenshots did not accurately reproduce the information found in the source writing and thus the screenshots did not qualify either as originals or duplicates.

The panel explained that, per Rules 1002 and 1003, an original writing is required in order to prove its contents and that a duplicate is admissible to the same extent as an original unless the copy fails to accurately reproduce the original. The Superior Court long has held that whether the rule calls for an original or duplicate varies depending upon

the reason the writing is being introduced, such that a party must offer either an original or duplicate when the contents of the writing are *essential* to proving a central issue at trial. *See id.* at 61(citing *Commonwealth v. Green*, 162 A.3d 509, 518-19 (Pa. Super. 2017) (*en banc*) (reviewing Superior Court precedent on the topic)). To the extent that the text messages were "an essential component in a successful prosecution of" Talley, the court found that the best-evidence rule insisted upon an original or duplicate. *Id*. at 62. If the screenshots failed to meet the criteria in order to be considered either of those two types of writings, they were inadmissible.

The Superior Court turned to Rule 1001's definitions of original and duplicate writings. "For electronically stored information, 'original' means any printout—or other output readable by sight—if it accurately reflects the information." Pa.R.E. 1001(d). The rule defines a duplicate as "a copy produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." *Id*. 1001(e). Finding that the screenshots were "authenticated printouts of the original electronic text messages," the court held that they constituted originals for purposes of Rule 1001(d). *Talley*, 236 A.3d at 62. Alternatively, the court also determined that the screenshots were admissible "as authenticated duplicates generated through a photographic process that accurately reproduced the original messages within the contemplation of Pa.R.E. 1001(e)." *Id*.

The court rejected Talley's contention that the omitted features—the hyperlinks, metadata, and sender's contact information—precluded the screenshots from being either duplicates or originals. Talley maintained that both a printout and a duplicate are inadmissible if they fail to accurately portray the original and that an original text message would have contained the features that the screenshots lacked. While recognizing that the omitted features may have "possessed some probative value in identifying the

author," the panel noted that Talley did not allege, let alone demonstrate, "that the content of those communications was essential in proving who sent the messages." *Id*. In other words, the court reasoned that whether a printout or duplicate accurately reflects the source writing turns upon whether the printout or duplicate is a verbatim reproduction of the aspects of the original that were "essential, not merely relevant, in proving a claim or defense." *Id.* The court explained that the features that were not reproduced here failed to meet that condition:

> [Talley] does not allege that the omitted features rendered the screenshots incapable of showing that the original communications established the elements of the charged offenses. Most importantly, [he] does not claim that the hyperlinks, metadata, and other content found in the original text messages, but omitted from the screenshots, were material or essential in proving the identity of the individual who authored or sent the text messages. Put differently, [Talley] does not allege that either he or the Commonwealth needed to prove the content of the original text messages in order to show who sent the original communications. Instead, [his] claim is only that the omitted features may have facilitated an assessment of the authorship of the messages and, therefore, may have some relevance in determining the identity of the sender.

Id. Accordingly, the Superior Court rejected Talley's best-evidence claim and, discerning no abuse of discretion on behalf of the trial court, affirmed Talley's judgment of sentence.

We granted Talley's petition for allowance of appeal, limited to the following questions:

> (1) Is the Commonwealth required under Art. I, [S]ection 14 of the Pennsylvania Constitution to produce clear and convincing evidence at a bail revocation hearing in order to meet its burden of proof that there is "no condition or combination of conditions other than imprisonment that will reasonably assure the safety of any person and the community when the proof is evident or presumption great"?
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> (2) Is it a violation of the Best Evidence Rule to permit the introduction of screenshots of text messages, and supporting testimony thereto, when those screenshots omit portions of the messages, all hyperlinks, and all

metadata, and the original was in the possession of the offering party but has never been produced to the non-offering party?

Commonwealth v. Talley, 250 A.3d 468 (Pa. 2021) (*per curiam*).

II. Issue One: Article I, Section 14's Standard of Proof

Rule 600(B)(1) provides that a defendant held in pretrial incarceration must be brought to trial within "180 days from the date on which the complaint is filed." Pa.R.Crim.P. 600(B)(1). Talley was held in pretrial detention beyond that period; therefore, per Rule 600, he was to "be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law," unless he was not "entitled to release on bail as provided by law." *Id*. (D)(2). At his bail hearing, the Commonwealth asserted that Talley was not entitled to release "as permitted by law," because a court may deny nominal bail under Rule 600 when a defendant is nonbailable under Article I, Section 14. As Talley was not charged with either a capital offense or an offense that carries a life sentence, the Commonwealth invoked the third category of nonbailable persons, which applies when "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." *Id*. The instant dispute is whether the "proof [was] evident or presumption great" that Talley fell within that category.

A. The Parties' Arguments

Talley's principal assertion is that Article I, Section 14's use of the phrase "proof is evident or presumption great" requires the Commonwealth to present "clear and convincing evidence" that the defendant committed the alleged offenses and that "there are no conditions of release that could obviate any risk posed by his release." Talley's Br. at 29. Talley argues that, because the Commonwealth solely relied upon the allegations in its affidavit at the nominal bail hearing, it failed to sustain its burden of proof. Further, he faults the trial court for deciding that no condition of bail could mitigate any

potential harm by considering only the prosecution's unsupported averment that electronic monitoring was unavailable. Talley suggests that the supposedly erroneous denial of nominal bail entitles him to a new trial because, had he been released, he would have been able to obtain exculpatory evidence in service of his defense.

Talley makes four arguments in support of his position that clear and convincing evidence is the pertinent standard. He begins with the plain language of Article I, Section 14. Citing dictionary definitions, he notes that "evident" is synonymous with "clear," thus "the plain language of Article I, § 14, translated into standard legal parlance, indicates a clear and convincing standard." Talley's Br. at 27. Talley then asserts that "the overwhelming majority" of other jurisdictions have interpreted the phrase "proof is evident or presumption great" to mean what is contemporarily referred to as "clear and convincing evidence." *Id*.

Next, Talley insists that clear and convincing evidence is the standard that best reflects the weight that the framers afforded the right to bail. He notes that a probable cause or *prima facie* standard is used when the court must decide whether the defendant can be charged with a crime, at which point the encroachment upon the accused's liberty is relatively minor, and that proof beyond a reasonable doubt is needed for a conviction, when the threat to the accused's liberty is at its greatest. According to Talley, the deprivation of liberty that occurs when the accused is denied bail is graver than the risk attendant to a preliminary hearing, but less significant than the stakes of a criminal trial. In that vein, the clear and convincing evidence standard is less demanding than proof beyond a reasonable doubt, but more demanding than probable cause or a *prima facie* showing. In light of his position that the burden of proof to deny bail should rest between the two poles, Talley concludes that clear and convincing evidence applies at denial of bail hearings. *See generally id*. at 27-29.

His fourth argument in favor of the clear and convincing standard invokes the canon of constitutional avoidance, positing that an interpretation of "proof is evident or presumption great" as any lesser standard would violate federal due process principles. *See id*. at 29 (citing 1 Pa.C.S. § 1922(3) (providing that, when ascertaining legislative intent, courts may presume "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.")) To that end, Talley cites *United States v. Salerno*, 481 U.S. 739 (1987), in which the Supreme Court of the United States considered whether the federal Bail Reform Act of 1984 violated the due process protections afforded by the Fifth Amendment to the United States Constitution by permitting pretrial detention on the grounds of future dangerousness. *See* 18 U.S.C. § 3142(g) (providing for future dangerous as a basis for denying bail). In rejecting a facial challenge to the Act, the Court held that pretrial incarceration due to future dangerousness is not unconstitutional *per se* because "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 749. The Court explained that the Government's concern for community safety, combined with the procedural safeguards contained in the statute, outweighed a defendant's liberty interest and satisfied constitutional scrutiny. *Id*. at 751–52.

The procedural guarantees were essential to the Court's holding, as they demonstrated that the Act was not "a scattershot attempt to incapacitate those who are merely suspected of these serious crimes." *Id*. at 750. Among the Act's numerous protections was the requirement that "the Government must 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." *Id.* (emphasis added.) Given the Court's invocation of that particular standard as justification for upholding the

Act, Talley asserts that Article I, Section 14 would violate federal due process if we interpreted "proof is evident or presumption great" as demanding anything less.

With that in mind, Talley addresses the kind of evidence that he believes is needed to satisfy his preferred standard. He suggests that, before denying bail, a court must consider "the weight of the evidence" demonstrating that the accused committed the charged offenses, in addition to "whether there are any combinations of conditions available that could obviate whatever risk is posed by the defendant." Talley's Br. at 31. Talley premises this argument upon the fact that, unlike the probable cause standard applicable to preliminary hearings, clear and convincing evidence is not just a burden of production—it also is a burden of persuasion. Talley details the specific evidentiary requirements as follows:

> [T]he judicial officer would have to survey what conditions of release are available (including drug and alcohol counseling, frequent check-ins with the department of probation, electronic ankle monitoring, stay away orders, restrictions regarding use of electronic equipment, etc.) and how those conditions could obviate the overall risk presented by the defendant, which would be determined by an examination of [the Pa.R.Crim.P. 523] factors such as: the nature and seriousness of offense charged, the defendant's character, physical and mental condition, community ties, past conduct or past criminal history, and any history related to drug or alcohol abuse.

Id.

According to Talley, the Commonwealth failed to fulfill those evidentiary requirements. He underscores that the Commonwealth offered only the affidavit of probable cause, which consisted exclusively of hearsay (namely, the investigating officer's description of the evidence and witness statements), which Talley notes fails to meet even the lower standard of proof for a preliminary hearing. *See* Talley's Br. at 32 (citing *Commonwealth v. McClelland*, 233 A.3d 717, 736 (Pa. 2020)). Talley reasons that, if the allegations were insufficient to hold the case for court, which requires a lesser evidentiary standard than the present bail inquiry, then surely they were insufficient to

deny him bail. As an example of the distortion that inheres in the use of allegations, Talley references statements in the prosecutor's averments at the bail hearing that were incorrect, such as the erroneous claim that the text messages referenced Talley's child (they referenced Nesbitt's daughter, R.N.).

Talley assails the Commonwealth for its contention at the bail hearing that electronic monitoring was unavailable, which contention he claims lacked support. Talley explains that it was the prerogative of the trial court, not the prosecution, to decide whether that condition of bail was available: "[A]s an arm of the trial court, the probation department would have to follow a valid court order for electronic monitoring." *Id*. at 35-36 (citing PA. CONST. art. V, § 1) ("A county's adult probation and parole office is considered an arm of the trial court, rather than the prison system, and thus, the probation department operates under the common pleas court's authority.")). Talley notes that the Montgomery County Court of Common Pleas has placed other defendants in home confinement with electronic monitoring prior to sentencing. *See id.* at 36 ("Indeed, electronic monitoring does occur in Montgomery County prior to sentencing when ordered by the judge. *See Commonwealth v. Saunders*, CP-46-CR-0009004-2016 (on November 6, 2017, prior to Mr. Talley's bail hearing, the defendant was ordered to be placed on electronic monitoring prior to sentencing until the conclusion of the trial for his co-defendant); *see also Commonwealth v. Fountain*, CP-46-CR-0003966-2019 (on October 25, 2019, after Mr. Talley's hearing, the defendant's nominal bail motion was granted and he was placed on home confinement and electronic monitoring).").

Lastly, Talley argues that the denial of nominal bail entitles him to a new trial. He cites several studies and law review articles suggesting that pretrial detention increases the likelihood of conviction, which they attribute to a combination of a detainee's inability to assist his counsel in obtaining exculpatory evidence, the difficulty in communicating

with counsel while detained, and the diminished likelihood that a detainee will pursue pretrial strategies that might cause delay, extending the incarceration. Talley does not offer any particular strategy that he would have pursued had he not been incarcerated. Nor does he highlight any specific instance where pretrial incarceration hampered his communication with his attorney.

Talley does, however, suggest that he would have been able to procure specific evidence had he been released on nominal bail. He alleges that he would have been able to obtain Facebook posts authored by Nesbitt in which "she described him in the way mentioned in his testimony,"[9] in addition to "locating the cease-and-desist letter his previous attorney had written to Ms. Nesbitt."[10] *Id*. at 42. He claims that "the prosecuting attorney improperly leveraged Talley's bail denial against him when he badgered Talley for not personally bringing in the above-mentioned evidence," despite the fact that "the prosecutor knew that Talley had no ability to gather such evidence precisely because the prosecutor had insisted Talley not be released pretrial." *Id*. In support of that claim, Talley references the following excerpts of his cross-examination by the Commonwealth:[11]

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[9] Talley testified that, after the breakup, Nesbitt began sharing on Facebook screenshots of the harassing messages that she had received. N.T., Trial, 7/24/2018, at 409. According to Talley, Nesbitt's posts tagged Talley's account and stated that he was responsible for sending the messages. *Id*. Talley claimed that Nesbitt made these posts in retaliation for Talley kicking her out of his home after the breakup. *See id.* at 411-12.

[10] Talley testified that, after seeing the Facebook posts, he hired an attorney who sent Nesbitt a cease-and-desist letter, demanding that Nesbitt stop sharing posts about the messages and claiming that Talley was the sender. *See* N.T., Trial, 7/24/2018, at 411-12.

[11] Talley omits the conversation that preceded this excerpt. The exchange followed the prosecution's inquiry about Talley's text conversation with his friend David Wolf, in which Talley asked Wolf how to "blow up" a phone with text messages. *See id*. at 442. In response, Wolf indicated that doing so might expose Talley to criminal prosecution. *See id*. Talley replied, "That's what Tor is for." *Id*. Talley claimed there were phone calls

Commonwealth:	That's not contained in the evidence that the jury is considering, right? Right now you're talking about a conversation that we have no proof of.
Talley:	The only proof is that I am under oath, and I am telling you what occurred.
Commonwealth:	Understood. That goes the same for the cease-and-desist letter, right?
Talley:	I don't know if we have a copy of that or not.
Commonwealth:	And the Facebook postings you mentioned?
Talley:	I believe we have some copies of them. I am not sure if they're going to be offered into evidence or not. That's not my department. With respect. I don't mean to sound like a smart aleck with that.

N.T., Trial, 7/24/2018, 444-45.

Commonwealth:	My question is: You have the capacity, if you really wanted to get these Facebook records, that you can try and track that down?
Talley:	Me? No.
Commonwealth:	You can petition Facebook to try to get them?
Talley:	I suppose so.

Id. at 448-49. Characterizing this conversation as proof that the denial of nominal bail affected the outcome of his trial, Talley asks this Court to vacate his sentence and remand for a new trial.

For its part, the Commonwealth argues that "proof is evident or presumption great" means that the evidence presented at the bail hearing, along with reasonable inferences in the Commonwealth's favor, need only establish a "*prima facie* case." Commonwealth's Br. at 28. The Commonwealth derives this argument from two of this Court's decisions,

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between him and Wolf concerning TOR, the anonymous browser, which, according to Talley, demonstrated that Wolf, not Talley, was curious about how to use TOR.

Commonwealth ex rel. Alberti v. Boyle, 195 A.2d 97 (Pa. 1963), and *Commonwealth v. Farris*, 278 A.2d 906 (Pa. 1971).

In *Alberti*, Angelo Alberti "was incarcerated in Allegheny County following a verdict of the Coroner's Jury that he be held to await the action of the Grand Jury on a charge of murder."[12] 195 A.2d at 97. Alberti filed a *habeas* petition, seeking release on bail. *Id*. At the bail hearing in the Allegheny County Court of Common Pleas, the Commonwealth relied upon the record of the coroner's inquest, but offered no testimony or other evidence. *Id*. The court granted Alberti bail, and the Commonwealth appealed to this Court, which considered the meaning of "proof is evident or presumption great" for the first time.[13] Without any analysis, the Court held that "if the Commonwealth's evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused." *Id*. at 98. Further, the Court proscribed the practice "of deciding this very important question on the basis of the testimony presented at a coroner's inquest." *Id*. Instead, "a decision should be made on the basis of the testimony which is presented by the Commonwealth at" the bail hearing. *Id*. Because the bail court considered only the record of the coroner's inquest, the *Alberti* Court remanded the matter for an evidentiary bail hearing. *Id*.

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[12] A "coroner's jury" is a six-person jury that a coroner may summon following an inconclusive autopsy. *See* 16 P.S. § 1219-B ("If the coroner is unable to determine the cause and manner of death following an autopsy, the coroner may conduct an inquest upon a view of the body as provided by law."); *id* (explaining that, at the inquest, the coroner's duty is to "[a]scertain the cause of death"; to determine whether any person other than the decedent "was criminally responsible therefor by act or neglect," and, if so, "the identity of the person"; and to "examine further evidence and witnesses regarding the cause of death"); *id.* § 1228-B ("The coroner may summon a jury of six individuals and two alternates to be selected from the jury panels of the court of common pleas.").

[13] At the time, Article I, Section 14 provided: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." PA. CONST. art. I, § 14 (effective to Nov. 3, 1998).

In *Farris*, the Commonwealth filed a delinquency petition against fourteen-year-old Emmanuel Farris following a homicide. 278 A.2d at 907. At "a counseled evidentiary hearing before a judge sitting in the Court of Common Pleas of Philadelphia, Family Court Division," the Commonwealth presented evidence that "Farris fatally stabbed another youth in the back without provocation during a street gang fight." *Id*. A grand jury subsequently indicted Farris for murder, voluntary manslaughter, and involuntary manslaughter, which Farris moved to quash. *Id*. After a hearing, "during which it was disclosed that Farris had previously committed acts in violation of the criminal laws and was committed to a correctional institution from which he committed an escape," the court denied the motions to quash, and ordered Farris to be held in pretrial detention. *Id*. Farris appealed the trial court's denial of his motion for release on bail to this Court, which disposed of his claim in a single sentence: "Since evidence offered at the preliminary hearing in the Family Court Division established a *prima facie* case of murder in the first degree, the court below did not err in refusing to release Farris on bail pending trial, and its order to this effect will be affirmed." *Id*. The Court did not discuss or cite *Alberti*.

The Commonwealth contends that *Farris* and *Alberti* compel the conclusion that "the standard of proof for denial of bail under Article I, § 14 is [a] *prima facie* case," and that "the standard remains the same" notwithstanding the 1998 amendment to the right-to-bail-clause. Commonwealth's Br. at 29. However, the Commonwealth offers no explanation as to what constitutes a *prima facie* case in the context of a request that bail be denied based upon an assertion that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community, which was not a basis for denying bail when *Farris* and *Alberti* were decided. Moreover, in dismissing Talley's claim that something less than clear and convincing evidence would violate federal due process following the High Court's decision in *Salerno*, the

Commonwealth suggests that the fact that "the safeguards in *Salerno* were enough for the federal Bail Reform Act of 1984 to withstand a due process challenge does not mean its procedures are necessary under the federal Constitution." *Id*. at 34. Assuming, *arguendo*, that clear and convincing evidence is the proper standard, the Commonwealth contends that the trial court did not abuse its discretion in denying nominal bail here because the court considered the evidentiary proffer set forth in the affidavit of probable cause,[14] which the Commonwealth believes was enough to satisfy that higher standard. *See id*. at 38-39 (recounting the affidavit's allegations). The Commonwealth notes that it proffered evidence of death threats that Nesbitt received via text message, proof that someone had shot her vehicle, and witnesses who could connect Talley to both the shooting and the texts. While the Commonwealth insists that Talley stipulated to the affidavit's allegations, it maintains that, "even if [Talley] had not stipulated to the affidavit of probable cause, the Commonwealth could still rely on it." *Id*. at 38 n.21.

B. Discussion

Resolution of this first issue requires us to interpret Article I, Section 14 of the Pennsylvania Constitution. In answering this question of law, our standard of review is *de novo* and the scope is plenary. *Commonwealth v. Molina*, 104 A.3d 430, 441 (Pa. 2014). Ascertaining the meaning of the phrase "proof is evident or presumption great" necessarily entails a review of the right-to-bail clause's text and history, in addition to "any relevant decisional law and policy considerations argued by the parties, and any extra-jurisdictional caselaw from states that have identical or similar provisions, which may be

[14] "Proffer" is a term used to describe an "offer of proof," 1 MCCORMICK ON EVIDENCE § 51 n.11 (8th ed. 2020), which is an explanation to the court of "what the witness would say if the witness were permitted to answer the question and what the expected answer is logically relevant to prove." *Id*. § 51.

helpful and persuasive." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018).

i. The meaning of "proof is evident or presumption great"

We begin, as we must, with the text. As it pertains to bail, Article I, Section 14 provides:

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

PA. CONST. art. I, § 14. The opening clause establishes a right to bail for all prisoners, while the remainder of the text provides an exception to the right for three classes of defendants. To satisfy one of these exceptions, the Commonwealth must offer "evident" proof or establish a "great" presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions. If the Commonwealth fails to satisfy its burden of proof, the trial court cannot deny bail. *Truesdale*, 296 A.2d at 836.

While the 1998 amendment to Article I, Section 14 added the latter two categories of nonbailable prisoners, the right to bail has existed in Pennsylvania law since 1682. The Commonwealth always has been required to demonstrate that the "proof is evident or presumption great" that the accused was nonbailable.[15] The historical context of the right and its exception aid us in defining the evidentiary burden captured in that operative phrase.

The framers of our earliest governing documents extended the protection against pretrial incarceration to all persons who have been arrested, arraigned, and subsequently placed in pretrial incarceration—*i.e.*, "prisoners." William Penn included the promise that

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15 *See infra.*

"all prisoners shall be bailable by sufficient sureties" in his draft of Pennsylvania's first governing document. *See* PA. FRAME OF GOVERNMENT OF 1682, LAWS AGREED UPON IN ENGLAND, art. XI (1682). The framers of the Constitution of 1776 incorporated the right into Chapter II, Section 28 of our foundational Charter. PA. CONST. chp. II, § 28 (1776) ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great."). The same provision appeared in Article IX, Section 14 of the Constitutions of 1790 and 1838. *See* PA. CONST., art. IX, § 14 (1790 & 1838) ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great."). And following the constitutional convention of 1873, the right was relocated without substantive alteration to Article I, Section 14, where it remained unchanged until 1998. *See* PA. CONST., art. I, § 14 (1874 & 1968) ("All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great.").

The architects of Pennsylvania's colonial and state governments recognized that a highly limited class of prisoners should remain incarcerated because no surety was sufficient to secure their appearance at trial if they were to be released. However, in framing the right, they imposed two conditions to ensure that bail was denied only to those prisoners who, in fact, posed a flight risk. In the framers' view, individuals faced with a choice between risking their life before a jury and forfeiting bail might be too tempted to choose the latter.[16] Thus, the first condition was that the individual had to be arrested, arraigned, and detained for a capital offense. At common law, either judicial approval of the charge or a grand-jury indictment were prerequisites to the arrest, arraignment, and detention of an individual for capital crimes. *See Hurtado v. California*, 110 U.S. 516, 544

[16] *Truesdale*, 296 A.2d at 835 ("[T]he framers of our Constitution must have felt that if a person were accused of a crime and had to risk the possibility of receiving the death penalty or forfeiting bail, he would obviously choose the latter.").

(1884) (Harlan, J., dissenting) (stating the precept that "no person could be arraigned for a capital crime except upon the presentment or indictment of a grand jury is shown upon almost every page of the common law");[17] *Gerstein v. Pugh*, 420 U.S. 103, 114-15 (1975) (explaining that, at common law, "[t]he justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody.") (citations omitted). Because a defendant could not legally be held in pretrial detention for a capital offense absent indictment by a grand jury or, at least, a magistrate's approval, the limited exception to the right to bail addressed the bailability of persons detained for a capital offense following those accusatory procedures.

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[17] *See also* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 53 (2007) (explaining that, at common law, it was assumed that "arrests would usually be by arrest warrant if an indictment had first been obtained (and that an indictment was usually required for the issuance of a warrant)"); *id*. at 193 (opining that the late 19th century "recognition of bare probable cause as a justification for a warrantless arrest by an officer marked a drastic departure from the common-law regime of accusatory criminal procedure that was familiar to the Framers"); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 ("But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon preparatory accusation of twelve or more of his fellow subjects, the grand jury."); *id.* at 287 ("Sir Edward Coke indeed hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found.").

Cf. PA. FRAME OF GOVERNMENT OF 1682, LAWS AGREED UPON IN ENGLAND, art. VIII (1682) ("That all Tryals shall be by Twelve Men, and as near as may be, Peers or Equals, and of the Neighbourhood, and men without just Exception. In cases of Life there shall be first Twenty-Four returned by the Sheriff for a Grant Inquest, of whom Twelve at least shall find the Complaint to be true[.]"); PA. CONST. chp. II, § 27 (1776) ("All prosecutions shall commence in the name and by the authority of the freemen of the commonwealth of Pennsylvania; and all indictments shall conclude with these words, '*Against the peace and dignity of the same.*'") (italics in original); PA. CONST. art. IX, § 10 (1790) ("That no person shall, for any indictable offence, be proceeded against criminally by information.").

But the framers did not regard either the initial judicial finding or the grand jury's indictment as sufficient to create an irresistible urge to evade trial. Even though the evidence may have been adequate to meet the lower threshold for an arrest or indictment, if the case against the accused was weak, then the risk of flight would have been deemed too remote to warrant the denial of bail.[18] For that reason, capital defendants could be denied their right to bail only when a second condition was satisfied: Not only did the prosecution have to support the arrest or indictment with sufficient evidence, but the proof of the defendant's guilt of the capital offense at issue had to be evident, or its presumption great.[19] Where the proof of guilt was not evident or apparent, or the presumption marginal at best, the framers believed that a reasonable person would choose to risk his life before a jury rather than forfeit bail. In such cases, the right to bail could not be denied.

The foregoing history suggests that the framers intended the evidentiary threshold for denying bail to be greater than that needed to arrest or indict the accused in the first place. Otherwise, the right-to-bail clause need only have provided that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses"—full stop. Because a capital "prisoner," could only be held following judicial sanction or grand-jury indictment,

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[18] *See* John S. Fields, *Determination of Accused's Right to Bail in Capital Cases*, 7 VILL. L. REV. 438, 440 (1962) ("Since the basic purpose of bail is to insure the accused's presence at trial, the authors of the state constitutions deduced that this urge [to evade a jury verdict of death] disappears when the facts adduced do not indicate a probable danger of conviction.").

[19] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1948 (Thomas Cooley ed., Little, Brown, & Co. 4th ed. 1873) (explaining that, per the various state constitutional provisions affording a right to bail, "even [in] capital cases it is in the power of the court to take bail, and it should be taken unless on the preliminary investigation 'the proof of guilt is evident or the presumption great'"). *Accord Truesdale*, 296 A.2d at 831 ("If a person was charged with murder which rose to the level of murder in the first degree, he could be denied bail when the proof was evident or the presumption great."); PA. CONST. chp. II, § 28 (1776) ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.").

as a matter of law, an interpretation of the phrase "proof is evident, or presumption great" as equivalent to the standard required for those pre-detention determinations would render it both duplicative and superfluous. Consequently, the more demanding burden of proof for the denial of bail finds meaning *vis-à-vis* the standards that controlled the validity of arrests and indictments at the founding.

In the colonial era, as today, the validity of pre-detainment criminal procedures was measured by the likelihood that the underlying accusation was true. Suspected felons often would be arrested based only upon a determination of probable cause by a neutral magistrate. *See* 1 HALE, HISTORY OF PLEAS OF THE CROWN 575, 579-80 (1680) ("Regularly no process issues in the king's name and by his writ to apprehend a felon or other malefactor, unless there be an indictment," but "if A makes an oath before a justice of peace of a felony committed in fact, and that he suspects B and shows probable cause of suspicion, the justice may grant his warrant to apprehend B.").[20] When a grand jury indictment was a prerequisite to arrest and detainment, grand jurors in capital cases were tasked with deciding whether the prosecution presented "probable evidence" that a capital offense occurred and that the accused likely was the one who committed it.[21] In

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[20] *Cf*. *Travis v. Smith*, 1 Pa. 234, 234-35 (1845) (holding that, in a civil suit for falsely "procuring a warrant for taking and apprehending" an individual accused of a crime, the civil defendant will not be held liable if he had "probable cause, or in other words, reasonable grounds for belief of guilt" of the individual whom he accused of a criminal offense); *Graham v. Noble*, 13 Serg. & Rawle 233, 235 (Pa. 1825) (stating that a grand jury's "finding of the bill [of indictment] is *prima facie* evidence of probable cause").

[21] GEORGE J. EDWARDS, JR., THE GRAND JURY: AN ESSAY 105 (1906); *see also* BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 58 (Univ. of Cal. Press 1991) ("[Sir Matthew] Hale took the position that grand juries 'in a case [where] there be probable evidence, . . . ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterward.' If on hearing the king's witnesses or 'upon their own knowledge of the credibility of the witnesses they are dissatisfied,' grand jurors might return the bill ignoramus."); *id*. at 84 (explaining that, of the few grand jury charges that were printed in the eighteenth century, "the probability standard seems more common").

Respublica v. Shaffer, 1 Dall. 236, 237 (Pa. 1788), Chief Justice Thomas McKean instructed a grand jury that its "duty" was "to enquire into the nature and probable grounds of the charge," and "diligently to enquire into the circumstances of the charge, the credibility of the witnesses who support it, and, from the whole, to judge whether the person accused ought to be put upon his trial."[22] While the precise articulation of the epistemic standards controlling the validity of arrests, arraignments, and indictments were debated throughout the 17th, 18th, and 19th centuries, probable cause was the predominant evidentiary gauge. Because "proof is evident, or presumption great" necessarily represents a higher standard than the framing-era standards for an arrest, arraignment, or indictment on a capital offense, the various iterations of our constitutional right to bail have never prescribed a finding of probable cause as justification for the denial of bail.

"Proof is evident or presumption great" also is not equivalent to the Commonwealth's suggested *prima facie* burden of proof, which is the standard applicable in preliminary hearings. The presentation of evidence and allegations that merely tend to establish the general elements of the charged offenses fails to capture the plainly

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[22] By the late 19th century, the probable cause standard for indictments gave way to a *prima facie* standard. SHAPIRO, *supra* n.21, at 93-98; *see also*, EDWARDS, *supra* n.21, at 105 (explaining that, by the turn of the 20th century, the "law in Pennsylvania" was as follows: "To justify the finding of an indictment the grand jury must believe that the accused is guilty. They should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a petit jury") (citation omitted); THOMAS STARKIE, PRACTICAL TREATISE OF THE LAW OF EVIDENCE 818 (Dowdeswell & Malcom eds., 10th Am. ed. 1876) ("*[P]rima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be credited by the jury, unless it be rebutted or the contrary proved."); *Commonwealth v. Church*, 1 Pa. 105, 109 (1845) (holding that the trial court erred in quashing an indictment of nuisance based upon extrinsic matters where the indictment provided that the defendant erected a dam in a stream that is a public highway, "which is *prima facie* indictable simply as a nuisance"); *Commonwealth v. Ross*, 252 A.2d 661, 663 (Pa. 1969) ("Where a person is indicted for a crime, at least a *prima facie* case of guilt has been established before a grand jury.").

qualitative thrust of the burden envisioned by Article I, Section 14. In modifying "proof" with "evident," and "presumption" with "great," the clause's text demonstrates that an assessment of the Commonwealth's evidence does not turn on a bare probabilistic assessment of the legal sufficiency alone. *See* N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (defining "evident" as "Plain; open to be seen; clear to the mental eye; apparent; manifest" and giving the following examples: "The figures and colors of bodies are evident to the senses; their qualities may be made evident. The guilt of an offender cannot always be made evident."); *id.* (defining "great" as "Expressing a large, extensive or unusual degree of any thing as [in] great fear; great love; great strength; great wealth; great power; great influence; great folly" and further defining it as "Important; weighty; as [in] a great argument; a great truth; a great event; a great thing; of no great consequence; it is no great matter"). Rather, those adjectives demonstrate that the bail court must evaluate the evidentiary weight of the "proof" or "presumption" as well. Put simply, in scrutinizing whether the accused can be denied the right to bail, the Commonwealth bears a burden of both production and persuasion.

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

Further, this Court has described a *prima facie* case as existing "when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes *probable cause* to warrant the belief that the accused committed the offense." *Commonwealth v. Karetny*, 880 A.2d 505, 514 (Pa. 2005) (emphasis added); *see also Commonwealth v. Ricker*, 170 A.3d 494, 503 (Pa. 2017) (*per curiam*) (Saylor, C.J., concurring) (explaining that, under one of this Court's various and often inconsistent formulations of the *prima facie* standard, "the sole function of the jurist presiding at a preliminary hearing is to determine whether probable cause exists to require an accused to stand trial on the charges contained in the complaint") (cleaned up). To the extent that "a *prima facie* case" entails a mere determination of probable cause, it surely cannot be equated with the "proof is evident or presumption great" standard.

In support of its contrary view, the Commonwealth relies upon this Court's holding in *Alberti* that "if the Commonwealth's evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused." *Alberti*, 195 A.2d at 98. The Commonwealth contends that we should infer from this holding that the *prima facie* standard controls, and thus all that is required to deny bail is a demonstration of probable cause.[23] We do not agree that *Alberti* sanctioned *sub silentio* the lesser burden that the Commonwealth suggests it did.[24]

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[23] *See* Commonwealth's Br. at 31 n.18 (opining that the *Alberti* standard aligns with other jurisdictions that equate "proof is evident or presumption great" with "probable cause"); *id*. at 37-40 (relying exclusively upon an affidavit of probable cause to support the trial court's decision).

[24] Nor can the Commonwealth find much analytical support in this Court's decision in *Farris*. In contrast with the view we adopt today, the *Farris* Court held that, because the "evidence offered at the preliminary hearing in the Family Court Division established a *prima facie* case of murder in the first degree, the court below did not err in refusing to release Farris on bail pending trial, and its order to this effect will be affirmed." *Farris*, 278 A.2d at 907. The *Farris* Court offered no justification for this conclusion. It did not

The *Alberti* Court derived its holding from *Commonwealth ex rel. Chauncey and Nixon v. Keeper of the Prison*, 2 Ashm. 227 (C.P. Phila. Cty. 1838), in which a common pleas court opined that bail should be refused "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." *Chauncey,* 2 Ashm. at 234;[25] *see Alberti*, 195 A.2d at 98 n.2 (instructing readers to "see particularly the opinion of President Judge King in" *Chauncey*). Evidence that is sufficient to sustain a jury verdict is not the mere presentation of any type of proof that supports all elements of the offense, which is the preliminary hearing standard. Rather, the evidence must be legally competent, meaning evidence that is facially admissible.

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cite, let alone discuss, *Alberti*. And it failed even to explain what a "*prima facie*" standard entails or how the evidence at Farris' preliminary hearing met that burden. Insofar as *Farris*' single-sentence holding can be construed as equating the standard for denying bail to the preliminary hearing standard, it is overruled.

[25] *See* John W. Ashmead, Reports of Cases Adjudged in the Courts of Common Pleas, Quarter Sessions, Oyer and Terminer, and Orphans' Court, of the First Judicial District of Pennsylvania, accessible at https://catalog.hathitrust.org/Record/010085515. Notably, the *Chauncey* court found that the Commonwealth's evidence failed to warrant the denial of bail under the standard endorsed by the court. There, the Commonwealth charged Henry Chauncey with the murder of Eliza Sowers. *Chauncey*, 2 Ashm. at 227-28. At a hearing, witness testimony demonstrated that Sowers, "being pregnant, applied to Henry Chauncey, (said to be a practicing physician) for the purpose of obtaining his aid in accomplishing a criminal abortion." *Id*. at 228. Chauncey performed the abortion "but did it in such a 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." *Id*. However, the court reasoned that inferring Chauncey's "intent to kill Eliza Sowers" from the proffered evidence "would be a most strained and forced presumption." *Id*. at 234. Despite the existence of evidence "showing that [a poison] was administered," which was competent evidence of intentional homicide, the court declined to find such an intent under the facts before it. *Id*. at 235; *see id* (explaining that "[m]urder by poison" can constitute "a willful, deliberate and premeditated killing," but that does not mean that it is "under all conceivable circumstances"). The court therefore appeared to assess the quality of the Commonwealth's evidence, not simply its sufficiency to sustain a guilty verdict.

Recently, we explained that, while the criminal rule governing preliminary hearings permits the Commonwealth to establish some elements of the charged offense with "some hearsay," it "does not state [that] a *prima facie* case may be established solely on the basis of hearsay." *McClelland*, 233 A.3d at 735. The *Alberti* Court rejected such a low standard. By requiring evidence sufficient at law to "sustain a verdict" of first-degree murder in order to deny bail for one charged with that offense, the *Alberti* standard is more robust than that applicable to preliminary hearings. As our pronouncements in *Alberti* suggest, the Commonwealth cannot sustain its burden at a bail hearing with hearsay or otherwise legally incompetent evidence because a jury could not consider such evidence in reaching its verdict. The preliminary hearing evidence that suffices to hold a case for court is not equivalent to legally admissible evidence that suffices to sustain a guilty verdict.

Alberti's holding thus recognizes that Article I, Section 14 imposes a higher evidentiary burden than a showing of probable cause or the Commonwealth's suggested *prima facie* standard. That said, *Alberti* does not fully clarify the requisite qualitative assessment of the evidence.[26] By requiring admissible evidence and evidence sufficient to sustain a jury's guilty verdict, *Alberti* arguably calls for an assessment of the character of the evidence and a determination that a guilty verdict would not be against the weight of the evidence.[27] Given the *Alberti* Court's failure to perform a constitutional analysis or

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[26] *Cf. Commonwealth v. Santana,* 333 A.2d 876, 877 (Pa. 1975) (holding that evidence is sufficient at law to support a verdict if "accepting as true all the evidence and all reasonable inferences therefrom, upon which, if believed, the jury could properly have based its verdict") (citation omitted).

[27] *Cf. Commonwealth v. Widmer*, 744 A.2d 745, 752 (Pa. 2000) (holding that a jury verdict is against the weight of the evidence and should be overruled if the court determines "that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice") (cleaned up); *Chauncey,* 2 Ashm. at 234 (indicating that the inquiry may involve a qualitative assessment by holding that the defendant was entitled to bail where inferring

otherwise explain its holding in a meaningful way, the precise standard it engendered is far from evident. Insofar as *Alberti* may be construed as permitting courts to deny bail without considering the strength of the Commonwealth's evidence, we find that it does not accurately reflect the standard of proof that the Commonwealth must satisfy when it seeks to deprive the accused of his right to bail. Rather, our Constitution's deliberate use of the terms "great" and "evident" in describing the evidentiary burden needed to overcome the right refutes directly and unambiguously any contrary articulation of the standard.

Moreover, the *Alberti* Court could not have anticipated applying the standard it articulated to the right-to-bail clause's contemplation of denials based upon *potential* risks to specific individuals and the community, which was added by constitutional amendment in 1998, long after *Alberti* was decided. It seems unlikely that the legal sufficiency of the evidence supporting the underlying charge also can establish automatically that the accused presents a risk of future dangerousness that no condition of bail can mitigate. Article I, Section 14's future dangerousness provision is not limited to specific offenses, and not all offenses indicate a risk of future harm. Additionally, it is unintelligible to suggest that a court must probe whether the Commonwealth's evidence presented at the bail hearing is sufficient in law to sustain a verdict that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." What evidence possibly could suffice to sustain a guilty verdict for a crime that has yet to be committed? Of course, the answer is none.[28] The Constitution

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his intent to kill from the Commonwealth's evidence "would be a most strained and forced presumption").

[28] For this reason, we are unable to accept Justice Mundy's assertion that bail can be denied based upon potential future dangerousness if the Commonwealth's evidence "is sufficient to establish that no condition or combination of conditions other than imprisonment would reasonably assure the safety of any person and the community." Concurring Op. at 3 (Mundy, J.).

does not permit punishing a person for a crime that has not been proven, let alone in anticipation of one that has not yet been committed. *Cf. Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

Because *Alberti* requires legally competent evidence of all elements of an offense, it simply is impossible to apply the *Alberti* standard to something that has not yet come to pass. Therefore, while *Alberti* required more than probable cause, and arguably calls for an assessment of the weight of the evidence, it does not articulate what constitutes "proof is evident or presumption great," as that formulation relates to the Commonwealth's burden of demonstrating the potential risk of harm that the accused poses to specific individuals and the community at large.

While Article I, Section 14 requires more than probable cause or a *prima facie* showing, we are confident that it does not necessitate proof beyond a reasonable doubt, the highest standard applicable to a prosecution. *See In re Winship*, 397 U.S. 358, 362-63 (1970) (explaining that the "reasonable doubt" standard "reflect[s] a profound judgment about the way in which law should be enforced and justice administered") (cleaned up). If it did, a bail hearing would be little more than a dress rehearsal for a jury trial, where the principles of due process impose the most exacting degree of persuasion in order to deprive the accused of his liberty. The Commonwealth cannot be expected to satisfy that heavy burden at the earliest stages of a case, perhaps even before an investigation is completed, witnesses are prepped, or laboratory analysis is ready. Setting the bar so high so early would impose an untenable burden on the Commonwealth, effectively nullifying the exceptions to the right to bail. If the full complement of due process constraints attendant to a criminal trial applied at a bail hearing, it would seem that bail never could be denied.

As a final point on the burden's place among our familiar degrees of proof, we also disagree with Talley that Article I, Section 14 imposes a clear and convincing evidence standard. "Proof is evident or presumption great" has no perfect analogue among the degrees of proof with which we are accustomed.[29] It is a *sui generis* degree of certainty. To declare that the burden for denying one's right to bail is strictly identical with a familiar standard "would be to put a 21st century gloss on or give a modern substitute definition to a historic legal phrase." *Simpson v. Owens*, 85 P.3d 478, 488 (Ariz. App. 1st Div. 2004). Although possessed of full authorial opportunities at any one or all of Pennsylvania's seven constitutional conventions over the last three centuries, our constitutional framers and delegates never have opted to exchange "proof is evident or presumption great" for the phrase "clear and convincing evidence," nor have they opted for any other conventional or familiar evidentiary standard.

Moreover, to describe Article I, Section 14's standard as strictly identical to the clear and convincing standard (a predominantly civil rubric) would be to incorporate the various and occasionally conflicting articulations of that standard into the burden of proof governing right-to-bail determinations.[30] In delineating the requirements of clear and

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[29] The development of the "clear and convincing evidence" standard began long after William Penn's coining of the phrase "proof is evident or presumption great" in 1682. Indeed, our research indicates that Pennsylvania courts did not employ the phrase "clear and convincing" evidence until 1840. *See Stricker v. Groves*, 5 Whart. 386, 1840 WL 3956, at *7 (Pa. 1840) (stating that the burden of demonstrating that a testator was unable to sign a will is not "satisfied short of most clear and convincing proof").

[30] Chief Justice Baer argues that we should adopt the "clear and convincing evidence" standard because, *inter alia,* that standard is "universally known and understood." Concurring Op. at 4 (Baer, C.J.). While we do expect that lawyers recognize the phrase "clear and convincing evidence" and understand its place among other evidentiary burdens, courts have provided varying definitions of that standard, obscuring its precise requirements. Confusingly, a few of this Court's descriptions of "clear and convincing evidence" nearly merge the standard with proof beyond a reasonable doubt. *See*, *e.g.*, *Stafford v. Reed*, 70 A.2d 345, 348 (Pa. 1950) (describing the clear and convincing standard as meaning "that the evidence is not only found to be credible, but

convincing evidence, courts have never contemplated how that standard would apply to right-to-bail determinations. Nor should they have done so. Inasmuch as it has developed in relation to the final stages of a case, the clear and convincing standard embodies an expectation that it will apply to a party's full evidentiary showing. Many of its various articulations reflect such an assumption; for example, we have held that corroboration often is critical in deciding whether that standard has been met. *See, e.g., Gen. Elec. Credit Corp. v. Aetna Cas. & Sur. Co*., 263 A.2d 448, 456 (Pa. 1970) (stating that, in order for evidence to be clear and convincing, "the evidence must be established by two witnesses or by one witness and corroborating circumstances"); *Easton v. Washington Cty Ins. Co.*, 137 A.2d 332, 337 (Pa. 1957) (same). Such grand expectations do not exist at a right-to-bail hearing, which often will occur well before the Commonwealth has compiled, or is even aware of, all evidence supporting its allegations. Put simply, holding that the two standards are indistinguishable would create an evolutionary mismatch: the environment in which the clear and convincing evidence standard developed makes it ill-suited to the world of bail hearings. While we recognize that the two standards are situated in proximity along the axis where the various burdens of proof

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of such weight and directness as to make out the facts alleged ***beyond a reasonable doubt***") (emphasis added; cleaned up); *Matter of Chiovero*, 570 A.2d 57, 60 (Pa. 1990) ("[C]lear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, ***without hesitancy***, of the truth of the precise facts in issue.") (emphasis added); *Aliquippa Nat. Bank, to Use of Woodlawn Tr. Co. v. Harvey*, 16 A.2d 409, 414 (Pa. 1940) (stating that evidence of fraud must be "clear, precise and ***indubitable***," which means impossible to doubt) (emphasis added). Other formulations indicate a lesser standard. *See, e.g.*, *Snyderwine v. McGrath*, 22 A.2d 644, 647 (1941) (defining the standard as "clear and satisfactory"). Our task in today's case is not to decide which of the numerous and sometimes confounding articulations of "clear and convincing evidence" controls; we are called upon to interpret "proof is evident or presumption great." Interchanging the standards is not as easily done as Chief Justice Baer suggests.

sit and that it is thus sensible to conclude that they share certain principles,[31] we decline to interpret them as one and the same.

In this vein, we also reject Talley's contention that the Supreme Court's decision in *Salerno* commands us to adopt the clear and convincing evidence standard. Although the High Court viewed the Bail Reform Act's heightened standard as an important consideration in assessing the Act's constitutionality, the Court did not state that it was a necessary condition. Indeed, the Court found that the Act's safeguards "are more exacting" and "far exceed" those held sufficient in other contexts where the state may detain an individual for nonpunitive reasons. *Salerno*, 481 U.S. at 752 (alluding to "the juvenile context" and post-arrest detention). As such, *Salerno* does not suggest, much less mandate, that we interpret Article I, Section 14 as imposing a clear and convincing evidence standard.

With the foregoing considerations in mind, we find that, under Article I, Section 14, "proof is evident or presumption great" constitutes its own unique standard,[32] one that lies

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[31] Because of the similarity, several adjectives highlighted by Chief Justice Baer in his preferred articulation of the clear and convincing evidence standard reasonably apply to the "proof is evident or presumption great" standard as well. For example, if the statement that the evidence should be "clear, direct, and weighty" is a useful heuristic for the bench and bar, they may consider it in the context of the right to bail. *See* Concurring Op. at 4 (Baer, C.J.). But courts should be careful not to assume that all iterations of the requirements of clear and convincing evidence apply at a bail hearing. *See, e.g., id*. (explaining that evidence is clear and convincing if it "enable[s] the trier of fact to come to a clear conviction, ***without hesitancy***, of the precise facts at issue") (emphasis added).

[32] According to Chief Justice Baer, we should not interpret Article I, Section 14's burden of proof as a *sui generis* evidentiary gauge because, in his view, "Pennsylvania recognizes three standards of proof: (1) beyond a reasonable doubt; (2) clear and convincing evidence; and (3) preponderance of the evidence." Concurring Op. at 2 (Baer, C.J.). Respectfully, this is incorrect. While those standards are the most common evidentiary gauges, they are not the only burdens of proof that our law recognizes. *See, e.g.*, *G.V. v. Dept. of Pub. Welfare*, 91 A.3d 667, 671-72 (Pa. 2014) (holding that "substantial evidence", not the higher "clear and convincing" standard, is the burden of proof that applies in proceedings to expunge an alleged perpetrator of sexual child abuse from the ChildLine Registry); *Ellerbe v. Hooks*, 416 A.2d 512, 513-14 (Pa. 1980) (holding

in the interstice between probable cause and proof beyond a reasonable doubt. Unlike the *prima facie* standard, it requires both a qualitative and quantitative assessment of the evidence adduced at the bail hearing. This dual inquiry finds ample support in extra-jurisdictional caselaw. Following Pennsylvania's lead, thirty-five other States adopted a constitutional provision providing for a right to bail conditioned upon a showing that the "proof is evident or presumption great."[33] Of the twenty-two jurisdictions in which courts have interpreted the phrase, appellate courts in twenty States have held that the government's burden is more stringent than probable cause but less demanding than proof beyond a reasonable doubt, and that the inquiry includes a qualitative assessment of the evidence.[34] Those decisions provide valuable guidance on the precise nature of the "proof is evident or presumption great" standard.

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that custody disputes between parents and third parties are governed by a unique burden of proof because parent-third party disputes are distinct from both parent-parent custody disputes, in which the standard is preponderance of the evidence, and parent-state disputes, in which the clear and convincing evidence standard controls); *Perez*, 249 A.3d at 1102 (explaining that, at the preliminary hearing stage, "the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense").

[33] *See* ALA. CONST. art. 1, § 16; ALASKA CONST. art. 1, § 11; ARIZ. CONST. art. 2, § 22 A(1)-(4); CAL. CONST. art. 1, § 12(a)-(c); COLO. CONST. art. 2, § 19; CONN. CONST. art. 1, § 8 (a); DEL. CONST. art. 1, § 12; FLA. CONST. art. 1, § 14; IDAHO CONST. art. 1, § 6; ILL. CONST. art. 1, § 9; IND. CONST. art. 1, § 17; IOWA CONST. art. 1, § 12; KAN. CONST. Bill of Rights § 9; KY. CONST. § 16; LA. CONST. art. 1, § 18 (B); ME. CONST. art. 1, § 10; MICH. CONST. art. 1, § 15; MINN. CONST. art. 1, § 7; MISS. CONST. art. 3, § 29 (1)(a) & (3); MO. CONST. art. 1, § 20; MONT. CONST. art. 2, § 21; NEB. CONST. art. 1, § 9; NEV. CONST. art. 1, § 7; N.M. CONST. art. 2, § 13; N.D. CONST. art. 1, § 11; OHIO CONST. art. 1, § 9; OKLA. CONST. art. 2, § 8 A; OR. CONST. art. 1, § 14; R.I. CONST. art. 1, § 9; S.D. CONST. art. 6, § 8; TENN. CONST. art. 1, § 15; TEX. CONST. art. 1, § 11; VT. CONST. ch. 2, § 40 (1)-(2); WASH. CONST. art. 1, § 20; WYO. CONST. art. 1, § 14.

[34] Specifically, this approach is followed in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Indiana, Iowa, Kentucky, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, and Wyoming. *See State v. Moyers*, 214 So.3d 1147, 1150 (Ala. 2014) (defining the standard as "clear and strong"); *Simpson v. Owens*, 85 P.3d 478, 491 (Ariz. App. 1st Div. 2004) ("The State's burden is met if all of the evidence, fully considered by the court, makes it plain and clear

to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed [an enumerated offense].”); *In re White*, 463 P.3d 802, 809 (Cal. 2020) (explaining that bail may be denied when the record “contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt”); *Yording v. Walker*, 683 P.2d 788, 791 n. 1 (Colo. 1984) (holding that the burden is “greater than probable cause but less than the standard of beyond a reasonable doubt required for conviction”); *State v. Menillo*, 268 A.2d 667, 676 (Conn. 1970) (holding that probable cause is insufficient to deny bail and requiring a separate evidentiary hearing where the prosecution must demonstrate a “fair likelihood” of conviction); *In re Steigler*, 250 A.2d 379, 382 (Del. 1969) (holding that an indictment supported by a probable cause determination, while relevant, is insufficient to deny bail; instead, the state’s evidence must demonstrate “a fair likelihood” that the accused will be convicted of a capital offense, which likelihood does not exist if “there is good ground to doubt the truth of the accusation”); *Ford v. Dilley*, 156 N.W. 513, 532 (Iowa 1916) (holding that the proof is evident if it “excludes any other reasonable conclusion” and that the presumption is great when testimony raises inferences of guilt that are “strong, clear, and convincing”); *Fry v. State*, 990 N.E.2d 429, 445-49 (Ind. 2013) (holding that the standard “requires something more than probable cause” and finding that where the denial of bail is related to the charges, “the standard is preponderance of the evidence,” which standard implicates a qualitative assessment of “competent evidence”); *Marcum v. Broughton*, 442 S.W.2d 307, 309-10 (Ky. 1969) (holding that the Commonwealth’s evidence of guilt must “competent under the ordinary rules of evidence” and further providing that, “where conflicting evidence creates a plausible basis for the defense of self-protection or the reduction of the offense to a noncapital degree,” the accused is entitled to bail); *Huff v. Edwards*, 241 So.2d 654, 656 (Miss. 1970) (stating that, “unless it plainly, clearly, and obviously appears by the proof that the accused is guilty of a capital crime, bail should be allowed”); *Ex parte Verden*, 237 S.W. 734, 737 (Mo. 1922) (providing that the evidence must “tend[] strongly to show guilt of a capital offence”); *Sewall v. Clark Cnty.*, 481 P.3d 1249, 1251-52 (Nev. 2021) (holding that the quantum of proof “is considerably greater than that required to establish the probable cause,” but less than proof “beyond a reasonable doubt”); *State v. Summons*, 19 Ohio 139, 141 (1850) (holding that bail cannot be denied “if the evidence exhibited on the hearing of the application to admit to bail be of so weak a character that it would not sustain a verdict of guilty”); *In re Barlow*, 280 P.2d 477, 478 (Okla. Crim. App. 1955) (holding that the evidence, while sufficient to survive a preliminary hearing, was insufficient to deny bail); *Application of Haynes*, 619 P.2d 632, 636 (Or. 1980) (“[T]he evidence should at least be clear and convincing.”); *Mello v. Superior Court*, 370 A.2d 1262, 1266 (R.I. 1977) (establishing the standard of proof as “beyond probable cause”); *State v. Burgins*, 464 S.W.3d 298, 310 (Tenn. 2015) (requiring an evidentiary hearing with evidence to corroborate allegations and stating that the standard is “preponderance of the evidence”); *Shaw v. State*, 47 S.W.2d 92, 94 (Tenn. 1932) (finding that the standard calls for an assessment of the “weight of evidence” and requiring “that the applicant offer the witnesses upon whose testimony the grand jury found the indictment”); *Ex parte Donohoe*, 14 S.W.2d 848 (Tex. Crim. App. 1929) (“Bail is a matter of right, unless the

"Proof is evident or presumption great" calls for a substantial quantity of legally competent evidence, meaning evidence that is admissible under either the evidentiary rules,[35] or that is encompassed in the criminal rules addressing release criteria. *See Young v. Russell*, 332 S.W.2d 629, 633 (Ky. 1960) (restricting the prosecution's proof at a denial-of-bail hearing "to that which is competent under the ordinary rules of evidence"); *see also* Pa.R.Crim.P. 523 (listing relevant considerations at a bail hearing). The Commonwealth's "feel[ings]" about evidence that it "may be able to introduce" are not relevant considerations. *See Application of Haynes*, 619 P.2d at 642. And, because a court must be able to evaluate the quality of the evidence, it also cannot rely upon a cold

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evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that an offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered."); *State v. Blodgett*, 257 A.3d 232, 236 (Vt. 2021) (holding that the standard assesses whether there is "substantial, admissible evidence of guilt" that "can fairly and reasonably convince a factfinder beyond a reasonable doubt that defendant is guilty of the charged offense"); *State v. Crocker*, 40 P. 681, 688 (Wyo. 1895) (holding that both the quality and sufficiency of the evidence must be considered).

Of the remaining fifteen States that use the "proof is evident or presumption great" standard, our research has not revealed the existence of an appellate court decision clearly interpreting the standard in thirteen jurisdictions: Alaska, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Washington. The Supreme Court of Florida seemingly has interpreted the phrase as requiring something *more* than proof beyond a reasonable doubt. *See Russell v. State*, 71 So. 27, 28 (Fla. 1916) (describing "evident" as "beyond question of doubt," and noting that "in a trial this degree of proof is not required"). In Maine, the standard is probable cause. *Harnish v. State*, 531 A.2d 1264, 1268 (Me. 1987) (requiring "the state to satisfy the probable cause standard in a bail hearing").

[35] While the bulk of the Commonwealth's proof must consist of admissible evidence, the Commonwealth is not entirely barred from using evidence that otherwise might be inadmissible under our Rules of Evidence. Given that a right-to-bail hearing typically occurs at an early stage of the case, the use of some inadmissible evidence may be necessary. For example, the Commonwealth may rely upon hearsay to present scientific, technical, or forensic information, to introduce laboratory reports, or to corroborate competent witness testimony. Nonetheless, the Commonwealth must introduce admissible evidence in order to establish the material factual claims implicated by the principal asserted ground for the bail denial.

record or untested assertions alone. *Cf. Alberti*, 195 A.2d at 98 (admonishing courts for deciding "this very important question on the basis of the testimony presented at" an earlier hearing).

When the Commonwealth seeks to deny bail, the quality of its evidence must be such that it persuades the bail court that it is **substantially more likely than not** that the accused is nonbailable,[36] which is just to say that the proof is evident or the presumption great. In making its case, the Commonwealth cannot satisfy its burden of persuasion solely "by stacking inference upon inference." *Howard v. Sheriff*, 422 P.2d 538, 540 (Nev. 1967); *accord Chauncey,* 2 Ashm. at 234 (refusing to deny bail where inferring an intent to kill from the Commonwealth's evidence "would be a most strained and forced presumption"). Nor can "the connection between the evidence" and what it seeks to prove be "conjectural." *Sewall*, 481 P.3d at 1252. Rather, the combination of the evidence and inferences must be "reasonable, credible, and of solid value." *White*, 463 P.3d at 809.

Accordingly, we hold that when the Commonwealth seeks to deny bail due to the alleged safety risk the accused poses to "any person and the community," those qualitative standards demand that the Commonwealth demonstrates that it is **substantially more likely than not** that (1) the accused will harm someone if he is

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[36] Chief Justice Baer surmises that the bench and bar would have less difficulty applying a clear and convincing standard than they would in deciding whether something is "substantially more likely than not." *See* Concurring Op. at 3 (Baer, C.J.). Respectfully, we disagree. As Professor McCormick cogently explains in his treatise, "[n]o high degree of precision can be attained by" various "groups of adjectives," such as "by clear and convincing evidence;" rather "[i]t has been persuasively suggested that they could be more simply and intelligibly translated to the" factfinder with an instruction that it "must be persuaded that the truth of the contention is highly probable." 2 MCCORMICK ON EVIDENCE § 340 (8th ed. 2020) (footnotes and internal quotations omitted); *see also Addington v. Texas*, 441 U.S. 418, 425 (1979) ("We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.").

released and that (2) there is no condition of bail within the court's power that reasonably can prevent the defendant from inflicting that harm. While we decline to provide an exhaustive list of circumstances that would suffice to deny bail in a given case based upon prospective harms, a bail court should consider the defendant's character, relevant behavioral history, or past patterns of conduct; the gravity of the charged offense; the conditions of bail reasonably available to the court; and any evidence that tends to show that those conditions would be inadequate to ensure the protection of any person or the community.

Importantly, we note that this high evidentiary standard applies only when the Commonwealth seeks to take the extreme step of denying the accused his or her state constitutional right to bail altogether. The "proof is evident or presumption great" standard does not govern a bail court's discretion in setting the amount of bail. *Cf. Petition of McNair*, 187 A. 498, 501 (Pa. 1936) ("Since the circumstances of individual defendants vary, considerable freedom must be allowed the magistrate in the performance of this function."); PA. CONST. art. I, § 13 ("Excessive bail shall not be required . . . ."); U.S. CONST. amend. XIII (same); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated" to assure the accused's presence at trial "is 'excessive' under the Eighth Amendment.").

In sum, a trial court may deny bail under Article I, Section 14 when the Commonwealth's proffered evidence makes it substantially more likely than not that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions.[37] That

[37] Today's decision has no effect on our long-standing holding that a trial court may deny bail when the accused presents a flight risk that cannot be overcome using any available conditions of bail. *See Truesdale*, 296 A.2d at 835-36 ("If upon proof shown,

determination requires a qualitative assessment of the Commonwealth's case. If the balance of the evidence is rife with uncertainty, legally is incompetent, requires excessive inferential leaps, or lacks any indicia of credibility, it simply is not evident proof, nor can it give rise to a great presumption, that the accused is not entitled to bail.

ii. Application of the standard

The question now becomes whether the Commonwealth's evidence at Talley's nominal bail hearing satisfied the standard set forth above. The answer entails a review of the trial court's determination "that no combination of conditions could ensure the safety of the community and in particular the victim,"[38] and that Talley thus was not entitled to release on nominal bail under Rule 600. More specifically, we must scrutinize the following rationale provided by the court:

> Given the nature of the allegations in this case and the substantial evidence that appeared in the affidavit of probable cause supporting the complaint, the court determined that no combination of conditions could ensure the safety of the community and in particular the victim, Christa Nesbitt. This was based on the escalating pattern of threatening and harassing messages received by Ms. Nesbitt, including mention of firearms and death threats against Ms. Nesbitt. There was substantial circumstantial evidence in the affidavit of probable cause linking [Talley] to these messages, including forensic analysis of his computer and [cellphone] that revealed research into "spamming" a [cellphone] with text messages, researching online when text messages become criminal harassment, and concerted efforts to anonymize his online activity. More significantly, Ms. Nesbitt's

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the court reasonably concludes the accused will not appear for trial regardless of the character or the amount of bail, then in such an instance bail may properly be denied, regardless of the nature of the charges. . . . This decision must be reached by the application of certain criteria, such as: (1) general reputation in the community; (2) past record; (3) past conduct while on bail; (4) ties to the community in the form of a job, family or wealth."); *id.* at 836 n.16 ("For example, if on a past offense the accused had jumped bail, it would seem that the judge could properly deny bail" in a subsequent case.). Because the parties do not raise the issue, we offer no opinion as to the standard of proof that applies to an assertion by the Commonwealth that a defendant poses such a flight risk that bail should be denied altogether.

38 Tr. Ct. Op. ("TCO"), 12/14/2018, at 7.

> vehicle was shot on the night of June 19, 2017 and a witness placed [Talley's] vehicle at the scene immediately before a loud bang was heard. [Talley] was arrested on June 20, 2017 and released on bail on June 22, 2017. The harassing and threatening messages stopped while [Talley] was in jail but resumed within an hour of [Talley's] release on bail. The vulgar and threatening messages continued until July 12, 2017, just days before [Talley] was again arrested on July 18, 2017. The court concluded the totality of circumstances indicated that [Talley] likely was the author of these threatening messages, was physically stalking [Nesbitt,] and fired a bullet into her car. There was no combination of conditions within the court's power that could ensure the safety of Ms. Nesbitt and the community.[39]

Because the present bail motion arose under Rule 600, "[o]ur scope of review is limited to the record evidence from" both the nominal bail hearing "and the findings of the lower court, reviewed in the light most favorable to the prevailing party." *Commonwealth v. Selenski*, 994 A.2d 1083, 1088 (Pa. 2010) (citation omitted). If the factual findings are supported by competent evidence of record, and the legal conclusions drawn therefrom are correct, the denial of nominal bail will be upheld.

As a prefatory matter, the courts below determined erroneously that, at the bail hearing, Talley's counsel conceded that the affidavit of probable cause alone sufficed to rule upon the issue of nominal bail when he said that the "affidavit is fine."[40] Counsel's purported concession followed the trial court's determination that "it can't be fully correct that unproven allegations or yet-to-be-proven allegations, while there still is a presumption of innocence, also could be sufficient" to deny nominal bail.[41] Throughout the hearing, Talley's counsel consistently rejected the Commonwealth's attempt to meet its burden

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39 *Id.* at 7-8 (footnote omitted).

40 See *id.* ("Defense Counsel conceded that consideration of the affidavit of probable cause supporting the charges was appropriate to decide the motion."); *see also Talley,* 236 A.3d at 52 (stating that Talley's counsel "conceded that the Commonwealth could rely on the factual averments in the affidavit of probable cause to oppose" the nominal bail motion).

41 N.T., Nominal Bail Hr'g, at 10.

with allegations lacking evidentiary support.[42] Beyond contesting the apparent lack of evidence for the charges, the defense also challenged the Commonwealth's position that no condition of bail could negate the risk of harm that the prosecution alleged Talley posed.[43] In characterizing defense counsel's errant comment as a concession, neither the trial court nor the Superior Court reconciled the defense's steadfast resistance to the sufficiency of the allegations contained in the affidavit of probable cause. Therefore, we decline to view counsel's statement that the "affidavit is fine" as a concession that the affidavit alone sufficed to deny bail.

Plainly, the trial court did not perform the qualitative assessment that we have clarified is mandated by the right-to-bail clause. Because the trial court decided Talley's motion without considering any testimony, exhibits, or other competent evidence, its decision to deny bail was erroneous.[44] An affidavit of probable cause simply is not conducive to assessing the persuasiveness of the Commonwealth's case under the standards discussed above. Of course, the court did not have the benefit of today's decision in ruling upon Talley's motion. That said, it has been more than half-a-century

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[42] *See id*. at 9 ("[T]here is no evidence to support that [the texts] came from my client."); *id*. at 17 ("There is absolutely no computer forensic evidence that can tie any of those texts to my client. There is also absolutely zero ballistic evidence to tie that shot to my client."); *see also id*. at 10 (stating that the court "can use [the allegations] *as a factor* in weighing" the Commonwealth's proof) (emphasis added).

[43] *Id.* at 19 ("There are many combinations of conditions that can ensure the safety of the alleged victim here and the community.").

[44] The trial court did hear testimony with respect to the bail motion during its June 27-28, 2018 hearing. *See supra* n.5. However, it appears from the trial court's Pa.R.A.P. 1925(a) opinion that the court decided Talley's bail motion based upon only the Commonwealth's proffer at the first hearing on Talley's motion for release on nominal bail. *See* TCO at 7 (stating that its decision to deny bail was supported by "the nature of the allegations in this case and the substantial evidence that appeared in the affidavit of probable cause supporting the complaint"). Likewise, the Commonwealth's brief asserts that the allegations alone supported the trial court's decision. *See* Commonwealth's Br. at 38-40.

since we held unequivocally in *Alberti* that bail could not be denied without an evidentiary hearing. Despite that long-standing requirement, the trial court here denied nominal bail based upon only the layered-hearsay statements contained in the Commonwealth's affidavit of probable cause and the prosecutor's proffer, neither of which are legally competent evidence. Further, the court did not appear to consider any evidence relating to the factors listed in Pa.R.Crim.P. 523(A), such as Talley's "age, character, reputation, mental condition," or any "prior criminal record." There is no indication that the court acknowledged Article I, Section 14's mandate of "evident" proof or "great" presumption, much less that the court attempted to apply that standard to the Commonwealth's proffer.

Just as importantly, neither the affidavit nor any other information of record provided any support whatsoever for the Commonwealth's statement that electronic monitoring was unavailable. When the court requested that the Commonwealth substantiate its claim, the prosecutor was unable to provide an explanation. We have explained "that Rule 600(E) permits a trial court to impose non-monetary conditions, such as house arrest and electronic monitoring, on a defendant who might otherwise be denied release on nominal bail under Article I, Section 14." *Commonwealth v. Sloan*, 907 A.2d 460, 468 (Pa. 2006).[45] It is unclear why the trial court ultimately credited the prosecutor's averment, particularly considering that the probation department, which typically administers electronic monitoring, is an arm of the court, not the district attorney. *See* PA. CONST. art. V, § 1 ("A county's adult probation and parole office is considered an arm of the trial court[.]"). Additionally, the record fails to demonstrate that the trial court

[45] In *Sloan*, the trial court granted the defendant nominal bail under Rule 600 but placed him on house arrest. On appeal to this Court following his conviction, Sloan claimed that he was entitled to unconditional release. We disagreed. Although we did not hold that electronic monitoring and house arrest *must* be available in crafting the conditions of pretrial release, we recognized that, when they are available, they can be imposed as a condition of bail.

considered and found inadequate any of the other conditions of release suggested by Talley's counsel at the bail hearing, such as house arrest and reporting requirements. Thus, even if the trial court could have relied solely upon the affidavit to conclude that Talley would be a danger to others if he was released, the record does not support the conclusion that "no condition or combination of conditions" could negate the risk of harm that he allegedly posed.

Had the court conducted an evidentiary hearing in compliance with *Alberti*, it may have been able to verify the witness statements and other averments contained in the affidavit of probable cause, as well as the Commonwealth's bald assertion that electronic monitoring was unavailable. We conclude that, in relying upon the Commonwealth's untested characterization of the evidence purportedly in its possession, and its unsupported assertion that electronic monitoring was unavailable,[46] the trial court committed an error of law. We now assess whether the erroneous denial of Talley's motion for nominal bail under Rule 600 entitles him to a new trial.

iii. Relief for the erroneous denial of nominal bail

The law is clear that "not every violation of the Pennsylvania Rules of Criminal Procedure calls for the most extreme sanction." *Commonwealth v. Abdul-Salaam*, 678 A.2d 342, 353 (Pa. 1996). Typically, a defendant who has been tried and found guilty is not entitled to any relief for the erroneous denial of bail. *See Commonwealth v. Abdullah*, 652 A.2d 811, 813 (Pa. 1995). When a trial court errs in denying bail to a defendant, the defendant's remedy is limited to an immediate appeal seeking an order for his release

[46] During oral argument in this appeal, the Commonwealth suggested that electronic monitoring was unavailable based upon the location of Talley's residence. This factual averment is *dehors* the record. For his part, Talley has filed an application for leave to file a post-submission communication and a memorandum in which he requests that we disregard the Commonwealth's extra-record assertion. We grant Talley's application, accept the attached memorandum, and have considered the arguments made therein.

pending trial. *Id.* at 813 n.6 (stating that "Appellant was not without remedy," because he "could have filed a petition for writ of *habeas corpus* as a result of the improper denial of his request for release on nominal bail"). But that relief was not available under the present circumstances. Because the trial court did not hold a hearing within a reasonable time of receiving Talley's motion—having waited nearly four months, in fact—the court did not issue an appealable decision until shortly before Talley's trial. It would have been impractical, if not impossible, for Talley to file an interlocutory appeal and expect this complex issue to be resolved before his trial. *See Sloan*, 907 A.2d at 465 ("It would be a rare case where a defendant could petition for relief under Rule 600[] after 180 days of incarceration, have it addressed by the trial court, and petition for review to the Superior Court and this Court before the underlying criminal case is brought to trial or the expiration of Rule 600[]'s 365 days, requiring dismissal with prejudice.").

However, the trial court's error does not automatically entitle Talley to a new trial either. Following a conviction, an appellant whose rule-based right to bail has been violated may receive a new trial only if he can demonstrate actual prejudice. *See Commonwealth v. Floyd*, 431 A.2d 984, 986-87 (Pa. 1981) (holding that, where the defendant was unable to articulate specific prejudice to his defense at trial, or that he could produce evidence for a retrial that he was prevented from obtaining due to the erroneous pretrial incarceration, the defendant was not entitled to a new trial); *Commonwealth v. Garcia*, 387 A.2d 46, 51 (Pa. 1978) (rejecting Garcia's claim that a seventy-day delay in setting bail hindered the preparation of her defense and thus warranted relief where she made "no specific allegations of prejudice that resulted from the delay"). Having been duly tried and convicted, Talley now must establish that the erroneous denial of nominal bail deprived him of a fair trial. He has not.

In large part, Talley's attempt to demonstrate that he was denied a fair trial is hypothetical. Talley cites several academic studies suggesting that bail deprivation hinders a defendant's ability to prepare a defense. He claims that, due to his incarceration, he was unable to locate character and alibi witnesses. However, he neither specifies the identity of these alleged witnesses nor explains how they would have aided his defense. The only specific information that Talley asserts that he would have been able to produce at trial but for his incarceration are Facebook posts authored by Nesbitt and a cease-and-desist letter that an attorney allegedly sent to her regarding the social media posts. According to Talley, he would have used the posts and the letter to bolster his defense that Nesbitt falsely claimed that Talley was the source of the harassing messages in retaliation for Talley ousting her from his home.

Even though Talley is no longer incarcerated, he still has not demonstrated that these documents exist. Further, Talley has failed to explain why no one else, including his attorney, could have assisted him in obtaining that evidence, or whether he even asked for assistance in that regard. We see no reason why counsel would have been unable to obtain the evidence if Talley had requested help. Talley's brief also omits any explanation as to how he would have fared better than his attorney in obtaining the evidence if he was out on bail. In other words, he has failed to show that, but for the erroneous bail denial, he would have attempted and succeeded at securing either the cease-and-desist letter or the Facebook posts.

We also are not convinced that this purported evidence would have bolstered Talley's defense. By Talley's own account, all that they would have proven is that Nesbitt posted the screenshots of the harassing messages on social media, that she tagged Talley in the posts, that she claimed he was the sender, and that, in response to the posts, Talley asked an attorney to send Nesbitt a cease-and-desist letter. Even if Talley had

offered that evidence, it would have done little, if anything, to support his defense that Nesbitt identified Talley as the sender only to get back at him for kicking her out of his home. Talley does not claim that the Facebook posts or the letter themselves contradicted or otherwise undermined Nesbitt's credibility or her account of the events that led to Talley's arrest and prosecution. Because that evidence, if it even exists, would have been unlikely to change the result of the trial, Talley has not established that he was prejudiced by the erroneous denial of nominal bail. Accordingly, he is due no relief on this claim.

III. Issue Two: The Best-Evidence Rule

We now turn to Talley's claim that the admission of the screenshots depicting the harassing and threatening messages received by Nesbitt violated the best-evidence rule. The trial court determined that the screenshots were admissible as either originals or duplicates. *See* TCO at 22-23. We will not reverse the court's determination in this regard absent an abuse of discretion. *See Commonwealth v. Gill*, 206 A.3d 459, 466 (Pa. 2019).

> An appellate court will not find an abuse of discretion based on a mere error of judgment, but rather where the trial court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. Importantly, an appellate court should not find that a trial court abused its discretion merely because the appellate court disagrees with the trial court's conclusion.

Id. at 466-67 (cleaned up). For the reasons explained below, we find no such abuse.

The best-evidence rule existed at common law. Traditionally, the rule limited the method of demonstrating the terms of a writing; when the terms of the instrument were material to the issue at hand, the original writing had to be produced. This common-law edict barred establishing the terms of a writing through testimony about the writing or the submission of a copy, "unless the original [wa]s shown through sufficient evidence to be

unavailable through no fault of the proponent." *Hera v. McCormick*, 625 A.2d 682, 687 (Pa. Super. 1993) (citations omitted).

A more relaxed approach to the best-evidence rule since has been codified at Pennsylvania Rules of Evidence 1001 to 1004. In pertinent part, those rules provide that "[a]n original writing . . . is required in order to prove its content unless,"[47] *inter alia*, "the writing . . . is not closely related to a controlling issue."[48] Pa.R.E. 1002, 1004(d). A "writing" consists of letters, words, numbers, or their equivalent set down in any form." *Id*. 1001(a). An "original writing" is defined as "the writing . . . itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, 'original' means any printout—or other output readable by sight—if it accurately reflects the information." *Id*. 1001(d).

The rules also address the admissibility of copies, which may be designated as "counterparts" or "duplicates," depending on the circumstances. Rule 1001 defines a

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[47] Rule 1002, entitled "Requirement of the Original," provides, in full: "An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise." Pa.R.E. 1002.

[48] Rule 1004, entitled "Admissibility of Other Evidence of Content," lists instances where an original is not required:

> An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
>
> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

Pa.R.E. 1004.

"duplicate" as "a copy produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." *Id.* 1001(e). While a "counterpart" also constitutes a "copy" of a writing or recording, counterintuitively, a "counterpart" is included within Rule 1001(d)'s definition of an "original" when it is "intended to have the same effect as the writing or recording itself." *See id.* 1001(d). A "duplicate," by contrast, is a "copy that was not intended to have the same effect as the original." *Id.* Cmt. Despite its subordinate designation, duplicates are not disfavored under the modern rule, which is a departure from the traditional approach. Per Rule 1003, "[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." *Id*. 1003.

Thus, when the content of a writing is closely related to a controlling issue, the party seeking to prove that issue must offer either the original or a duplicate. While the rule no longer bars the routine use of duplicates, a duplicate cannot substitute for an original if the opponent raises a genuine claim as to the authenticity of the original or if admission of the duplicate otherwise is unfair to the opponent.

A. The Parties' Arguments

Talley asserts that these rules barred the Commonwealth from introducing screenshots of the text messages as they appeared in the user interface of Nesbitt's cellphone. He contends that text messages are writings, that the screenshots were offered to prove their content, and that the content was closely related to a controlling issue. Therefore, he asserts that the Commonwealth was required to offer either the original messages pursuant to Rule 1002, or duplicates that conformed to the dictates of Rule 1003.

According to Talley, an original text message consists of the entirety of the raw data that is stored in the hard drive of a cellphone and that produces the viewable, substantive content of a text message as it appears in the user interface of a text messaging application. When this raw data generates the message that appears on the screen, some of the data—*e.g*., time stamps, read receipts, and information about the sender and recipient (*i.e.*, metadata)—is not represented visually. When the user takes a screenshot of the interface, those features necessarily are omitted. Talley thus claims that a printed screenshot is not an original, as it fails to depict accurately all of the data that comprises a text message. Talley's Brief at 48-52

Conversely, Talley notes that, following a forensic download of the entirety of a text message's data from a cellphone's hard drive, an individual can print an extraction report that creates a readable account of both the text message's metadata and its substantive content. *Id*. at 48. Because the entirety of the raw data is only available through an extraction report, Talley maintains that, with regard to text messages, an "original" or "duplicate" means the description of the message as it appears in an extraction report. Talley insists that a screenshot that omits material information is inadmissible because a document cannot constitute an "original" or a "duplicate" under the best-evidence rule unless it "*accurately* reflects the information" it purports to reflect. Pa.R.E. 1001(d) (emphasis added); *see id*. 1001(e) (requiring that the duplication process "accurately reproduces the original").

Talley argues that, if we were to conclude that the screenshots constituted duplicates, they were inadmissible nevertheless because he raised "a genuine question" as to "the original's authenticity," or because "the circumstances ma[de] it unfair to admit the duplicate." Talley's Brief at 52-53 (quoting Pa.R.E. 1003). To that end, he notes that none of the printed screenshots displayed the metadata, that some portions of the

messages' contents were truncated, and that others did not show the portion of the phone's screen that displays the sender's identifying information. *Id.* at 53-54. Talley concludes the trial court committed an error of law in admitting the screenshots, thereby abusing its discretion.

For its part, the Commonwealth primarily disputes that Talley actually has raised a best-evidence claim. In the Commonwealth's view, Talley is not challenging the terms of a writing; rather, his contentions only relate to the identity of the sender. As such, the Commonwealth asserts that we should construe Talley's claim as an authentication challenge under Rule 901. Commonwealth's Br. at 42-52. Typically, the proponent of a piece of evidence authenticates that item by producing "evidence sufficient to support a finding that the item is what the proponent claims it is." Pa.R.E. 901(a). With regard to digital evidence, the rule requires, *inter alia*, authentication that the alleged sender is the actual sender, which may be accomplished using circumstantial evidence. *See id.* 901(b)(11)(A)-(B) (providing that "direct evidence such as testimony of a person with personal knowledge" and "circumstantial evidence" are means by which digital evidence allegedly attributable to "a person or entity" can be authenticated).

The Commonwealth parries Talley's assertions with citations to trial testimony that it says sufficed to authenticate the messages under Rule 901, before confronting the merits of Talley's best-evidence argument head on. Commonwealth's Br. at 42-52. Metadata is not the "content" of the message, the Commonwealth claims; rather, metadata is information about the message. *Id.* at 54. The Commonwealth explains that metadata merely describes other data and thus constitutes secondary data. Conversely, the contents of the messages—the information with which the best-evidence rule is concerned—were the words that appeared on the phone's screen. The Commonwealth contends that a printed screenshot satisfies the definition of a printout that accurately

reflects the information displayed in the original message, which, per Rule 1001(e), is an original version of electronically stored information. Alternatively, the Commonwealth asserts that, if we were to construe the screenshots as duplicates, they would still be admissible because they were generated through a photographic process that accurately reproduced the original. *Id.*

B. Discussion

Given that the text messages that Talley allegedly sent to Nesbitt "consist[] of letters, words, numbers, or their equivalent set down in any form," we have no difficulty concluding that they constitute a writing. Pa.R.E. 1001. If those writings were "closely related to a controlling issue," then the best-evidence rule applied. *Id.* 1004(d). A writing's mere relevance to a controlling issue is not enough. *See Perry v. Ryback*, 153 A. 770, 773 (Pa. 1931) (holding that where a writing was "not necessarily the only evidence nor the best evidence of a given state of facts," a party may prove "such facts by the testimony of a witness"); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 576 (D. Md. 2007) (explaining that, under F.R.E. 1004(d), which is identical to Pa.R.E. 1004(d), "the key to the rule is to determine when 'the contents' of a writing, recording or photograph actually are being proved, as opposed to proving events that just happen to have been recorded or photographed, or those which can be proved by eyewitnesses, as opposed to a writing or recording explaining or depicting them"). Rather, a close relation under Rule 1004(d) exists when the content of a writing is "operative," or when the content is "dispositive" of a controlling issue. Pa.R.E. 1002, Cmt. ("[W]ritings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule. On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event."); *cf. Commonwealth ex rel. Park v. Joyce*, 175 A. 422, 424 (Pa. 1934) (holding that a birth certificate is not required to prove an

individual's age because a person's age exists independently of a birth certificate). In the context of a criminal case, this often means that the best-evidence rule applies to a writing "only if the Commonwealth *must prove* the contents of the writing . . . to establish the elements of its case." *Commonwealth v. Fisher*, 764 A.2d 82, 88 (Pa. Super. 2000) (emphasis added).

Here, the text messages were closely related to a controlling issue because their contents were necessary to prove the elements of stalking and terroristic threats. *See* 18 Pa.C.S. § 2709.1(a)(1) (stalking) (requiring that the defendant "repeatedly commits acts . . . under circumstances which demonstrate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress"); *id*. § 2709.1(a)(2) (stalking) (defining the offense as "repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person"); *id*. § 2706(a)(1) (terroristic threats) ("A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to commit any crime of violence with intent to terrorize another."). The messages were critical to establishing the *actus reus* of those offenses. Indeed, the contents **were** the *actus reus* of those charges. Because the messages' contents were closely related to a controlling issue, the printed screenshots of the messages were admissible only if they amounted to originals or duplicates pursuant to Rules 1001 and 1003, respectively.

A screenshot is "an image created by copying part or all of the display on a computer screen at a particular moment."[49] By definition, a screenshot is a "copy produced by a[n] . . . electronic . . . process[.]" Pa.R.E. 1001(e). Under Rule 1001, such a copy either is a counterpart, which is an original, or it is a duplicate. For the following

[49] *Screenshot*, *COLLINSDICTIONARY.COM*, *available at* www.collinsdictionary.com/dictionary/english/screenshot (last visited Nov. 9, 2021).

reasons, we conclude that the screenshots of the messages received by Nesbitt were duplicates, not counterparts, of the original messages.

Unlike a counterpart, a duplicate is not created with the intent to have the same effect as the original. When Nesbitt took the screenshots of the messages she received, she was not motivated by the same purpose as the sender. The Commonwealth offered those screenshots to prove that Nesbitt received the messages depicted therein and that their content placed her in fear of bodily injury, caused her substantial emotional distress, and threatened her. The original messages, which allegedly were generated and disseminated for the purpose of harassing and threatening Nesbitt, existed in two locations: on the user interface of the messaging application on Nesbitt's phone, and on the sender's device. When Nesbitt took screenshots of her phone's user interface, she did so at the behest of law enforcement in order to preserve evidence. In doing so, she created a new record that reflected, but was not a product of, the author's intent. Because the copies of the messages were not created in order to have the same intended effect as the original messages, the screenshots constituted duplicates, not counterparts.

To be admissible as duplicates, the screenshots had to meet the criteria set forth in Rules 1001(e) and 1003. Rule 1001(e) requires that the screenshots "accurately reproduce[] the original"; if so, they are admissible under Rule 1003, unless "a genuine question is raised about the *original's* authenticity or the circumstances make it unfair to admit the duplicate." Pa.R.E. 1001(e), 1003 (emphasis added). Talley argues that the screenshots at issue here were not admissible as duplicates because they lacked metadata and did not display the entire screen, excising portions of the messaging application's interface. According to Talley, those omissions compel us to find that the screenshots did not accurately reproduce the original messages, that Talley raised a

genuine question as to the original messages' authenticity, or that the admission of the screenshots was unfair. We disagree.

In order to ensure that only "accurate" reproductions of original writings may be used as evidence, Rule 1001(e) focuses on the "process or technique" that is used to create the copy. *Id.* 1001(e). The rule reflects the reality that "[t]he exact words of many documents, especially operative or dispositive documents, . . . are so important in determining a party's rights accruing under those documents." *Id.* 1002, Cmt. A process that creates an accurate reproduction of an original writing helps to inhibit fraud. *Id.* Screenshotting is one such process. Generally speaking, a screenshot is a photographic process that produces an exact copy of whatever content appeared on a digital device's interface at the time it was taken. Typically, it guarantees precision and does not suffer from the inaccuracy that the rule seeks to prevent. *Cf. id.* 1003, Cmt. ("Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy."). At trial, Nesbitt testified that the messages in the screenshots that she turned over to law enforcement were exactly as they appeared on the display of her cellphone when she received them. Talley does not assert that the screenshotting process altered the words contained in the text messages. While he challenges the omission of certain digital information from the trial exhibits—the metadata—those are not the kinds of inaccuracies with which Rule 1001(e) is concerned. Rather, the rule seeks to abate dangers of mistransmission and fraud. But Talley has not established that screenshotting is a method that presents such dangers in theory or in fact.

For similar reasons, we reject his argument that the omissions raised a genuine question about the original messages' authenticity or otherwise rendered the admission of the printed screenshots unfair. An

> opponent may raise a genuine question as to the authenticity of the original, or [assert that] there are circumstances making it unfair to admit the duplicate instead of the original. In both situations, production of the original may reveal indicia of putative fraud such as watermarks, types of paper and inks, alterations, etc., that may not be discernable on the copy. Decided cases suggest that *the requisite challenge to authenticity must be relatively specific*. Unfairness usually involves some infirmity with the duplicate itself; for example, an incomplete copy that *fails to reproduce some vital part* of the original document. Unfair conduct by the proponent which alters the copy or prevents the proponent from examining the original may also justify exclusion of a duplicate.

2 MCCORMICK ON EVIDENCE § 236 (8th ed. 2020) (footnotes omitted) (emphasis added). A challenge to the admission of a duplicate under the best-evidence rule necessarily requires that the opponent raise some "genuine question . . . about *the original's* authenticity" or that the opponent assert that a feature of the duplicate renders its admission unfair. Pa.R.E. 1003 (emphasis added). Both a fairness challenge and an authenticity challenge under Rule 1003 should pertain to a "vital part of the original." *Cf*. 2 MCCORMICK ON EVIDENCE § 236. As the best-evidence rule applies to writings only insofar as they "*closely relate*" to a controlling issue, vital parts of a writing are the contents that are dispositive of a controlling issue. *See* Pa.R.E. 1004(d) (emphasis added); *see also id*. 1002, Cmt. Therefore, a typical Rule 1003 challenge to either the original's authenticity or the fairness of the duplicate's admission into evidence implicates an aspect of the original's content that is dispositive of a central issue.[50] *Cf*. *Fisher*, 764 A.2d at 88 (explaining that, in a criminal case, the best-evidence rule applies to aspects of writings that, in and of themselves, establish one or more elements of an offense); Pa.R.E. 1002, Cmt. (providing that the best-evidence rule reflects the principle that "[t]he exact words of many documents, especially operative or dispositive documents, . . . are so important in determining a party's rights accruing under those documents") (citation omitted).

[50] In that sense, Rule 1003 authenticity is distinguishable from authentication issues under Rule 901, which broadly requires direct or circumstantial evidence "[t]o connect digital evidence with a person or entity." Pa.R.E. 901(b)(11).

Authenticity and fairness challenges that relate to features of a writing that are collateral to a controlling issue do not fall within Rule 1003's ambit.

Applying that reasoning here, a "genuine" claim that the original text messages were inauthentic under Rule 1003 would attack aspects of the originals that established the *actus reus* of the offenses: *i.e*., parts of the messages that placed Nesbitt in fear of bodily injury, caused her substantial emotional distress, or terrorized her. Therefore, a challenge to the authenticity of the original text messages under Rule 1003 would have involved, for instance, a claim that the messages sent to Nesbitt's phone did not originally contain threatening or harassing language when they were received. But Talley raises no such claim. While he makes the vague, theoretical assertion that admission of the original text messages may have weakened the Commonwealth's case, he fails to identify and call into question specific features of the originals that would undermine the reliability of the duplicates in establishing the elements of the criminal offenses. Consequently, his claim is not cognizable as a challenge to the original messages' authenticity as contemplated by Rule 1003.

Nor was the admission of the duplicate messages unfair to Talley. A challenge to the admissibility of a duplicate on fairness grounds entails some claim that "the circumstances make it unfair to admit the duplicate," Pa.R.E. 1003, such that, in the criminal context, a defendant would be prejudiced by not requiring production of the original writing. But, as with authenticity under Rule 1003, an unfairness claim should invoke a feature of the duplicate that is closely related to a controlling issue. For example, it would have been unfair to allow the screenshots to be admitted if Talley had shown that the duplication process distorted the wording of the original messages, or if the omission of relevant content from the proffered photographs served to misrepresent a vital part of

that evidence. Talley identifies no such issues or other circumstances that otherwise suggest unfairness.[51]

The discrepancies that Talley highlights all relate to the identity of the sender. Challenges involving features related to the sender's identity do not attack vital parts of the text messages. As the messages' contents themselves did not name the author, they were not closely related to the *identity issue*. Unlike their relation to the issue of whether the alleged crimes occurred, the messages were collateral to the identity issue because the Commonwealth only could establish Talley's identity as the sender using circumstantial evidence. For example, Nesbitt testified that she began receiving the anonymous messages after terminating her relationship with Talley, and that they ceased temporarily when he was arrested, but started up again upon his release on bail. She also explained that, after she received a message stating that the sender was watching her as she ate in a restaurant, investigators determined that an application installed on her cellphone surreptitiously had been sharing her location with Talley. The Commonwealth further relied upon the testimony of an investigator about the software discovered on Talley's computer, which enabled him to send text messages to Nesbitt anonymously, as well as Talley's use of a search engine to query "When [do] text emails become harassment[?]" There were also the text messages between Talley and Wolf in which Talley asked how he could anonymously spam a phone "with so many texts and

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[51] Pursuant to Pa.R.Crim.P. 573, Talley could have requested a pretrial production of a forensic download of the messages that Nesbitt received in order to examine the metadata of the originals and the portions of any content that the screenshots omitted. *See* Pa.R.Crim.P. 573(B)(2)(a)(iv) (providing that, "if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable: . . . (iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice"). For whatever reason, he did not.

calls it just totally fucks it up;" the bombardment of Nesbitt's phone commenced soon after. While Nesbitt testified that some of the messages that she received contained peculiar phrases that Talley had uttered while they were dating, the existence of those expressions was not dispositive as to the issue of the perpetrator's identity; the phrases were merely cumulative of the other circumstantial evidence demonstrating Talley's culpability.

Thus, Rule 1003 did not prevent the Commonwealth from offering any of the screenshots into evidence. Because the screenshots were admissible as duplicates under Rule 1001(e) and not vulnerable to authenticity or fairness challenges under Rule 1003 on the grounds raised by Talley, his best-evidence claim fails.

IV. Conclusion

In sum, while the trial court committed an error of law in denying Talley's motion for release on nominal bail, Talley is due no relief because he has failed to prove that the error affected the outcome of his trial. Nor is a new trial warranted on his best-evidence claim, since the lower courts concluded correctly that the screenshots of the text messages were admissible duplicates. Accordingly, we affirm.

Justices Saylor, Donohue and Dougherty join the opinion.

Chief Justice Baer files a concurring opinion in which Justice Todd joins.

Justice Mundy files a concurring opinion.