[J-74-2023] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 11 MM 2023
Petitioner	:	
v.	:	SUBMITTED: October 11, 2023
MICHAEL NOEL YARD,	:	
Respondent	:	

CONCURRING OPINION

JUSTICE WECHT **DECIDED: September 26, 2024**

Article 1, Section 14 guarantees every criminal defendant the right to bail, except when that defendant is: (1) charged with a capital offense; (2) charged with an offense that carries the possibility of life imprisonment; or (3) sufficiently dangerous such that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community" (hereinafter, the "dangerousness exception").[1] The phrase "when the proof is evident or presumption great"[2] appears immediately after this list of the three exceptions. In *Commonwealth v. Talley*,[3] we held that the "proof is evident or presumption great" standard is *sui generis* in the law, constituting a burden of proof that "lies in the interstice between probable cause and proof beyond a reasonable doubt."[4] This peculiar standard, we said, requires "both a qualitative and quantitative

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1 PA. CONST. art. I, § 14.

2 *Id.*

3 265 A.3d 485 (Pa. 2021).

4 *Id.* at 522.

assessment,"[5] and "calls for a substantial quantity of legally competent evidence, meaning evidence that is admissible under either the evidentiary rules, or that is encompassed in the criminal rules addressing release criteria."[6] *Talley* did not consider whether this evidentiary standard applies to the entire list of exceptions, or whether it applies only to the immediately preceding exception, the dangerousness exception. In *dicta*, we suggested that the standard might apply to all aspects of Article I, Section 14.[7] That suggestion notwithstanding, the question remained an open one, until today.

The Majority finds no ambiguity in Article I, Section 14, and holds that the constitutional text and basic rules of grammar compel the conclusion that the "proof evident or presumption great" standard of proof applies only to the exception that immediately precedes it—the dangerousness exception. The Majority's analysis is compelling, and, ultimately, unavoidable. There is no other reasonable interpretation of our Constitution's bail provision that does not strain the plain meaning of the text or import to those terms a meaning that they cannot bear. Thus, I join the Majority in full.

"As an interpretive matter, the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provision[] at issue."[8] We avoid reading the contested language in a "strained or technical manner,"[9] and instead must "favor a natural reading."[10] When the constitutional language at issue is "clear and

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5 *Id.*

6 *Id.* at 524 (footnote omitted).

7 *Id.* at 525-56.

8 *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014); *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) ("The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself.").

9 *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008).

10 *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979).

explicit,"[11] we cannot "delimit the meaning of the words used by reference to a supposed intent."[12] By contrast, "if, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity becomes apparent in the plain language of the provision, we follow the rules of interpretation similar to those generally applicable when construing statutes."[13]

And so we must ask, is the language at issue ambiguous? Interpretation of a constitutional provision necessarily begins with an examination of the language chosen by the General Assembly when drafting the provision and ratified by the electorate; we inquire whether that language is "clear and explicit."[14] In this case, our interpretation both begins and ends with an examination of the Constitution's language. As amended in 1998, Article I, Section 14 of the Pennsylvania Constitution states:

> 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[.][15]

The structure of this sentence—a three-part list that ends with a qualifier—implicates the common tool of grammar known as the "last antecedent rule." In the context of legal interpretation, this rule holds that courts "should generally apply qualifying

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11 *League of Women Voters*, 178 A.3d at 802.

12 *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013) (quoting *Commonwealth ex rel. MacCallum v. Acker*, 162 A. 159, 160 (Pa. 1932)).

13 *League of Women Voters*, 178 A.3d at 802 (citing *Robinson Twp.*, 83 A.3d at 945 and *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009)). An ambiguity arises when a provision is susceptible to two reasonable interpretations. *A.S. v. Pa. State Police*, 143 A.3d 896, 905-06 (Pa. 2016).

14 *League of Women Voters*, 178 A.3d at 802.

15 PA. CONST. art. I, § 14.

words or phrases to the words immediately preceding them."[16] This means that qualifying words "do not extend to or include other words, phrases, or clauses more remote, unless such extension or inclusion is clearly required by the intent or meaning of the context or disclosed by an examination of the entire [constitutional provision]."[17] Although the "last antecedent rule" is a necessary consideration in ascertaining the plain meaning of a term or phrase,[18] it is not an inexorable command. The rule is stated in permissive terms—a court "should generally" apply it—rather than in mandatory language.[19] Hence, mere invocation of the rule would not automatically preclude a finding of ambiguity where a term, phrase, or clause defies clear explication. The "last antecedent rule" itself recognizes that there are circumstances in which the context and meaning of the challenged provision preclude application of the general rule.[20]

Here, the Majority compellingly demonstrates why, in this instance, application of the "last antecedent rule" provides a plain and natural reading of Article I, Section 14. The text reveals no ambiguity. Nothing in that text suggests that the "proof evident or presumption great" standard applies to the more remote terms in the list. As the Majority aptly explains, any other reading would render unintelligible the drafters' second use of

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16 *Commonwealth v. Packer*, 798 A.2d 192, 198 (Pa. 2002) (citing 1 Pa.C.S. § 1903) (emphasis added).

17 *Id.* (quoting *John Hancock Prop. & Cas. Ins. Co. v. Pa. Ins. Dept.*, 554 A.2d 618, 621-22 (Pa. Cmwlth. 1989)).

18 *See* 1 Pa.C.S. § 1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]").

19 *Packer*, 798 A.2d at 198.

20 *See id.* (precluding application of the "last antecedent rule" when "extension or inclusion [of more remote terms] is clearly required by the intent or meaning of the context or disclosed by an examination of the entire [constitutional provision]"); *Omar*, 981 A.2d at 187 (explaining that "the 'last antecedent rule' is not absolute").

the word "unless" in the constitutional text.[21] The textual disjunction of the three categories (capital, life, dangerousness) is the "natural reading"[22] of the "clear and explicit" [23] terms of Article I, Section 14.

That reasonable people can and do disagree on the correct interpretation of this provision is due principally to a series of misinterpretations made by this Court, the Attorney General, and the Secretary of the Commonwealth at and after the time of the amendment's birth. Article I, Section 14 originally stated that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great[.][24] In 1995, the General Assembly proposed to amend this provision by inserting the language "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" immediately after "capital offenses" and immediately before "when the proof is evident or presumption great."[25] Once the amendment was approved by the General Assembly, it was published for review and duly placed on the ballot for ratification (or rejection) by the Pennsylvania electorate.

As required by law, the Secretary of the Commonwealth prepared the ballot question. Unaccountably, here is what the Secretary supplied to Pennsylvania's voters:

> Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment or that no condition or

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21 *See* Maj. Op. at 10.

22 *Isaac*, 397 A.2d 760 at 766.

23 *League of Women Voters*, 178 A.3d at 802.

24 PA. CONST. art I, § 14 (1997).

25 *Grimaud v. Commonwealth*, 865 A.2d 835, 839 (Pa. 2005).

> combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?[26]

The reader will of course notice that the Secretary's placement of the phrase "proof is evident or presumption great" differed significantly from the location of that phrase in the actual constitutional amendment that the voters were being asked to ratify. This was sloppy and misleading. It told voters that the "proof is evident and presumption great" standard would apply to the life imprisonment exception as well as the dangerousness exception, a statement that conflicted directly with the plain language of the constitutional amendment.

The Attorney General compounded the error, bungling the "statement in plain English"[27] that he was required to issue at the time of the amendment's presentation to the electorate.[28] In that "plain English" statement, the Attorney General wrote that:

> [t]he purpose of the ballot question is to amend the Pennsylvania Constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail. Presently, the Constitution allows any person accused of a crime to be released on bail unless the proof is evident or presumption great that the person committed a capital offense. A capital offense is an offense punishable by death. The Pennsylvania Supreme Court has ruled that a person accused of a crime that is not a capital offense may be denied bail only if no amount or condition of bail will assure the accused's presence at trial.
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> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the

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26 *Id.* at 841.

27 *Id.* at 842 (citing 25 P.S. 2621.1).

28 *Id.*

> crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.
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> The proposed amendment would have two effects. *First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or life imprisonment.* Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.[29]

For reasons ably described by today's Majority, the language italicized above was wrong, reflecting an unfortunate inattention to textual detail. Under the actual words of the amended provision, a court would be required to deny bail in any life or death charged case, regardless of the evidentiary showing. Like the Secretary, the Attorney General failed to closely read and correctly summarize the plain language that the General Assembly actually adopted and placed before the voters.

To make matters worse, in *Grimaud*, this Court implicitly approved these misleading descriptions of the amendment to Article I, Section 14. Although the Court was not called upon to interpret Article I, Section 14—as we are today—we were asked to evaluate the Attorney General's "statement in plain English" in order to determine whether it adequately set forth the "purpose, limitations, and effects" of the amendment on the ballot.[30] Not only did this Court fail to repudiate the Attorney General's statement as proffering an incorrect interpretation of the proposed amendment; it also failed even to subject the statement to close inspection. Instead, this Court gave the statement only a

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[29] *Id.* at 842-43 (emphasis added).

[30] *Id.* at 840; *see also* 25 P.S. § 2621.1 ("Whenever a proposed constitutional amendment or other State-wide ballot question shall be submitted to the electors of the Commonwealth in referendum, the Attorney General shall prepare a statement in plain English which indicates the purpose, limitations and effects of the ballot question on the people of the Commonwealth.").

passing glance, opining that the Attorney General was not required to provide an "in depth illustration of how a proposed amendment to the constitution may affect the public,"[31] explaining that the Attorney General was not bound to provide a "comprehensive recitation of all ramifications of a constitutional amendment," and emphasizing that the Attorney General's obligation is to "present a 'statement' not a treatise."[32] This Court offered no criticism of the Attorney General's description of the amended language. In failing to do so, this Court, like the Secretary of the Commonwealth and the Attorney General, shares responsibility for the confusion that now renders plausible (albeit unsuccessful) the arguments advanced here by Yard and by Chief Justice Todd and Justice Donohue in their learned and erudite dissents.[33] This is a discussion worth having.

Regardless of how we got here, nothing can change the fact that the bail portion of Article I, Section 14 today bears only one grammatically reasonable interpretation. In such circumstances, judicial interpretation is at an end. Textual interpretation is not a boundlessly discretionary process. We cannot pick and choose an atextual path that we prefer because we are presented with compelling equities or objectionable consequences. Justice Donohue eschews this well-settled methodology. Instead, Justice Donohue would elevate to primacy over the text the intent she perceives to underly the constitutional provision at issue. Justice Donohue would "take into account the ballot question put to the voters" when construing "the meaning of an amendment."[34] The desire to give effect to the will of the voters is understandable. I do not disagree that,

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31 *Grimaud*, 865 A.2d at 843 (quoting *Lincoln Party v. General Assembly*, 682 A.2d 1326, 1332 (Pa. Cmwlth. 1996)).

32 *Id.*

33 *See* Diss. Op. at 14-18 (Donohue, J., dissenting).

34 *Id.* at 2.

for all practical purposes, the voters were misled. The constitutional provision that they were told they were approving is not the one that they got. That is unfortunate, and it reflects poorly on those responsible for the error. But here we are. There is no "ballot question exception" to our obligation to apply the words that actually appear in our Constitution. It is not a "bait and switch"[35] to enforce unambiguous constitutional language. It is our duty. Justice Donohue does not get to write an alternative Constitution.

The precedents cited by Justice Donohue do not permit us to reimagine constitutional interpretation in the manner that she proposes. Justice Donohue cites a litany of cases in which this Court has approved of references to, or consideration of, the history and structure of a constitutional provision, the will of the voters that ratified it, the interpretations of other similar provisions from other states, and the policy considerations underlying the provision.[36] None of these cases allows what Justice Donohue proposes: leapfrogging the plain language that appears in the text of our Constitution in favor of the presumptive will of those who voted on a ballot question. Our precedents do not permit this, and our standard rules of interpretation prohibit it.[37] We are never permitted to disregard clear and unambiguous language in the constitutional text, not even when that language differs from that presented in a ballot question.

Justice Donohue concedes, but nonetheless violates, the principle that we do not allow "'the supposed intent' of voters to cloud clear and explicit constitutional language."[38] This case is different, Justice Donohue insists, because here we deal not with "supposed

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35 *Id.* at 2.

36 *Id.* at 3-6 (listing cases).

37 *See, e.g.,* 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

38 Diss. Op. at 11 n.7 (Donohue, J., dissenting) (citation omitted).

intent"; instead, we "know precisely the **actual** intent of the electorate."[39] Justice Donohue offers no support in our cases for this novel and swashbuckling sliding-scale intent test. Nor does Justice Donohue explain how a court is supposed to assess whether the presumptive intent of a provision is imbued with sufficient clarity to circumvent our otherwise mandatory fidelity to the "clear and explicit constitutional language."[40] I agree with Justice Donohue that this case presents a "unique scenario."[41] It is cause for consternation and dismay. When tears subside, the text of the Constitution reads the same. Justice Donohue's angst over the flouted will of the voters aside, Pennsylvanians live under their Constitution. Justice Donohue disagrees with the Court today as to whether the Constitution's text is ambiguous. Were it ambiguous, I readily would agree with Justice Donohue that the history of the provision and the intent of the voters compels a result entirely different from the one that the Majority and I reach today. But wishing will not make it so. I do not ignore the voters' intent by choice; I am not permitted to consider it here by law.

Unlike Justice Donohue, I also would not resort to (and have long since disavowed) reliance on floor statements by individual legislators in the course of attempting to discern the meaning of the General Assembly's collective enactments.[42] Yet, while the unambiguous constitutional text drives the result in this case regardless,[43] I note that even

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39 *Id.* (emphasis in original).

40 *Id.*

41 *Id.*

42 *See, e.g., Harmon v. Unemployment Comp. Bd. Of Rev.*, 207 A.3d 292, 311-12 n.6&7 (Pa. 2019) (Wecht, J., concurring); *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1081-84 (Pa. 2018) (Wecht, J., concurring).

43 *See In re Bruno*, 101 A.3d at 659 ("As an interpretive matter, the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provision[] at issue.").

Justice Donohue concedes that sundry legislators offered "various views," a circumstance that can provide no reliable support for an alternative interpretation of the provision in question.[44] Justice Donohue insists that this opaque record of floor debates contains no evidence that the legislature intended the "proof is evidence or presumption great" standard to apply only to the dangerousness exception. Yet, Justice Donohue cites no evidence that the General Assembly intended the opposite, either. The best that Justice Donohue can proffer is the absence of any express statements by those legislators who rose to speak to the effect that the amendment aimed to limit the evidentiary requirement to the dangerousness exception.[45] In order to make this argument, Justice Donohue necessarily is forced to ascribe beliefs and statements of a few to the collective will of the whole, a jurisprudential methodology that is profoundly flawed. "Our goal is not to ascertain and effectuate the intent of [a few legislators;]"[46] it is to ascertain the expressed will of the entire General Assembly that approved the amendment and of the voters who ratified it.[47] When we read the text that was ultimately inserted into Article 1, Section 14, we are required to take them at their word.

For her part, Chief Justice Todd refuses to be constrained by the words of the constitutional text. She takes us to task for "sacrific[ing] a constitutional provision on the

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44 Diss. Op. at 7 & n.5 (Donohue, J., dissenting).

45 *Id.*

46 *Harmon*, 207 A.3d at 312 (Wecht, J., concurring).

47 In any event, even Justice Donohue cannot (and does not) maintain that those legislators that she chooses to cite had anything to say about the particular issue that we decide today. Rather, Justice Donohue invokes the statements for the proposition that no lawmaker appears to have stated that the amendment aimed to (or did) limit the evidentiary requirement to the dangerousness exception. Such commentary was apparently absent. No doubt many other things were absent as well, including any cogent recognition or demonstration by lawmakers of how confusing and antiquated the relevant textual language is (and was).

altar of plain language interpretation."[48] To the charge of feeling bound by the text of our Constitution I must plead guilty. However "blithe[]" and "myopic" this might seem to the Chief Justice,[49] she offers no account of how and when this Court is free to manufacture an alternative text. Such an imaginary text might be more to the dissents' liking (and, indeed, more to ours), and more consistent with the bungled readings offered by an Attorney General and Secretary of State of yesteryear, but it disappears like fairy dust when we hold it up against the actual words of the actual text in the light of day.

The Chief Justice maintains that, as we are interpreting our Constitution, "we have a special duty, our highest duty, to get it right." While a parent fighting for custody or an inmate seeking postconviction relief might think his or her claim just as "special," I freely acknowledge the weightiness of the issue here. All the more reason for unswerving fidelity to the words of the Constitution, not to our own view of what the Constitution should say. And here is where the Chief Justice's dissent really takes flight, asserting that "[R]ules [such as plain language] have their exceptions. *Rules are powerful only to the degree they do justice. Rules can be sacrosanct, until they must not be*."[50] That is not law; it is license. Self-license. It is a view that judges apply rules only when, and to the extent that, they choose to do so. Of course, this is not a serious approach to interpretation of a Constitution. It is a frank avowal of power to "do justice" according to judicial whim, regardless of what the text actually instructs. That is not how this business works.[51]

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48 Diss. Op. at 1 (Todd, C.J., dissenting).

49 *Id.* at 2.

50 *Id.* (emphasis added).

51 I am again reminded here of the famous encounter between Justice Oliver Wendell Holmes, Jr., and Judge Learned Hand. Judge Hand recalled it as follows:

(continued…)

Chief Justice Todd would treat this case as "a very special" one, a case that she "suspect[s] . . . is one of a kind."[52] I can take no comfort in this "one of a kind" approach. Who knows what compelling case tomorrow might bring? All manner of cases that come before us cry out for "justice". I suspect that there is not just "one of a kind," or even two or three of a kind; there are thousands. This is not a yardstick. It is an unending enterprise in judicial lawmaking. Fortunately, notwithstanding the eloquence and fervor of my dissenting colleagues, the majority elects to hew to the text. Messy and unfortunate as the process that got us here, this is where we are. Once we unmoor ourselves from the text of the Constitution and decide that it really means what it should have said rather than what it does say, we have embarked on a voyage that knows no boundaries, or only the boundaries that may happen to exist in the minds or hearts of a court's majority on a given day. To "get the Constitution right" in the way that she thinks it should rightly be written, Chief Justice Todd would "bend" "the rules".[53] With the idea that we can "bend" the words of the constitutional text to suit our preference, I respectfully disagree.

In a perfect world, one that has proven consistently elusive, the framers of the amendment to Article I, Section 14 would have seen fit to modernize the archaic language of this bail section, clarifying or revising the "proof is evident or presumption great"

> I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."

LEARNED HAND, *A Personal Confession, in* THE SPIRIT OF LIBERTY 302, 306-07 (Irving Dilliard ed., 3d ed. 1960).

[52] Diss. Op. at 2 (Todd, C.J., dissenting).

[53] *Id.*

verbiage, which traces back to the powdered wig days of our 1790 Constitution. But they failed to do so. Instead, the framers of the 1990's chose simply to drop into the provision the new language concerning life imprisonment and dangerousness, without any apparent regard to the impact of this word dump upon the meaning of the sentence as a whole. This sowed confusion and disagreement over constitutional meaning that has bedeviled this Court and burdened all Pennsylvanians for decades past and decades foreseeable. This supplies an object lesson in why citizens, legislators, and jurists should give careful and scrupulous attention to the specific words, phrases, and punctuations of amendments that are proposed for our foundational charter. This is serious business, and it requires serious thought and attention. As Chief Justice John Marshall reminded us long ago, "it is a [C]onstitution that we are expounding."[54]

Today's decision undoubtedly creates an anomalous and unfortunate result.[55] The constitutional provision that the voters ratified is not the same one for which they were led to believe they were voting. But, the intent of voters is a relevant consideration only when the chosen language is unclear. That is not the case here. The text is the text. We are duty-bound to give effect to its plain, unambiguous language.

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54 *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis omitted).

55 The obvious solution to such anomalies is not to judicially rewrite our Constitution, but rather to amend it. Pennsylvanians know how to amend their Constitution. They have done it almost fifty times since we adopted our Commonwealth's first Constitution in 1776.