[J-56-2021] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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

CONCURRING OPINION

CHIEF JUSTICE BAER **DECIDED: December 22, 2021**

I join Part III of the Majority Opinion, as I agree with the manner in which it disposes of Appellant's claim concerning the best evidence rule. However, I cannot join Part II of the Majority Opinion because I respectfully disagree with its conclusion regarding the Commonwealth's burden of proof when it seeks to establish that an accused is nonbailable because "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 Majority adopts a "substantially more likely than not" burden of proof, I am persuaded that the more traditional standard of "clear and convincing evidence" in practice is substantially identical and offers the benefit of a well-known and used definition. I would apply that standard to these circumstances. Thus, for the reasons that follow, I ultimately concur in the result reached by the Majority Opinion.

Regarding Part II of the Majority Opinion, this Court granted allowance of appeal to address the Pennsylvania constitutional provision that allows trial courts to deny an accused bail when "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. More specifically, this matter requires the Court to discern what standard of proof the Commonwealth must meet to establish these conditions.

The purpose of a standard of proof "is to instruct the factfinder as to the level of confidence that society believes he should have in the correctness of his conclusion; furthermore, different standards of proof reflect differences in how society believes the risk of error should be distributed as between the litigants." *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003). Pennsylvania recognizes three standards of proof: (1) beyond a reasonable doubt; (2) clear and convincing evidence; and (3) preponderance of the evidence. *Id*. "[T]he most stringent standard - beyond a reasonable doubt - is applicable in criminal trials due to the gravity of the private interests affected; these interests lead to a societal judgment that, given the severe loss that occurs when an individual is erroneously convicted of a crime, the public should bear virtually the entire risk of error." *Id.* "The preponderance-of-the-evidence standard, by contrast, reflects a belief that the two sides should share the risk equally; for this reason, it is applicable in a civil dispute over money damages, where the parties may share an intense interest in the outcome, but the public's interest in the result is 'minimal.'" *Id.* "The 'clear and convincing' standard falls between those two end-points of the spectrum; it is typically defined as follows:

> The clear and convincing standard requires evidence 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.'"

Id (citations omitted).[1]

I agree with the Majority insomuch as it concludes that, to deny an accused bail based upon the danger he presents to any person and the community unless he is incarcerated, the Commonwealth must present more than a mere *prima facie* case or evidence that equates to a preponderance-of-the-evidence standard. Stated simply, the constitutional liberty rights of the accused are too important to be overcome by such a low evidentiary bar. I also agree with the Majority that the beyond-a-reasonable-doubt standard does not apply in this context. As the Majority astutely explains, "If it did, a bail hearing would be little more than a dress rehearsal for a jury trial[.]" Majority Opinion at 37.

Thus, it seems that we are left with the well-established standard of clear and convincing evidence. The Majority nonetheless rejects this standard because, *inter alia*, it is concerned about putting a modern "gloss" on the historic legal phrase "proof is evident or presumption is great." *Id.* While I am cognizant that we must construe this phrase in a manner that is consistent with the principles of constitutional interpretation, I do not share the Majority's concern. To the contrary, I believe that it is of the utmost importance that, after we understand the nature of this constitutional phrase, we articulate its definition in a manner that provides a workable construct to the bench and bar. In my view, although well intended, the Majority's newly-minted "substantially more likely than not" standard may lead to unnecessary confusion when a simpler solution is readily available, namely, the utilization of the existing and familiar standard of "clear and convincing evidence."

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[1] *See California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (explaining that "[t]hree standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution") (footnote omitted).

As noted *supra*, the Pennsylvania Constitution allows a trial court to deny an accused bail when the Commonwealth can prove that "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. I believe that the Commonwealth can fulfill this burden by meeting the requisites of the well-understood and established standard of "clear and convincing evidence." In other words, to meet the mandates of this constitutional provision, the Commonwealth must demonstrate that no condition or combination of conditions short of imprisonment will reasonably assure the safety of any person and the community by producing evidence 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 at issue. This familiar standard of proof provides an adequate balance between the accused's liberty rights and society's interest in keeping its citizens safe from near certain danger, and it offers ease of application for the bench and bar.

Despite my disagreement with the nomenclature adopted by the Majority, I conclude that Appellant is not entitled to any relief under either the Majority's "substantially more likely than not" standard or the universally known and understood "clear and convincing evidence" standard. Stated succinctly, I believe that the Commonwealth sufficiently proved that nothing less than Appellant's incarceration will reasonably assure the safety of Christa Nesbitt and the surrounding community. Accordingly, because I also would affirm the Superior Court's judgment regardless of the standard employed, I concur in the result reached by the Majority.

Justice Todd joins this concurring opinion.